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## Special Prosecutor releases Clear Statement

**Victoria** – On June 17, 2020 the BC Prosecution Service (BCPS) announced the appointment of Joseph Doyle KC as a Special Prosecutor to provide advice and assistance to the RCMP in the course of an investigation into the conduct of Vancouver Police Department (VPD) officers in connection with an investigation of former VPD detective, James Fisher. That announcement can be found here:

[www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/media-statements/2020/20-07-sp-pros-appointed-vpd.pdf](http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/media-statements/2020/20-07-sp-pros-appointed-vpd.pdf)

On May 30, 2020, the Special Prosecutor informed the ADAG that the charge assessment standard had not been met for any of the officers and no charges were approved.

The final report of the Special Prosecutor has been withheld pending the conclusion of several related matters, including a conduct investigation under the *Police Act*. As the related matters have concluded, a Clear Statement summarizing the Special Prosecutor's decision not to approve charges is now being released. The Special Prosecutor's recent appointment to the bench has meant that he played no role in the drafting of this Clear Statement, a copy of which is attached.

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## Clear Statement

### Summary

Between March 2016 and December 2016, the Vancouver Police Department (VPD) investigated and subsequently charged one of their officers, Detective James Fisher (Fisher), with several offences, including breach of trust and sexual exploitation. Fisher was an officer in the Counter Exploitation Unit (CEU), and it was alleged he had used his professional position of trust to make sexual advances and have inappropriate sexual conduct with various victims working with the CEU.

In April 2016, a VPD Project Team was created by the VPD to covertly investigate the allegations of inappropriate sexual conduct by Fisher against the first victim (Victim A). Throughout this investigation and until his arrest in December 2016, Fisher continued his duties in the CEU. Although Fisher was not told he was under investigation, he likely suspected he was under investigation.

The VPD Project Team investigation utilized two of Fisher's alleged victims (Victim A and Victim B) as police agents. In August 2016, Fisher contacted Victim A and told her that allegations of sexual impropriety were being made against him by two other female youths, and that officers would be contacting her for an interview. During that conversation, Fisher counselled Victim A about the answers she should give when questioned by the officers. Victim A subsequently met with the officers and denied that Fisher did anything inappropriate with her.

In December 2016, Fisher was arrested and charged. Given that Fisher had continued working in the CEU until his arrest, the VPD Project Team decided to interview other officers in the CEU to determine whether there were other unidentified victims or whether Fisher had committed any other offences.

In January 2017, VPD investigators began interviewing CEU officers who had worked with Fisher. Those interviews included the two officers, Subject Officer 1 (SO 1) and Subject Officer 2 (SO 2), who had interviewed Victim A and a third Subject Officer (SO 3). Based on those interviews, the VPD investigators raised concerns with their superiors about the three Subject Officers possibly being misleading or deceitful.

During the interviews of the three Subject Officers, a Vancouver Police Union representative was present. This representative also met individually with each of the officers prior to their interviews.

The Non-Commissioned Officer (NCO) in charge of the CEU was aware of the Fisher investigation and had conversations with the Subject Officers before and after Fisher's arrest. It is from those conversations that the VPD Project Team became aware that the Subject Officers were not being forthright in their statements.

The three Subject Officers told the NCO that they had received legal advice from the union representative prior to their witness interviews, regarding how they should respond to questions.

In August 2018, Fisher pled guilty to two counts of breach of trust and one count of sexual exploitation. In January 2019, Fisher's sentence appeal was dismissed.

This Clear Statement summarizes the evidence gathered during the investigation and the applicable legal principles. These are provided to assist in understanding the Special Prosecutor's decision not to approve any charges against the officers involved in the incidents. Not all of the relevant evidence, facts, case law, or legal principles are discussed.

### Investigative History

On July 7, 2017, the Police Complaint Commissioner (PCC) wrote to the Assistant Deputy Minister and Director of Police Services (the Director) requesting that he order a special investigation under the *Police Act* into "allegations of serious misconduct" possibly "criminal in nature" by three members of the CEU of the VPD. The PCC also expressed concern that a police union representative may have attempted to undermine the investigation by the advice he gave to the officers before their interviews.

The BC RCMP initiated a special investigation, as requested, but determined that it should be conducted by investigators from outside the province. The investigation was ultimately carried out by RCMP officers from Alberta. They prepared a Report to Crown Counsel (RCC) that was provided to the Special Prosecutor on August 7, 2019, however the investigation continued until December 2019. The RCC recommended charges related to obstruction of justice and breach of trust.

### Charge Assessment and the Criminal Standard of Proof

The standard of proof in a criminal case requires that each essential element of the offence be proven beyond reasonable doubt.

The charge assessment guidelines that are applied by Crown Counsel in reviewing all RCCs are established in policy and are available at:

[www.gov.bc.ca/charge-assessment-guidelines](http://www.gov.bc.ca/charge-assessment-guidelines)

BCPS guidelines for assessing allegations against peace officers are also established in policy and are available at:

[www.gov.bc.ca/allegations-against-peace-officers](http://www.gov.bc.ca/allegations-against-peace-officers)

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

- whether there is a substantial likelihood of conviction; and, if so,
- 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 Crown Counsel is satisfied there is a strong and solid case of substance to present to the court. In determining whether this test is satisfied, Crown Counsel 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.

## Potential Charges

The charges considered by the Special Prosecutor in this case were obstruction of justice, conspiracy to obstruct justice, counselling another to obstruct justice, and breach of trust by a public officer.

### Obstruction of Justice, Conspiracy and Counselling

Section 139 of the *Criminal Code* makes it an offence to willfully attempt to obstruct, pervert or defeat the course of justice. In this case the alleged obstruction related to allegations of interference in the VPD Project Team’s investigation of Fisher.

The essential elements of conspiracy requires proof of an intention to agree, completion of the agreement, and a common unlawful design to do something unlawful.

Counselling an offence can occur whether or not the offence is actually committed. If the counselled offence is committed, the counsellor is also a party to the offence.

### Breach of Trust

Breach of trust by a public officer requires proof that a public officer (a police officer is a public officer) acting in connection with the duties of their office:

- breached the standard of responsibility and conduct demanded by the nature of their office;

- the conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and,
- the accused intended to use their public office for a purpose other than the public good, such as for a dishonest, partial, corrupt, or oppressive purpose.

The breach of trust alleged against the SOs related to their failure to make notes of interviews and interactions with victims and witnesses.

## **Evidence Review**

In March 2016, a young woman (Victim A) advised Vancouver police that Fisher had been sexually inappropriate with her in the past. Victim A had met Fisher the year before when she had been involved in the sex trade and Fisher was investigating her pimp. In April 2016, the VPD created a Project Team to investigate these allegations and further allegations made by other women, including an allegation that Fisher had sex with Victim A.

Fisher became aware of these allegations and contacted Victim A in August 2016. Fisher arranged for an officer from his unit (SO 1) to interview Victim A on August 18, 2016. SO 2 also attended. The VPD Project Team secretly recorded the communications between Fisher and Victim A and the subsequent interview between Victim A and SOs 1 and 2.

In December 2016, Fisher was arrested and charged. After charges were approved the VPD Project Team interviewed CEU officers to determine if there were other unidentified victims or if Fisher had committed any other offences. The VPD Project Team investigators believed that statements of the three SOs made during these interviews were likely misleading or deceitful. Investigators were also concerned about the involvement of the VPD union representative who attended the interviews of the SOs.

### **SO 1**

On January 13, 2017, SO 1 was interviewed by the VPD Project Team, but did not volunteer information relevant to Fisher's dealings with victims. Examples of omissions include information that Fisher was alone with a victim in a police vehicle, on his day off, and they were in a minor collision (SO 1 had attended the collision scene). SO 1 also did not tell the VPD investigators about another allegation of sexual misconduct by Fisher from 2017 or that Fisher had told SO 1 that the "RCMP are sniffing around about me".

SO 1 spoke with his NCO the next day, and provided the NCO with some of this omitted information, and agreed to have the NCO provide the information to investigators.

During the January 13, 2017 interview, SO 1 was also inconsistent in his answers regarding Fisher meeting privately with victims. On one occasion he contradicted himself on whether he was always in eyesight of Fisher's meetings with victims/witnesses.

SO 1 also spoke to the VPD Project Team about how he became aware of the allegations that Fisher had sex with Victim A and the extent of his communications with Fisher up to and after SO 1 and SO 2 met with Victim A to discuss the allegations.

SO 1 said that he became aware of the allegations when Fisher was away on annual leave. He planned to talk to Fisher in person upon his return, but Fisher, while on leave, had called him about it, and that "our plan" was to "bring it up with Victim A" and "get ahead of it".

The SO 1 did not tell the VPD Project team about the extensive communication he had with Fisher in the period leading up to the interview with Victim A and immediately after. In that timeframe there were 152 communications (text and phone) between the two of them, many of them the day of the interview with Victim A along with lengthy phone conversations before and after the meeting.

Nor did SO 1 tell the VPD Project Team he spoke to Fisher before meeting with Victim A and that Fisher had told him to "remind her that she was all "methed out" at the time that she's making this allegation that I sexually assaulted her. Remind her that she's a drug addict...".

The phone conversations between SO 1 and Fisher were not recorded.

In conversation with The NCO the day after the interview SO 1 advised his NCO that he was told by the union representative, prior to the January 13, 2017 interview, words to the effect of "if they don't ask you don't tell", and that the union representative appeared to be unconvinced the evidence against Fisher was sufficient, and said "you don't want to be the guy that puts them over the top or contributes something they didn't have".

## SO 2

VPD Project Team investigators interviewed SO 2 on January 13, 2017.

Investigators asked SO 2 about the Victim C comment regarding Fisher having sexual intercourse with Victim A. SO 2 said she met with Victim C, another officer, and Fisher at Victim C's foster home when Victim C said to Fisher that she had heard Fisher "slept with somebody". SO 2 did not think Victim C "could give any sort of detail". SO 2 felt Victim C was "trying to get a rise out of Fisher" and did not believe the allegation was true. She was not aware of Fisher having a sexual relationship with a victim or witness but did recall him providing money for "boost or cigarettes or things like that".

SO 2 said she did not recall Fisher ever asking her to talk to Victim A but acknowledged interviewing her with SO 1. SO 2 did not audio record the interview, nor did she take notes of the interview, aside from making a note of the meeting and notes of advising the NCO of the outcome.

A review of Fisher's cell phone the day after the meeting with Victim A shows text messages between Fisher and SO 2. This text messaging follows SO 2 asking if Fisher had talked to SO 1 "since our call". That call was in response to a text from SO 2 asking if Fisher was available for a call. Fisher asked her to call his other number. Those records show a call to Fisher's other number from SO 2's shortly after, which lasted just over twelve minutes. There is no record of the contents of this call.

When asked by the VPD Project Team investigators if there was "anything else" they should know, SO 2 replied "no", then added that she thought they were aware of an incident she brought forth through the union representative about Fisher being left alone with another victim.

After the interview, SO 2 boasted to the NCO that she had been an "absolute bitch" during the interview, would not look at the investigators and provided one-word answers to questions.

The NCO could not recall if SO 2 claimed she received legal advice from the union representative but he recalls he clarified with her that a conversation with the union Representative is "only union advice". The NCO made no notes of his post interview conversation with SO 2.

### SO 3

VPD Project Team investigators interviewed SO 3 on January 13, 2017.

In his interview SO 3 acknowledged that Fisher met with victims and witnesses alone. SO 3 described a meeting Fisher had with a victim at a recovery house. He also related other contacts Fisher had with this person. SO 3 told investigators that he had never seen Fisher provide money to witnesses or victims. SO 3 also responded "no" when asked if there was anything else the VPD investigators should know about.

After the interview SO 3 told the NCO that he had information that Fisher had picked up the same person on another occasion "on his own time in his own car". He knew this information from another Cst but said he did not mention the Cst's name since he figured the VPD investigators were probably going to interview that Cst at some point.

The NCO said that SO 3 told him his pre-statement conversation with the union Representative was to the effect of to not be the one to "tip the scales" or "say too much". The NCO made no notes of this conversation with SO 3.

## The Union Representative

The union representative was interviewed by Alberta investigators and was told that it was alleged he had provided guidance or instruction to the SOs to be untruthful or not forthcoming, and he "took great exception" to that allegation, "emphatically" denying he would ever do such a thing. He said he told them to "be truthful, answer all questions and not feel the need to fill quiet pauses with erroneous information". Asked if he had said "don't be the one who sewered Fisher", he replied "absolutely not".

The union representative was described as "open and cooperative" by the Alberta investigators.

## Other Evidence

The Alberta investigators interviewed many witnesses, including other police officers and Victims A, B, and C. None of the Subject Officers provided statements to the Alberta investigators.

In her interview with the Alberta investigators, Victim A recalled meeting with SO 1 on August 18, 2016. She did not think SO 1 knew what was going on between her and Fisher, and the main topic was unrelated to the Victim C assertion that Victim A and Fisher had sexual intercourse.

Statements and text messages confirm that Fisher was arranging the meeting in August 2016. Fisher texted SO 1 on Monday, August 15 that Victim A had texted that she was scared about her pimp trying to get to her due to the "serious time" he was facing. Fisher and SO 1 texted again on August 17, Fisher saying they "need to check up on Victim A" and discussing her being scared of her pimp. Later that day they texted about meeting August 18. Nothing of substance is discussed until the post meeting text from SO 1 that "Meeting with Victim A went really well".

The telephone conversations between Victim A and Fisher on August 18, 2016 were recorded. From those, it is clear that Fisher told Victim A what to say. Though the topic is clearly the sexual intercourse rumour, Fisher did not tell her what questions SO 1 would ask. Fisher told Victim A that SO 1 "may or may not ask you the question that you and I talked about" (the Victim C allegation she and Fisher had sexual intercourse) and that SO 1 was his "friend, he's not trying to get me in trouble" and "he's not internal. "He's, he's with me, but no matter what question he asks" she can say "I don't remember saying any of this or I said it when I was high... whatever is the truth" ... "and the second thing is no matter what was said or how it was said, it never happened". Fisher also advised Victim A that SO 1 does not know about the kissing, only that Victim C says they slept together. He tells her that SO 1 will not ask about kissing because he does not know anything about it.

A further telephone conversation between Fisher and Victim A was recorded that same day, and it took place after her meeting with SO 1 and SO 2. She says that SO 1 and SO 2 met her, and



SO 1 asked "so we heard that you, you and Fisher had sex". She tells Fisher that she told SO 1 "no that didn't happen".

### Fisher Statement

The Alberta investigators interviewed Fisher after his appeal from conviction was dismissed.

Fisher denied that he had directed SO 1 what questions to ask Victim A during the August 18, 2016 interview. He said he was concerned about the investigation of Victim A's pimp, for which Victim A was a witness, and did not want her to be lying about the two of them having sex at a condo out of concern for the impact on her credibility at that trial. He said he asked SO 1 to "flush out why she may have said this" and where is "this information coming from". He was concerned it may have been coming from a pimp. Fisher said that he told Victim A to "tell the truth" to SO 1 in relation to the August 18, 2016 interview.

In the pre-interview phone call, the recording confirms that Fisher does use the phrase "tell the truth". However, he also provided her with the suggested answers; "I don't remember saying any of this" or "I said it when I was high"... "whatever is the truth... no matter what was said or how it was said, it never happened" and then he says "So, is it gonna be that you don't remember it, or is it gonna be that you were high". Near the end of the call Fisher says: "And then if he asks you a question about you and me. Simple. I don't remember it, or, if I said it, I was high".

Fisher said he did nothing to instruct or counsel Victim A or SO 1 to lie or hide the truth in that interview, and he did not direct SO 1 about what questions to ask.

### Analysis

After reviewing all the evidence, the Special Prosecutor concluded there was not a substantial likelihood of conviction for any of the suggested offences.

### Obstruction by Omission

All of the subject officers and indeed some officers who were not suspects failed to fully disclose information relevant to the investigation. The Special Prosecutor concluded that this failure did not amount to criminal conduct. The subject officers did not lie or misrepresent anything. They simply did not volunteer information. Absent a statutory or common law duty to provide the information to the VPD Project Team investigators there was no legal obligation for them to provide the omitted information.

Although the police have the right to ask questions, and indeed may be under a duty to do so where they reasonably suspect that the person questioned was involved in a crime, citizens are under no legal obligation to respond to those questions in the absence of a statutory duty. The

duty of a peace officer to make enquiries must not be confused with the right of any person, even peace officers, to not provide information to police questions.

While the officers may have had what the Special Prosecutor regarded as a moral or social duty to be more forthcoming in the investigation, there was no legal duty that would support a criminal prosecution.

### Conspiracy to Obstruct

The evidence does not provide a basis to conclude that the discussions between Fisher and the SOs regarding the victim interviews amounted to a conspiracy. Little is known of the content of these discussions. The length and frequency of the discussions raises suspicions, but the circumstances of the discussions are inconsistent with planning to obstruct an investigation, as the officers were unaware of the allegations, and they shared information about the discussions with their NCO.

### Counselling Obstruction

The admissible evidence does not establish that the advice the union representative provided to the SOs amounted to obstructive behavior. In any event, his direct statement to the contrary would raise a reasonable doubt.

### Breach of Trust re: Note Taking

While the Special Prosecutor noted that the failure on the part of the officers to properly document their interactions with witnesses in this case may have constituted a breach of their professional duties as investigators, it was consistent with the practice of others in the unit. The note taking practices on the unit where these officers worked was described by witnesses as "lax" and "minimal". While the SO's conduct in this regard may have been inappropriate there is no evidence that it was markedly different from others on the unit nor was there any evidence suggesting an improper purpose. Accordingly, the Special Prosecutor could not conclude that the allegation of breach of trust by a public official met the charge assessment standard.

## Conclusion

The Special Prosecutor concluded that the evidence available did not warrant any criminal charges pursuant to the BCPS charge assessment guidelines. The Special Prosecutor referred the allegations back to the police for consideration of administrative discipline pursuant to the *Police Act*. The administrative discipline process has concluded, so the BCPS is releasing this clear statement summarizing the charge assessment decision of the Special Prosecutor. The Special Prosecutor's recent appointment to the BC Supreme Court precluded him from having any involvement in the preparation of this statement.