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## BC Prosecution Service announces decision of Special Prosecutor

**Victoria** – On March 4, 2024, the BC Prosecution Service (BCPS) announced that John M. Gordon KC had been appointed as a Special Prosecutor involving an investigation being conducted by the Port Moody Police Department (PMPD) into allegations of campaign finance irregularities in West Vancouver Mayor Mark Sager’s campaign for the municipal election held in October 2022.

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

[BC Prosecution Service - Announces Appointment of Special Prosecutor](#)

On June 13, 2024, Mr. Gordon informed the Acting Assistant Deputy Attorney General that the charge assessment standard for possible offences under the *Criminal Code* had not been met, and accordingly, no criminal charges were approved.

The charge assessment guidelines to be applied by the Special Prosecutor, which are the same as those applied by regular Crown Counsel, are established in BCPS policy and are available at:

[Charge Assessment Guidelines \(CHA 1\)](#)

On June 13, 2024, the matter was remitted back to Elections BC to resume their investigation and charge assessment into possible regulatory offences under the *Local Election Campaign Financing Act*.

The announcement of the Special Prosecutor’s charge assessment decision was delayed so as to not compromise the integrity of Elections BC’s regulatory investigation and charge assessment. As that process has now concluded, this announcement and accompanying Clear Statement regarding the Special Prosecutor’s decision is being released.

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## Clear Statement

### Circumstances

Mark Sager, then a lawyer, was a candidate for mayor of the District of West Vancouver in the municipal election held on October 15, 2022. His law partner, Ron Nairne, served as his campaign's financial agent. Mr. Sager was elected mayor and formally assumed the position on November 7, 2022. Candidates and financial agents bear responsibility for complying with post-election reporting requirements under the *Local Elections Campaign Financing Act* (LECFA).

Elections BC (EBC) is a non-partisan office of the provincial legislature that is empowered with enforcement of LECFA. EBC officials have specialized knowledge and expertise in relation to the administration and enforcement of this statute. However, the investigation of potential offences under the *Criminal Code* is beyond the mandate of EBC. In cases where they deem such an investigation to be warranted a referral will be made to the relevant police agency.

During EBC's standard compliance review of the required post-election campaign finance filings submitted by the Sager campaign, concerns arose over potential campaign finance irregularities. After the election had concluded, the Sager campaign purchased a number of items to furnish the mayor's office. Under LECFA, candidates may only claim expenses "incidental to the candidate's campaign", which these items were not. In addition, the Sager campaign's post-election disclosure statement identified campaign funds allocated to "post-election communications". These funds were paid to a public relations and communications consultant.

The Sager campaign produced receipts for some of the office furniture, all of which post-dated the election. Some receipts bore notations "Mayor's office". Some of the furniture purchases were disclosed on the disclosure statement required under LECFA; others were not. Some purchases were covered by funds drawn on the campaign account; others were not. There were three purchases of furniture totalling \$14,622.52; however, the investigation was only able to establish that \$7,301.52 of that total came from the campaign account.

Two payments to a communications consultant were listed in the campaign's disclosure statement as "post-election communications". Professional services of this type occurring before an election are understood to be a permissible campaign expense, but services rendered after a campaign are generally not. The first payment was in the amount of \$3,761.87, for services rendered in October 2022 (both before and after the election). This payment was made from the campaign account. The second payment was in the amount of \$7,993.13, for services rendered in November and December 2022 (entirely after the election). However, this second payment was billed to Messrs Sager and Nairne's law firm and was not paid out of the campaign account.

The Special Prosecutor determined this second payment should be excluded from consideration because even though it was for some reason included in the campaign's disclosure statement, it was not in fact paid for by the campaign. Some portion of the first payment to the communications consultant (as it pertained to services rendered after the campaign had concluded) was not a permissible campaign expense, but the amount is not determinable.

Had the Sager campaign not spent the money it did on the above-referenced furniture and communications expenses, the campaign would have had unused, or surplus, campaign funds it was required to remit to the municipality, totalling close to \$10,000. Failing to remit surplus campaign funds would deprive the District of West Vancouver of money that it should otherwise have received, although it is possible the deprivation would only be temporary, as the legislation requires that excess funds remitted to a municipality be held in trust and then returned to the candidate should they choose to run for office in the next general election.

In addition to a potential contravention of LECFA (the enforcement of which is within the purview of EBC), the act of claiming these expenditures as legitimate campaign expenses could also serve as the foundation for a criminal prosecution for fraud over \$5,000, pursuant to section 380(1) of the *Criminal Code* (which is outside the jurisdiction of EBC). In these circumstances, EBC suspended their regulatory investigation in November 2023 and referred the matter to the PMPD for a criminal investigation. The Special Prosecutor was appointed soon thereafter with a mandate to determine if the charge assessment standard was met in relation to any offences under the *Criminal Code*. PMPD submitted a Report to Crown Counsel to the Special Prosecutor May 18, 2024. The Special Prosecutor reported his charge assessment decision to the BC Prosecution Service on June 13, 2024, and the matter was referred back to EBC to conclude their investigation and charge assessment under LECFA.

### **BCPS Charge Assessment**

BCPS charge assessment policy CHA1 requires that the available evidence meet a two-part test: whether there is a substantial likelihood of conviction; and, if so whether the public interest requires a prosecution.

To secure a conviction on a charge of fraud over \$5,000, contrary to section 380(1)(a) of the *Criminal Code*, the Crown must prove that the accused engaged in an act of deceit, falsehood or other fraudulent means, and that this act gave rise to a risk of prejudice (economic loss): *R. v. Theroux*, [1993] 2 S.C.R. 5. The accused must have acted knowingly, that is, with an intent to deceive and with knowledge that his act could result in putting others at economic risk.

The Sager campaign openly declared many of the impugned expenditures in its post-campaign filings. When EBC questioned these expenditures and requested further information and supporting documents, these requests were, in the main, complied with. There was no apparent attempt to conceal the fact that these expenses were incurred after the campaign had ended or what they were for. The evidence in this regard provides fruitful ground for the defence to argue that the campaign did not act with an intent to deceive.

With respect to the purchase of furniture for the mayor's office, Mr. Sager claimed that he sought and obtained the permission of an EBC official that the use of campaign funds for such a purpose was permitted. EBC has denied that this occurred. Regardless of its merits, a defence of officially induced error would likely be advanced. Regarding the furniture expenses, Mr. Sager stated that the furniture was intended for the mayor's office at Municipal Hall, and that such a use represented a savings to the taxpayer. In short, the essential element of an intention to deceive in relation to the impugned expenses would therefore be an arguable issue at trial.

Proving that the District of West Vancouver suffered economic prejudice or deprivation is more straightforward. If unused campaign funds were improperly expended, then they were no longer available to be remitted to the municipality, thereby depriving it of those funds. However, this deprivation is more technical than it might otherwise seem, given the money would be returned to his campaign if he chooses to run in the next election. Further, correspondence from an EBC representative to Mr. Sager suggests that he could leave his campaign account open for future use, as long as statements were provided showing the "last" expenses and transactions [pertaining to the 2022 campaign] that went through the account. This, arguably, created ambiguity as to the deadline for unused funds to be remitted, and, by extension, ambiguity as to whether the municipality could have suffered economic deprivation.

The Special Prosecutor concluded that the available evidence is equivocal regarding the essential question as to whether Mr. Sager acted dishonestly or was simply careless or mistaken in his efforts to comply with LECFA. Accordingly, the Special Prosecutor concluded there was no substantial likelihood of conviction regarding the *Criminal Code* offence of fraud over \$5,000.

Notwithstanding his conclusion regarding the first part of the charge assessment test, the Special Prosecutor also examined the public interest considerations in this case. He determined that notwithstanding the importance of the aims and objectives of LECFA, the public interest did not require a criminal prosecution to protect the regulatory scheme, in particular a regulatory process as robust as this one in which the available penalties are more significant than what would be likely under a criminal prosecution in this particular case.

**Conclusion**

The Special Prosecutor concluded that, on the basis of the available evidence, a criminal charge of fraud over \$5,000 was not supportable against either Mr. Sager or Mr. Nairne. The matter was remitted back to EBC for authorities there to resume their investigation and proceed within the regulatory enforcement process under LECFA, at its discretion.

The announcement of the Special Prosecutor's charge assessment decision was delayed so as to not compromise the integrity of EBC's regulatory investigation and charge assessment. As that process has now concluded, this Clear Statement regarding the Special Prosecutor's decision is now being released.