

**Independent Review and Evaluation
of the Actions of Fraser March with
Respect to the Decision to Remove him
from the
Office of the Citizens' Representative**

Presented to the Speaker of the House of Assembly
by the Honourable John J. O'Neill
December 12, 2009

The O'Neill Review

Independent Review and Evaluation of the Actions of Fraser March with Respect to the Decision to Remove him from the Office of the Citizens' Representative

Presented to the Speaker of the House of Assembly
by the Honourable John J. O'Neill
December 12, 2009

By an agreement dated October 23, 2009 and made between Her Majesty in right of the Province of Newfoundland and Labrador as represented by the Speaker of the House of Assembly and the Honourable John O'Neill, (the "Judge's Agreement") I, John O'Neill, a retired Judge of the Supreme Court of Newfoundland and Labrador, Court of Appeal, agreed to review material, conduct necessary interviews and complete a report to the Speaker of the House (the "Speaker") for distribution to the Members of the House of Assembly (the "House"), including my written opinion as to whether there was sufficient cause to remove Fraser March from the position of Citizens' Representative (the "Review").

APPOINTMENT AND DISMISSAL OF CITIZENS' REPRESENTATIVE

Pursuant to section 3. (1) of the *Citizens Representative* (the "Act") and following a Resolution of the House on December 13, 2001, the Lieutenant-Governor in Council, by Order in Council dated December 14, 2001, appointed Fraser March to serve as the Citizens' Representative effective February 1, 2002.

In his report submitted to the Speaker on January 26, 2005 (the "Report"), and in a supplementary report (the "Supplementary Report"), (jointly the "Reports") submitted to the Speaker on March 7, 2005, the Auditor General identified a number of concerns relating to the operation of the Office of the Citizens' Representative. The Reports

The O’Neill Review

included the written responses of the Citizens’ Representative with respect to some of the concerns raised in the Reports (the “Responses”).

The Commission of Internal Economy of the House (the “Commission”), of which the Speaker was chair, was the governmental body with which Fraser March dealt during his tenure as Citizens’ Representative. The Commission conducted a review of the concerns raised by the Auditor General and retained a lawyer, Michael F. Harrington, Q.C., now a Judge of the Trial Division of the Supreme Court of Newfoundland and Labrador, to advise the Commission with respect to the concerns raised by the Auditor General. The Commission also instructed Mr. Harrington with respect to several complaints which had been brought to the Commission’s attention, questioning whether Mr. March lacked impartiality, acted in a biased manner or had placed himself in a conflict of interest situation. The opinion provided by Mr. Harrington concluded that the work done by Mr. March for the union constituted just cause for dismissal. Subsequently, on April 14, 2005, the Speaker wrote to Mr. March raising the several matters of concern to the Commission, all as set out in the letter and inviting Mr. March to attend a meeting with the Commission, with counsel if he wished, to discuss these concerns, or to make a written submission with respect to them.

Prior to the Speaker’s letter of April 14, 2005, Mr. March had written to the Speaker, on February 4, 2005, referring to the Report, and the reference therein to “excessive private vehicle usage”, and a statement by the Speaker to the media referencing concern over “the excessive travel” of the Citizens’ Representative. Mr. March continued in his letter: “[n]ow the public is being told by the Auditor General that the travel of the Citizens’ Representative is ‘excessive’ and the Speaker of the House of Assembly has concerns about the excessive travel of the Citizens’ Representative”. The letter then calls upon the House to revisit the whole question of how the Citizens’ Representative service is to be administered and to invite “a person with expertise in the ombuds field” to review the operation of his office and provide “an overall evaluation of this system’s development”. Mr. March suggested that “the retiring ombudsmen of Manitoba and Ontario” would fit this task.

The O’Neill Review

Mr. March again wrote the Speaker on February 9, 2005, this time with respect to the Auditor General’s accusation that the Citizens’ Representative had contravened Section 4. (2) of the Act, an accusation which Mr. March stated “has very serious consequences for the Citizens’ Representative and the credibility of the ombuds service”. He then requested that the House appoint an independent third party to determine ‘if the Auditor General is correct when he makes the accusation against the Citizens’ Representative or if the Citizens’ Representative is correct when he claims that the *Citizens’ Representative Act* was not contravened.” He requested “that a member of the Judiciary... be recruited to determine this question.”

It was following the receipt of these letters that the Commission directed the Clerk of the House to retain legal Counsel.

Further letters were written by Mr. March to the Speaker; one on February 11, 2005, two on February 14, 2005, another on February 17, 2005 and a further letter on March 1, 2005.

It is not necessary for my purposes to deal at any length with these last mentioned letters.

Mr. March did not attend a meeting with the Commission nor was any meaningful reply, in writing or otherwise, forwarded to the Commission in response to the Speaker’s letter.

The Citizens’ Representative may, for cause, be removed from Office or be suspended by the House, on a majority vote, by section 6. of the *Act*. Section 7. provides that when the House is not in session, the Lieutenant-Governor in Council, on the recommendation of the Commission, may suspend the Citizens’ Representative for incapacity, neglect of duty or misconduct, such suspension not to continue in force beyond the end of the next ensuing session of the House.

The O’Neill Review

The Commission, on June 29, 2005, the House not then being in session, directed the Speaker to recommend to the Lieutenant-Governor in Council that Fraser March be suspended in accordance with section 7. (1) of the *Act*. The suspension was to be effective, “with pay”, pending consideration of the status of his appointment by the House at its next session.

On December 12, 2005, the House, by a majority vote of its Members, passed a resolution that Mr. March be removed from the Office, following which the Lieutenant-Governor in Council, under section 6. of the *Act*, issued an Order in Council removing Mr. March from the Office of Citizens’ Representative, effective December 12, 2005.

Mr. March requested that there be an independent review of the circumstances surrounding his removal.

On May 13, 2009, a majority of the House Management Commission (for purposes of the Review, also the “Commission”) resolved that the Commission endorse a resolution in the House to appoint a retired Supreme Court Justice to conduct an independent and impartial review into the circumstances of Fraser March’s removal from Office, which review would give Mr. March an opportunity to be heard, and include an opinion as to whether there was “sufficient cause” to remove him from Office.

SCOPE OF REVIEW

The work and review to be completed and performed under the Judge’s Agreement are set out in Schedule “A” of the agreement as follows:

1. Carry out a review and evaluation of the actions of Mr. Fraser March with respect to the decision to remove him from the Office of the Citizens’ Representative.
2. In carrying out the review and evaluation referred to in clause 1, review
 - The decision of Justice Orsborn in the case of *March v. Hodder et al* and support documents relating to the case,

The O’Neill Review

- Hansard debates relating to Mr. March’s dismissal,
 - The documentation of the events and decisions which ultimately resulted in the December, 2005 dismissal of Mr. March by resolution of the House of Assembly,
 - Those other documents considered necessary by the Judge in order to provide the required written opinion.
3. Meet with Mr. Fraser March to allow Mr. March an opportunity to be heard.
 4. Meet with other persons considered necessary by the Consultant in order to make a fair determination of the facts of the matter.
 5. Provide to the Speaker a report which shall include a written opinion as to whether or not there was sufficient cause to remove Mr. March from the Office of Citizens’ Representative.

While I have reviewed and considered *March v. Hodder et al* 266 Nfld. & P.E.I.R. 130 (“*March v. Hodder*”) and the relevant debates contained in Hansard in great detail, I do not find that the scope of the Review requires that I provide any opinion with respect to same save as hereinafter set forth.

MARCH V. HODDER

On June 9, 2006 Fraser March took out an Originating Application in the Trial Division of the Supreme Court of Newfoundland and Labrador seeking Orders in the nature of Certiorari, Quo Warranto and Mandamus in relation to the decision of the House to remove him as Citizens’ Representative. I have obtained and reviewed the Application and all documents filed in the Application and the reasons for Judgment of the Honourable Mr. Justice David B. Orsborn, now Chief Justice of the Trial Division of the Supreme Court of Newfoundland and Labrador, filed April 26, 2007. That decision has not been appealed. I find the decision to be in order.

I agree with Judge Orsborn’s opinion that the resolution of the House that Fraser March be removed from the Citizens’ Representative Office for cause under section 6. of the *Act* and the process leading to the passage of such resolution in the House are protected by parliamentary privilege. I agree that the resolution and the manner in which the House debated and considered it are within the exclusive jurisdiction of the House of Assembly

The O'Neill Review

and are immune from judicial review. For the purposes of the Review, I do not believe that any further consideration of the Application is warranted.

HANSARD

The debate set forth in Hansard essentially involves the consideration of whether Mr. March should be afforded the opportunity to be heard by the House, in effect, his employer. The House determined that he should not. It is not within my mandate to provide any opinion on this point.

MATTERS CONSIDERED

The report of the Speaker presented to the House, dated December 6, 2005, was the subject of some debate as to whether any actual conclusion had been reached by the Commission prior to the suspension of Mr. March.

The report consisted of Minutes of the Commission pertinent to the matter of Mr. March, the Report, the Supplementary Report, the legal opinion prepared for the Commission by Michael Harrington, Q.C., letters to the Speaker from Mr. March, dated February 4, 9, 11, 14 and 17, 2005, March 1, 2005, April 18 and 29, 2005 and May 27, 2005, and letters from the Speaker to Mr. March dated April 14 and May 26, 2005.

In carrying out the Review I examined in detail the items contained in the report of the Speaker, and particularly, the Report and the Supplementary Report, including the Citizens' Representative's Responses. As well, I reviewed the Commission's Minutes and files, news releases and media interviews, cell phone records and the Citizens' Representative's travel claims. I have reviewed the relevant legislation, rules and regulations, including the *Act*, the *Auditor General Act*, the *Public Tender Act*, the *Conflict of Interest Act, 1995*, the Executive Travel Compensation Rules, other government travel policy information as well as the various forms to be completed in

The O'Neill Review

filing travel claims. As indicated I reviewed *March v. Hodder* and the relevant portions of Hansard. Additionally, various legal precedents were considered in arriving at my opinion.

I conducted interviews and had discussions with the Clerk of the House, Bill Mackenzie, the former Clerk, John Noel, former Speakers Lloyd Snow and Harvey Hodder, the Auditor General and staff, the interim Citizens' Representative, Bob Jenkins, the current Citizens' Representative, Barry Fleming, former employees' of the Citizen's Representatives Office, Bradley Moss, and Sandra Mitchell Cooney, and Elizabeth Horwood, who had been seconded to the Citizens' Representative Office during the period the Office was being set up. As well, I met with former Premier Grimes. Assistance was sought and received from a variety of sources, including Aliant, and Marlene Lambe, a Chartered Accountant in the Office of the House of Assembly. Fraser March was heard at the Review Office for a total period of approximately three and one-half days, during two and one-half days of which his legal counsel was present. At his counsel's request, Mr. March was sworn.

A comprehensive review of all the Minutes of the Commission and the files maintained for each meeting of the Commission from December, 2001 to December, 2005 was conducted by me and my legal counsel, Tobias F. McDonald, Q.C. I am satisfied that I have been provided with copies of all relevant information from these records.

ISSUES OF CONCERN

There were three principal issues of concern:

- Did Mr. March carry on a business while engaged as Citizens' Representative contrary to section 4. (2) of the *Act*?
- Did Mr. March submit claims and receive payment for private vehicle travel usage which was not eligible for reimbursement or was improperly claimed for the period February 1, 2002 to June 30, 2004?

The O’Neill Review

- Did Mr. March lack impartiality, act in a biased manner or place himself in a conflict of interest situation in his leadership of an investigation into the home care sector?

I will deal with those and other pertinent issues seriatim.

SECTION 4. (2) OF THE ACT

Early in his career, Mr. March had taught in several high schools and vocational schools. He had been active in the labour movement and from 1981 to 1993 was president of the Newfoundland Association of Public Employees (“NAPE”), in which position he was the Chief Administrative Officer, the first executive officer, and chief negotiator.

Immediately prior to his appointment as Citizens’ Representative, Mr. March was self-employed as a labour relations consultant under the business title “Fraser March - Mediation/Dispute Resolution”, providing assistance to clients in negotiations, mediation, conciliation and various employer/employee programs.

In early December, 2001, Mr. March, having expressed an interest in the position of Citizens’ Representative, was interviewed by a panel including the Clerk of the Executive Council, the Deputy Minister of Justice and the Clerk of the House. The interview notes indicate that Mr. March was, at that time, involved in 23 labour arbitrations in which he had been named as employee nominee, some of which had not started, and that he “would need a couple of months to disengage” from them. Before me, Mr. March stated that the reference to 23 labour arbitrations should have been “43”.

Mr. March was appointed as Citizens’ Representative by a Resolution of the House on December 13, 2001, to become effective February 1, 2002. The term of Office of Citizens’ Representative, as stipulated by section 5. (1) of the *Act* is six years “unless he or she sooner resigns, dies or is removed from office”.

The O'Neill Review

The Auditor General in the Report stated that his Office, during its review of the Citizens' Representative Office, became aware of several invoices that were addressed to a public sector union for work completed by the Citizens' Representative. He added that performing such work would constitute a contravention of section 4. (2) of the *Act*.

By section 4. (2) of the *Act*, the Citizens' Representative shall not hold another public office or carry on a trade, business or profession. The contract entered into between the Crown, represented by the Speaker, and Fraser March sets out in Clause 1.3 that, during the term of Office, the Citizens' Representative shall be governed by the terms set out in the contract and the provisions of the *Act*. The contract further specifies that "the role and responsibilities of the Citizens' Representative are as set out in the *Act*".

During the Review, I examined copies of 13 invoices which had been forwarded by Mr. March to the Newfoundland and Labrador Association of Public and Private Employees ("NAPE"). The Auditor General references in the Report an additional invoice, dated August 12, 2002 in the amount of \$110.00, of which we do not have a copy and to which I will make no further reference. Some, if not all, of the invoices and associated letters had been typed in the Office of the Citizen's Representative. I will sometimes refer to an invoice by a letter, rather than by the name of the person or persons involved.

The earliest invoice, which I will refer to as "A", dated May 10, 2002, is in the amount of \$1,108.00 for services completed by Mr. March, as union nominee on an arbitration board. That invoice lists a hearing or meetings on March 19, 2002 and April 4, 2002, reviewing draft awards, and drafting a partial dissent on April 8 and 9, 2002. No substantial work had been done before March 19, 2002. There is no apparent reason, nor was any explanation given, as to why Mr. March did not withdraw from this arbitration and have some other person named as union nominee.

On November 1, 2001, Mr. March had been appointed by NAPE to a study group dealing with hours of work of support staff workers of school boards. The invoice forwarded to

The O'Neill Review

the union on August 12, 2002 indicates some preliminary work in December of 2001, and meeting with the chairman, Dr. Philip Warren, and the group on February 1, 2002. As well, there were meetings with the union with respect to its presentation to the study group. Mr. March eventually arranged on August 1, 2002 for the transfer of his function to a member of NAPE. Mr. March's invoice, totalling \$3,170.00, included a charge of \$2,550.00 for 8.5 days, six days of which occurred after February 1, 2002.

An invoice in the amount of \$1,460.00 dated August 12, 2002 resulted from an arbitration in which "B" was the grievor. There was some preliminary work such as arranging for dates for hearings. Hearings were held on March 6 and June 6, 2002. A draft award was reviewed on May 2 and a further draft award was reviewed on June 6. A partial dissent was drafted on June 13. The actual time charged in the invoice was 3.5 days. It is interesting to note that the invoice shows Mr. March, on December 20, 2001, meeting with the employer's nominee, agreeing to a board chair and to the venue and to hearing dates of January 24, 25 or February 1, 2002. Later, on January 4, 2002, he agreed to March 7, 2002 as the hearing date, a date after his work as Citizens' Representative was scheduled to commence.

The next invoice, in which "C" was the grievor, was dated August 15, 2002. There are references to some preliminary work such as confirming hearing dates and arranging alternates but there were no hearings until November 19 and December 17, 2001. There were hearings on April 1 and April 3 of 2002 and subsequent meetings with the arbitrator and employer nominee. The total invoice in the amount of \$2,330.00 included charges for 4.5 days beginning on April 1, 2002. Here, because there had been hearings on November 19 and December 17, 2001, in my view, it would not have been unreasonable for the Speaker, had he been asked, to agree that Mr. March could continue this arbitration to its conclusion, provided, however, that his schedule as Citizens' Representative permitted it.

The O'Neill Review

Mr. March, as part of his Response to the Auditor General with respect to these invoices, stated:

“[d]uring the period from February 1, 2002 to August 1, 2002 the Citizens’ Representative spent four regular work days on the matters listed above and stemming from pre-appointment duties. During the same period the Citizens’ Representative worked 28 Saturdays, 2 statutory holidays, and 8 Sundays. Hardly a bad deal for the citizens of Newfoundland and Labrador.”

Mr. March actually billed NAPE for 17 days work during the stated time period (16 days worked if one takes into account that he billed for 1.5 days on each of March 6 and April 3). I note Mr. March indicates “regular” work days. Allowing that two and one-half days charged to NAPE fell on holidays, he worked a minimum of 13.5 days for NAPE, not 4 as he stated. There were a total of 26 Saturdays falling within the stated period; he claims to have worked on 28.

There are four invoices dated October 15, 2002, each dealing with grievances where the employer is the “Marine Institute”. It is not clear from the documentation as to when Mr. March was appointed as an employee or union nominee, but it was January 12, 2002 or shortly thereafter, in each case. The invoices, which are in letter form state: “statement of account for work completed”. When Mr. March appeared before me, he explained that on being nominated as employee nominee by NAPE, his consulting agreement with it was that he was entitled to a \$100.00 fee and an additional \$10.00, which appeared in virtually every invoice as “Pre-arbitration work/set-up fee and Long Distance Telephone”, respectively. The charge was justified, according to Mr. March, because his presence as employee nominee, whether the matter eventually went on to an arbitration hearing, improved the position of the union which had nominated him because of his solid reputation as an employee nominee. No reason was advanced by Mr. March as to why he waited until October 15, 2002 to forward these invoices.

With respect to the four grievances referred to in the last paragraph, there is a letter bearing the same date as the invoices which was forwarded by Mr. March to Phyllis

The O'Neill Review

Loder, an Employee Relations Officer of NAPE. The first paragraph of the letter lists the names of the grievors. The next paragraph is as follows:

“This is to notify that I must discontinue membership on arbitration boards dealing with above noted matters because of excessive workload being experience (sic) by the Office of the Citizens’ Representative.”

The salutation in the letter is: “Dear Sister Loder”; the closing is: “In Unionism”.

I will interject here that, before me, Mr. March stated empathetically that he did not accept any appointment from the union after December 13, 2001, the date of his appointment as Citizens’ Representative. As noted earlier, his appointments here were January 12, 2002 or later.

The next invoice to which I will refer involved grievances by two employees of the hospital in Gander – “D” and “E”. Mr. March had written to Hubert Sutton, an Employee Relations Officer of the union, on October 22, 2002 stating that he “must discontinue membership on the arbitration board...because of excessive workload being experience (sic) by the Office of the Citizens’ Representative”. Mr. March used the salutation “Dear brother Sutton”. On the same date, he forwarded an invoice for work completed setting out “pre-arbitration work/set-up fee and long distance telephone” in the amount of \$110.00.

On October 22, 2002, Mr. March wrote to Jerry Earle, an Employee Relations Officer of the union, whom he addressed as “Dear brother Earle”, saying that he had to discontinue membership on an arbitration board involving an employee of Health Care Corporation of St. John’s as grievor “because of excessive work load being experience (sic) by the Office of the Citizens’ Representative”. On that same date, he forwarded an invoice in the amount of \$110.00, similar in form to the invoice referred to in the preceding paragraph.

The O'Neill Review

On January 6, 2003, Mr. March wrote to an Employee Relations Officer of the union with respect to an arbitration in which he had been named as the union nominee in a policy grievance. In this letter, he used the salutation "Dear Brother Sutton" and stated that he "must discontinue membership on the arbitration board...because of excessive workload being experience (sic) by the Office of the Citizens' Representative". The closing of his letter was: "In Unionism". On the same day, he forwarded an invoice "for work completed" in the amount of \$110.00, as in the previous paragraph.

Two further invoices were forwarded to NAPE, each dated January 6, 2003, in the total amount of \$110.00 for "work completed" for the union. The services reference in each is for "pre-arbitration work/set-up fee". Again, there is the \$10.00 charge for "long distance telephone".

There was nothing in the documentation reviewed to show that there were any further invoices for services carried on by Mr. March for the union.

Earlier I referred to Mr. March having stated that the total fee of \$110.00 became payable by the union to him immediately following his nomination as union nominee. I note that the invoice referred to as "A", in which there is a total charge for hearings and drafting a dissent, includes the amounts of \$100.00 and \$10.00 for "pre-arbitration work/set-up fee" and "long distance telephone". The invoices in the "B" and "C" arbitrations included the same charge for "Pre-arbitration work/set-up fee".

No explanation was offered by Mr. March as to why he would wait several months before sending an invoice to the union for what he said was a fixed and known amount. It appears that, with the exception of the four grievances with respect to which Mr. March had been appointed as an employee nominee on January 10, 2002, the appointments referenced had been made prior to his appointment as Citizens' Representative. Assuming, as I must, that the presence of Mr. March as the employee nominee improved the position of the union because of his "solid reputation", then it would have been

The O'Neill Review

advantageous for the union to continue Mr. March's presence on an arbitration board, even though the actual hearing might not occur for what could be a period in excess of a year. Indeed, one might argue that the \$100.00 charged for "pre-arbitration work/set-up fee" continued to be earned until the arbitration was concluded or cancelled or his position on the Board had been terminated, at which time an invoice would be presented to cover the fee for that service.

I wish to revisit the matter of the interview notes taken before Mr. March was appointed. The actual notation was: "Would need a couple of months to disengage from 23 labour arbitrations on which he has been named as employee nominee (some have not started). Mr. March, before me, accepted the correctness of the note except he said that "23" should have been "43".

It may be argued that the period of two months during which he would "disengage from" his arbitrations would not begin until February 1, 2002 and not December 13, 2001, the date of his appointment. However, it cannot be seriously argued that "disengage" would include "completing" or carrying on with matters already commenced by him if another person could be found to replace him without any undue cost or inconvenience to the parties. Furthermore, in my view, it must have been abundantly clear to Mr. March that he should not have accepted any further union nominations. There is nothing before me to suggest that Mr. March made any effort to facilitate his replacement on boards to which he had been appointed. Indeed, immediately on his appointment on December 13, 2001, he should have informed NAPE and any other union which might be expected to nominate him to boards, or engage his services in any way, that he had accepted an appointment which precluded him from any other work.

Mr. March was aware of the importance of his position as Citizens' Representative and its significance and this becomes very apparent when one reviews his comments made at the time of an interview on a radio phone-in program in January 2003. He is reported to have said:

The O'Neill Review

“But I want to point out to people that not only am I not allowed to be part of any union activity, I am not allowed to be part of any business activity, I am not allowed to rent an apartment. I mean, I am an Officer of the House of Assembly and that’s the function I am carrying out right now. And any other feelings that I have that are political or businesslike, I’ve just got to bury. I’m really no different than a person who becomes a justice of the court and, or the Auditor General. And so I make the same kind of report to the House of Assembly as the Auditor General. Now the House of Assembly can listen to me or the House of Assembly can ignore it, but in my deliberations I cannot represent anybody, alright?”

Mr. March confirmed to me that the foregoing was essentially an accurate version of what he had said.

In his Response to the Report and the recommendation of the Auditor General that the Citizens’ Representative should comply with the *Act*, and in particular, to the statement by the Auditor General that performing the work set out in the invoices already referred to “would constitute a contravention of section 4. (2) of the *Act*”, Mr. March stated “*unequivocally that he did not hold another public office or carry on a trade, business or profession*” since his appointment and that the matter had been dealt with prior to his accepting the position of Citizens’ Representative. In his Response he continued:

“This matter was dealt with by the hiring committee of the Executive Council, the Lieutenant-Governor in Council, the House of Assembly and the Citizens’ Representative prior to Fraser March accepting the position...At this time the Citizens’ Representative had forty three projects ongoing in his labour relations consultation business...It was agreed by the noted parties on advice from the Department of Justice....that Fraser March would be expected, baring (sic) unforeseen circumstances, to separate himself from these private business matters by June 30, 2002. Such was/is practice in other Canadian jurisdictions for newly appointed ombudspersons”

Mr. March further stated in his Response that it had been agreed “at the request of Government, that this understanding would be an addendum to the Agreement between Fraser March and the Crown and would be enforced under authority of Section 45(1) of the *Act*.” No such addendum was presented for my examination or consideration, nor, indeed, does it appear that any such document was ever drafted. Earlier in his response to

The O'Neill Review

the Report of the Auditor General, Mr. March referred to section 2. (1) of his Agreement and said:

“Said Agreement is a complete Agreement (see section 4.1) and is the sole governing authority for relationships between the Crown and the Citizens’ Representative”.

Although there were frequent references by Mr. March to June 30, 2002 as the date on which he was to have “completed” his union work, no compelling indications were suggested to me in support of any date even close to June 30 and in all the circumstances, I have to reject that date as having any particular significance.

Short of an actual addendum to the Agreement, one would have thought that there might be an exchange of letters between Mr. March and the Speaker or someone in the Speaker’s Office, or even a reference in the minutes of the Commission of Internal Economy establishing the position advocated by Mr. March as to the work he was doing for NAPE.

The Office of the Speaker has no knowledge of any written or verbal understanding with Mr. March at the time of his appointment, or at any time, that he could carry on with business he had been engaged in other than what would have been necessary to disengage from that business. In my view, in asserting otherwise, Mr. March was not being truthful.

Mr. March produced four letters from persons active on the political scene at the time but none establishing or confirming the position as advanced by Mr. March. One of these letters, dated April 22, 2005, and drafted by Mr. March for Mr. Roger Grimes’ signature, refers to a conversation the two had in December of 2001 in which Mr. Grimes, while unable to recall the exact details of the conversation, was certain that the Citizens’ Representative was allowed a “transition period” of three to four months after appointment to complete business activities that were ongoing at the time of his appointment. Before me, Mr. Grimes, very aware that some eight years had passed since

The O'Neill Review

Mr. March's appointment, was unsure as to details but essentially repeated what he had stated in the letter.

Another letter, dated January 20, 2006, from the then leader of the official opposition, stated that it was his understanding that there was a "transition period" during which the Citizens' Representative would finalize certain consulting work ongoing at the time of his appointment and that such period was agreed between the Citizens' Representative and Government. While saying that he had no specific knowledge of the length of that transition period, it was his "considered opinion" that a period of six months would have been reasonable.

The Minister of Education at the time of Mr. March's appointment wrote on February 21, 2006 that on February 1, 2002, she was aware of an agreement between the Citizens' Representative and Government that there would be a "transition period" after February 1, 2002, during which Mr. March would establish the Office of the Citizens' Representative and complete certain ongoing work related to his prior occupation. It was her understanding that the length of the transition period would be a matter of discussion between the Premier and the Citizens' Representative.

In the last letter, the writer was a Member of the House, a member of the Commission and a member of Cabinet. It was his position that in February 2002, "there was general and accepted knowledge in Government...and at the (Commission)" of an agreement between Mr. March and Government, to a "transition period" during which the Office would be established and the Citizens' Representative would complete certain ongoing work related to his prior role as a Labour Relations Consultant. It appeared reasonable to him that the transition period should have started February 1, 2002. He had no knowledge of any contact between the Citizens' Representative and the Commission or Government on the matter of the transition period.

The O'Neill Review

A review of the above mentioned invoices shows Mr. March being active in union matters in January, February, March, April, May and June following his appointment as Citizens' Representative. Further, the invoices dated August 15, October 15, October 22 and January 6, 2003 indicate a continuing relationship with the union months after he should have disengaged from these associations.

No reason was advanced before me as to why Mr. March carried on his labour relations consulting work without the specific knowledge and agreement of the Speaker. He was well aware of the importance and significance of the position to which he had been appointed. Although he had been appointed on December 13, 2001, the operation of the Office of the Citizens' Representative was not to commence until February 1, 2002. In fact, the effective date for the opening of the Office was delayed until March 1, 2002. I cannot accept the position that Mr. March was unable to disengage from the arbitrations to which he had been named as employee nominee and from the hours of work study. Mr. March was a veteran of the labour movement and would have known a battery of persons who would have been willing and able to replace him.

There is a troubling aspect to the fact that work was being done by Mr. March outside his function as Citizens' Representative. His continuing association with the union was well known. I have already referred to his letter to the union of October 15, 2002 with respect to grievances where the employer was the Marine Institute. It will be recalled that the salutation in that letter was "Dear Sister Loder" and the closing was "In Unionism". That letter was copied to Claude Horlick, the Director of Staff Relations of the Division of Labour Relations of Memorial University. The letter of October 22, 2002 from Mr. March to Jerry Earle, an Employee Relations Officer with the union, whom he addressed as "Dear brother Earle", notifying him that he "must discontinue membership on the arbitration board", was copied to Mr. Jerry Curnew, the Director of Labour Relations for the Newfoundland and Labrador School Trustees Association and the employer nominee for Health Care Corporation of St. John's on the arbitration board. One would very

The O'Neill Review

readily conclude from these letters that Mr. March's association with the union was still continuing some ten months after his appointment as Citizen's Representative.

The Citizens' Representative, under the *Act* and his contract, could, during the term of his appointment, only perform "the role and responsibilities of the Citizens' Representative". He was not at liberty to perform any work for himself or for any other person without the express knowledge, permission and agreement of the Speaker. The very nature of the position required that he be completely free from other obligations and the quotation set out earlier from an interview given by Mr. March a year or so after his appointment sets that out very clearly.

I cannot but conclude that Mr. March was seriously in breach of his obligation under the *Act* and under his agreement. Under the *Act*, he was precluded from carrying on a trade, business or profession. The agreement, by section 1.4, stipulated that his role and responsibilities are as set out in the *Act*. By section 1.1.3, the Citizens' Representative is to be governed by the terms set out in his agreement and the provisions of the *Act*.

By way of review, Mr. March was appointed on December 13, 2001, the position to become effective on February 1, 2002. In fact, the Office did not "open for business" until March 1, 2002, some two and one half months after Mr. March's appointment.

Under the terms of his contract and the *Act*, Fraser Marsh was bound to devote his full time and attention to the position of Citizens' Representative, a very senior position, in that he was an Officer of the House of Assembly, and enjoyed the same status as a Deputy Minister in the Provincial Government service.

Mr. March had sufficient time to disengage himself from his union commitments prior to the opening of his Office; he did not do so. He continued to be involved in his union activities and was thereby carrying on "a trade, business or profession", contrary to section 4. (1) of the *Act*.

The O’Neill Review

Nothing short of an agreement between Mr. March and the Speaker, or some person on behalf of the Speaker, could be interpreted as entitling or permitting Mr. March to continue with his union commitments.

The situation here is not about whether a person can serve two masters. The *Act* clearly precludes the incumbent from holding another “public office or carrying on an outside job or profession”. In his position Mr. March was required to be completely free, and appear so to be, of any association with or obligation to any person, group, company, or other entity, other than that which might become necessary in the performance of his Office.

In continuing his work with the union, Fraser March was clearly in breach of his obligation to the Office to which he had been appointed. In my view, there was sufficient cause to remove him from the Office of Citizens’ Representative.

REPORTS - CONCLUSIONS

The Report and Supplementary Report contain the following Conclusions:

“My audit of the Office of the Citizens’ Representative identified a number of concerns relating to the operations of the Office. In particular, claims for private vehicle usage appeared excessive, private vehicle mileage was incorrectly claimed between the Citizens’ Representative’s permanent residence and the Office, there were inconsistencies related to private vehicle usage claims and traveling without authorization. In addition, there were management practice issues relating to such matters as cellular telephones and entertainment. Furthermore there was an instance of non-compliance with the *Citizens’ Representative Act* and another instance of non-compliance with the *Public Tender Act*.”

“Our update on the review of the Office of the Citizens’ Representative identified 8 inconsistencies between times and location of travel as recorded on travel expense claims submitted by the Citizens’ Representative and times and location of travel identified on the cellular telephone records for the telephone assigned to the Citizen’s Representative. These 8 inconsistencies were identified in 43 trips reviewed. Of particular concern is an inconsistency relating to a travel expense claim for personal vehicle mileage to and from Port aux Basques where cellular

The O’Neill Review

telephone records indicate that the Citizens’ Representative’s telephone was being used in Nova Scotia on the day that travel was claimed for driving across the Province.”

I identified a number of additional concerns and inconsistencies that were not addressed by the Auditor General and to which I will refer later.

In conducting the Review I encountered a number of constraints which somewhat restricted my ability to reach the same conclusions as had the Auditor General.

THE ACT

The Auditor General noted that his office did not have access to the citizen’s files in the Citizens’ Representative Office due to their confidential nature. When there were references on travel claims to file numbers, he was unable to identify the citizen involved to confirm whether, for example, there had been a meeting or interview with that citizen. His office therefore could not always make a determination as to whether the travel claimed had taken place.

In conducting the Review, the same constraint existed. However, the Review was able to overcome the problem to some extent. The current Citizens’ Representative was asked to conduct a review of some 28 citizen’s files that were referred to in 33 travel claims submitted by Mr. March to determine if there was evidence in these files that he had travelled to the places and on the dates listed, as he claimed. An Affidavit was provided by the current Citizens’ representative indicating: on 11 occasions there were handwritten notes of Mr. March, dated on the day of the trip; on one occasion a complaint form was filled out in Mr. March’s handwriting and signed by the complainant on the date of the trip; on one occasion there was a notation by a complainant dated July 17, referencing “your recent visit” when the trip had occurred July 9; on another occasion a form was sent to a complainant by mail on June 27, a trip had been made July 9, and the form was

The O'Neill Review

signed July 10; on one occasion there was evidence of an interview. On the remaining 18 trips there was no evidence of travel noted.

THE AUDITOR GENERAL ACT

The Review encountered another constraint when I requested that the Auditor General provide answers to a number of questions arising out of the Reports. I also requested copies of several documents referenced in the Reports, in particular, a copy of the cell phone invoices which were used in his audit. The Auditor General advised that his files relating to his Reports fell under the category of audit working papers and he was precluded by the *Auditor General Act* from making them available to me.

The Citizens' Representative Office cell phone service provider was Aliant, under account number 00138083 (the "Account"). The Account was opened in March, 2002 and covered three cell phones: 689-9908, 689-9943 and 689-9948; two additional phones were added in June or July, 2003: 690-2554 and 690-2556. The Account was invoiced by Aliant effective the 14th of each month which invoices dealt with the use of, and charges to, each of the 5 noted cell phones, individually.

Fraser March provided the Review with copies of the Aliant invoices dated March 14, 2002 to January 14, 2005, inclusive. I will call these the "Standard Invoices". The Standard Invoices generally provided only the details of the cell phone calls made, to or from, each of the cell phones, which resulted in a charge to the account. The Standard Invoices do not, in the majority of instances, reveal the details of calls made or received that did not result in a specific charge to the Account (e.g. local area calls made within the allotted minutes were not often detailed).

I have confirmed that in completing the Supplementary Report, the Auditor General requested and received through the Clerk of the House a detailed set of invoices which I will call the "Detailed Invoices". The Detailed Invoices reflect all cell phone

The O'Neill Review

communications to or from each of the five cell phones, whether they resulted in a charge to the Account or not. The Detailed Invoices provide information regarding all “local area” calls made. I am informed that the Clerk did not retain a copy of the Detailed Invoices. The Clerk cannot presently obtain or provide a copy of the Detailed Invoices from Aliant, as Aliant does not have any further record of them and Fraser March does not have a copy of them. I have concluded that the Auditor General’s office is the only location where the Detailed Invoices would be if they exist, and, as indicated, his firm position was that he was not legally permitted to provide same. Without the benefit of having the information contained in the Detailed Invoices it was more difficult to review and analyze the travel claims in the same manner as the Auditor General had done.

Additionally, the Auditor General’s failure because of constraints imposed on him by sections 21, 22 and 23 of the Auditor General Act, to answer certain specific questions, such as how he determined which cell phone was being used by Mr. March on each trip, and what the basis was for certain conclusions he had made, also impeded my ability to come to conclusions on certain issues.

DOCUMENTAL EVIDENCE – FRASER MARCH

It was anticipated that documental evidence was going to be provided by Mr. March to the Review. On March 1, 2005, he wrote a letter to the Speaker which is fully reproduced later in this Review, in which he stated:

“Since a recent report of the Auditor General, the Citizens’ Representative has reviewed in detail the 76 travel claims he submitted between February 1, 2002 and June 30, 2004.

This review has proceeded without identifying any citizen complainant or any citizen involved in an investigation under provisions of the Citizens’ Representative Act.

In his review the Citizens’ Representative has utilized bank statements, credit card statements, cell phone records, car rental receipts, airline records, Marine Atlantic information and the personal observations of others. These documents

The O'Neill Review

clearly demonstrate that the Citizens' Representative traveled to the locations and at the times he described in these travel claims. The Citizens' Representative will produce this documental evidence at the pleasure of the House of Assembly."

Mr. March advised that he had delivered this evidence to the Speaker sometime between the presentation of the Report and the Supplementary Report. The letter of March 1 does not reference providing same to the Speaker and in fact says "*the Citizens' Representative will produce this documental evidence at the pleasure of the House of Assembly*". The Speaker, at that time, has no recollection of having received this documentation.

Mr. March advised that he did not currently have the documentation in his possession. He advised that he had spent a significant period of time photocopying various pieces of information in preparation for what he expected to be a further investigation of the circumstances leading to the Report. We have confirmed from a staff member of the Citizens' Representative that Mr. March did a significant amount of photocopying prior to his dismissal. Further, Mr. March informed me that his bank records for the relevant dates could not be obtained.

Mr. March suggested that the documentation might be contained in the individual citizen's files involved. The current Citizen's Representative advised that this was not the case. Also, we are advised that same is not in Mr. March's lawyer's files. I should note that Mr. March provided copies of what he described as all of the letters that he had written to his lawyer in preparation for *March v. Hodder*, together with copies of the various documentation referenced therein, but the type of documental evidence described in the letter was not referenced in any of that correspondence.

The Review requested that the current Citizen's Representative search the Citizens' Representative Office files for evidence of any separate file where such documentation may be. There was a file entitled "Audit Information 2004" containing copies of the various Citizens' Representative's letters to the Speaker and press releases related

The O’Neill Review

thereto, the Report, the Supplementary Report and drafts and related correspondence, copies of which the Review has on file, and various messages. There was, however, no documental evidence of the type to which I have referred.

SECTION 45. (1), ATTENDANCE RECORDS PUBLIC TENDER ACT

The Review proceeded with the documental information which it had, being primarily the Citizens’ Representative’s travel claims and the Alliant “Standard Invoices”.

While being argumentative, but not really confrontational, in his Responses to the Reports, the Citizens’ Representative said:

“the Citizens’ Representative uses offered opportunity for response to deal with factual errors, misinterpretation and situational lack of knowledge on the part of the Auditor General”.

The Auditor General raised the fact that attendance records had not been maintained for the period February 1, 2002 to March 31, 2002. The Citizens’ Representative responded:

“While the office of the Citizens’ Representative routinely provides attendance data which it is hoped will keep the bean-counters, paper-clip organizers and paper pushers happy and off our backs, the Citizens’ Representative considers such bureaucratic malingering as an obstacle to professional public service. It is not important when you show up but what you do after you show up...Those who cannot accept this non civil-service mode of operation don’t seem to stay in close contact with the incumbent Citizens’ Representative for any lengthy period of time.”

On March 1, 2002, the office opened, though it was ill equipped. The Citizens’ Representative Office had two employees on staff in the month (as well as an additional person seconded from another government department). In the circumstances it is entirely understandable that attendance records may not have been kept.

The Citizens’ Representative Response on this issue continues:

The O’Neill Review

“The Citizens’ Representative, hoping that the foregoing testimony annoys a little bit but not too much, suggests that the answer to (this) issue may be found in the fact that during the period in question the Citizens’ Representative did not have employees, did not have office furniture except for a borrowed telephone requiring him to perform most of his duties at home.

It is a relevant note that the Commission of Internal Economy has never directed the Citizens’ Representative to keep an attendance record for his office under authority of Section 45(1) of the Act thus there is no legal requirement for the Citizens’ Representative to keep any attendance records.”

The issue regarding the lack of attendance records is a small one, having regard to the overall Report, but the Response of the Citizens’ Representative is relevant in that he takes a simple issue, requiring a straightforward response and not only responds inaccurately but clouds the issue which he would be expected to address. He uses section 45. (1) of the *Act*, and the lack of directives made under it, as a shield.

I do not see the concerns raised by the Reports as an attempt to infringe on the independence of the Citizens’ Representative Office. In my view, there was no issue raised that appeared in any way to limit or interfere with the operation of the Citizens’ Representatives Office. The concerns raised by the Auditor General relate to the person, not the Office. The Auditor General, an independent Officer of the House and separate from government, was auditing the Office of another Officer of the House. As stated in the Report, his objective “was to review the expenditures of the Office of the Citizens’ Representative and to determine whether they were in accordance with the approved budget, and in accordance with the legislative requirements”.

The use of section 45. (1) as a shield against criticism is evident throughout the course of the Citizens’ Representative’s Response. For example, to the Auditor General’s concern that:

“[t]here were instances where travel within a week included multiple return trips to St. John’s. For example, in a one week period in July 2003 the Citizens’ Representative claimed a total of 4,101 kilometers (\$1,292) for travel...”

The O'Neill Review

The Citizens' Representative's Response was:

"[i]t is noteworthy that during the week in question the Citizens' Representative was criticized for not travelling to another part of the province and dealing with other issues. Also relevant to this discussion is the Act which provides law that gives the Citizens' Representative the authority to 'determine his..procedure' unless restrained by section 45(1). The House of Assembly utilized powers available under section 45(1) when travel regulations of the Executive Compensation Plan were negotiated into the Agreement between the Citizens' Representative and the House of Assembly."

Mr. March referred to section 45. (1) again in addressing travel to and from Blaketown, and again in addressing the issue raised by the Auditor General related to the *Public Tender Act*.

There were two invoices involved with the printing of the Citizens' Representative 2002 Annual Report to the House, one for \$10,025 and one for \$1,156 (totalling \$11,182 excluding HST). The Citizens' Representative was not correct in stating that the two invoices were "*each less than \$10,000.00*". On being asked to explain the Response that he gave to the Auditor General, Mr. March indicated that he had never seen the invoices. He advised that he had phoned the Speaker's Office and was informed that the *Public Tender Act* amount was not exceeded.

The Auditor General states, in part, as follows:

"Our review disclosed that the Office contravened the Public Tender Act when in June 2003 the Office paid \$11,182 for printing services for the 2002 Annual Report to the House of Assembly without being publicly tendered. The Public Tender Act requires tenders to be invited where the cost of goods and services is more than \$10,000."

The Citizens' Representative responded, in part, as follows.

"First, the Office of the Citizens' Representative does not come under the authority of the Public Tender Act. In order for the...Act to apply to the Office of the Citizens' Representative such would have to be directed under...Section 45(1)

The O’Neill Review

or 45(2) of the Act. This has not happened. That is not to say it should not happen...

Second, even if covered by the Public Tender Act,...the Act would not have been contravened when printing the Annual Report because this was not one printing contract but two, each less than \$10,000.”

Neither the Auditor General nor the Citizens’ Representative was technically correct. It is not, in my view, necessary to make any further comment with respect to the matter.

The Citizens’ Representative provided very detailed answers to a number of concerns raised by the Auditor General. In many instances the detail was not able to be either verified or brought into question by virtue of the constraints imposed by the *Act* or the *Auditor General Act*.

Section 45. (1) has little to do with anything before the Review and in my opinion, nothing at all to do with the matter of travel claims. The Citizens’ Representative’s raising the matter repeatedly does not make it relevant.

MILEAGE CLAIMS ON LEAVE DAYS

The Travel Expense Claim Voucher signed by the Citizens’ Representative each time a travel claim was filed states:

“I certify that the whole of the expenses incurred by me were on Government Business and are in accordance with the Treasury Board Travel Rules”.

The Auditor General, in matching Mr. March’s attendance records to his travel claims, found four days when travel claims were made for days when he was on leave. Mr. March responded that on three of these days he was on leave for one-half day and on the other day he was not on paid leave. The Review has concerns regarding 3 of the 4 days involved, being July 30, 2002, July 31, 2002 and August 26, 2002.

The O'Neill Review

The Auditor General in the Report had stated:

“During the period 1 February 2002 to 30 June 2004, there were four instances where private vehicle mileage was claimed for days when the Citizens’ Representative was recorded as being on paid leave.”

Mr. March’s Responses regarding July 30 and 31, 2003 were as follows:

“July 30, 2003. The Citizens’ Representative was on personal leave for one-half day on this date. Leave commenced at 8:00 am and was terminated at 1:00 pm. Mileage claimed and approved on July 30, 2003 occurred between 1:00 and 10 pm.”

“July 31, 2003. The Citizens’ Representative was not on personal leave on this date. He visited western Newfoundland locations as part of investigations into complaint # 36CF02, and complaint #685CF02 as well as having meetings with three individual citizens.”

In his travel claim Mr. March indicated that he departed from Port Aux Basques on July 30 at 7:00 a.m. and travelled from “Port aux Basques to Corner Brook to Hawke’s Bay to Westport to Gander to Hare Bay to Musgravetown to St. John’s” arriving there on August 1 at 12:30 a.m. Total mileage of 1,603 kilometers is claimed. A receipt from the Hotel Port aux Basques attached to the travel claim shows a check out time of 9:51 a.m., July 31.

Mr. March’s cell phone records reveal that his phone was used in Sydney, N.S. on July 30 at 2:08 p.m. when a call was received, and at 2:12 p.m. when a call was placed to Whitbourne, NL. A further call was made from Port aux Basques to Summerside, P.E.I. at 10:13 p.m. on the same date. Mr. March explained that he had travelled by ferry from North Sydney to Port aux Basques on July 30. Marine Atlantic advised that the only passenger vessels in operation that day were the Caribou and the Leif Ericson. The Caribou departed North Sydney at 3:20 p.m. local time and arrived at Port aux Basques at 10:00 p.m. local time. I have concluded she was the only ferry on which Mr. March could have travelled in order for his phone to have been used as it was.

The O'Neill Review

During the Review Mr. March produced and provided a copy of his daily diary for July 30, 2002 on which is indicated that he was on personal leave only on the morning of July 30. I do not accept this explanation.

I find that Mr. March was untruthful in his Response to the Auditor General. He did not commence and terminate leave as he indicated.

Mr. March acknowledged that he did not depart from Port aux Basque at 7:00 a.m. on July 30 as he had indicated on his travel claim. He advised that he had a meeting on the night of July 30 in Port aux Basques. Such meeting would have had to take place after the ferry docked at 10:00 p.m.

Mr. March confirmed that the 10 kilometers he claimed for travel in Port aux Basques on July 30 was the travel to which he was referring in his Response. The total claim for mileage on this trip was 1,603 kilometers and Mr. March advised that the balance of the travel occurred on July 31, 2002.

The current Citizens' Representative's Affidavit indicates that he reviewed file #36CF02, for verification of Mr. March's travel on July 31, 2002; there was no indication of such travel. On file #685CF01, he identified a handwritten notation of Mr. March, dated July 31, 2003: "Visited Westport to take view of property in question". Other than the copies of his July 30 and 31 daily diary, Mr. March did not provide any evidence confirming his travel on these days.

It is difficult to understand how Mr. March could have travelled 1,593 kilometers on July 31 to 12:30 a.m., August 1 and during that period, visit the locations and hold the meetings as indicated.

August 26, 2002 is another date on which a travel claim was submitted by Mr. March while he was recorded as being on paid leave.

The O'Neill Review

Mr. March's Response regarding August 26, 2002 was as follows:

"The Citizens' Representative was on personal leave during the morning of August 26, 2002 and terminated his leave at 2:00 pm so that he could attend to a matter that was brought to his attention concerning file # 93CF02..."

In his travel claim, Mr. March indicated that he had departed Port aux Basques on August 26 at 8:00 a.m. and travelled from "Port aux Basques to S'ville to Grand Falls to Cottrell's Cove to Arnold's Cove to Blaketown to St. John's", arriving there on August 28 at 8:00 a.m. Mileage of 1,216 kilometers is claimed.

Mr. March's cell phone records reveal a call was placed from Port aux Basques to St. John's at 9:25 a.m. August 27, 2002. A Hotel Port aux Basques invoice for the night of August 26 is attached to the travel claim.

Mr. March confirmed during the Review that he did not leave Port aux Basques until August 27 and that the travel of 1,216 kilometers claimed was for that day, not for August 26 as stated in his claim.

During the Review, Mr. March indicated that he had travelled to the mainland on the weekend of August 24 and 25 and returned to Port aux Basques by ferry on August 26. Mr. March's notes in his diary indicate "North Sydney to Port aux Basque Personal" on August 26, 2002, with a line drawn, the length of the page, to 5:00 p.m. He indicated he had a meeting in Port Aux Basques the night of August 26. There was reference in the diary to "8:00 p.m. Port aux Basques 93CF02". It is his position that the only error he made on this travel claim was to state that he left Port aux Basques on August 26 rather than August 27.

The current Citizens' Representative's Affidavit indicates that a review of file 93CF02 did not reveal any confirmation of a meeting held on August 26.

The O'Neill Review

Neither the office file nor the diary indicates leave ending at 2:00 p.m. as Mr. March stated. Marine Atlantic records indicate that the Leif Erickson and the Caribou were the only passenger vessels in use on August 26, 2002. The Leif Ericson arrived in Port aux Basques at 3:10 pm and the Caribou arrived 10:05 p.m. I find that Mr. March was not being factual when he stated that he “terminated his leave at 2:00 p.m.”.

Mr. March could argue that he worked for a period of time on the night of August 26 and therefore he should only be noted as being on leave for one-half day. Had his Response to the Auditor General set forth this position, it could be considered reasonable. I find the Response that he gave was not truthful.

TRAVEL BY CITIZEN'S REPRESENTATIVE

The Auditor General calculated that the Citizens' Representative had received \$39,518 reimbursement for kilometers claimed for using a private vehicle. Private vehicle claims indicated 125,454 kilometers travelled by the Citizens' Representative during the period of the audit.

In the Report, the Auditor General indicated:

“Our review of the Citizens' Representative's private vehicle usage claims indicated a number of inconsistencies and concerns as follows:

- There were instances where it is difficult to determine how there was sufficient time in a day to travel the number of kilometers claimed and also have time for the number of meetings with citizens indicated on the travel claims. For example, there were five instances where the Citizens' Representative claimed in excess of 1,000 kilometers in a day and also met with citizens”

I agree with the above observation of the Auditor General. The preceding analysis of mileage claims made while on leave days results in findings of two additional 1,000 kilometer trips in a day, one being 1,593 kilometers.

The O'Neill Review

The Auditor General proceeds to provide details of the five instances he noted. In all five cases, the Review did not have any conclusive evidence of use of a particular cell phone by the Citizens' Representative. The files were reviewed by the current Citizens' Representative and reported on in his Affidavit. Fraser March did not provide any documental evidence.

In the first instance, travel of 1,020 kilometers is claimed and 10 files are referenced. The Affidavit references no confirmation of travel in six of these files. The remaining four files have some information which indicates work was completed on the files on or about the appropriate date.

In the second instance, travel of 1,270 kilometers is claimed and 3 files are referenced. The Affidavit references no confirmation of travel in one of these files. The remaining two files have some information which indicates work was completed on the appropriate date.

In the third instance, travel of 1,202 kilometers is claimed and 3 files are referenced. The Affidavit references no confirmation of travel in two of these files. The remaining file has some information which indicates work was completed on the appropriate date.

In the fourth instance, travel of 1,301 kilometers claimed and 2 files are referenced. The Affidavit references no confirmation of travel in one of these files. The remaining file has some information which indicates work was completed on the appropriate date.

In the fifth instance, travel of 1,119 kilometers is claimed and 7 files are referenced. The current Citizens' Representative's Affidavit references no confirmation of travel in six of these files. The remaining file has some information which indicates work was completed on the appropriate date.

The O’Neill Review

While I cannot make any conclusion that such travel did not occur, neither could I find nor was there presented by Mr. March, conclusive evidence that it did.

EXCESS MILEAGE CLAIM

The Auditor General reported on a trip taken by the Citizens’ Representative on August 15 – 16, 2002 where the details “specified travel from St. John’s to Gander to Lewisporte to Summerford to Gander to St. John’s and the distance travelled was 1,768 kilometers”. The Auditor General pointed out that “the total distance to and from these locations is approximately 900 kilometers”.

The Citizens’ Representative’s Response was that “[t]he Citizens’ Representative agrees with the mileage estimate of the Auditor General and will review and make required changes if same are required.” There was no explanation as to how the incorrect mileage claim occurred. That he would review the claim and make changes, if “required”, is puzzling in that the excess mileage claimed amounted to 868 kilometers, which, at 31.5 cents per kilometer, would result in a \$273.42 overpayment.

During the Review, Mr. March advised that, subsequent to receiving the Report, he went to the Director of Finance of the House of Assembly to discuss this excess mileage claim and was informed that it had already been addressed and adjusted. The Citizens’ Representative says that he was advised by the Director that the amount of the overpayment had been deducted from a subsequent travel claim or claims in 2002 and that the Director had informed the Citizens’ Representative or someone at his office of this back in 2002. Mr. March was unclear as to whether the overpayment was deducted from one or two subsequent travel claims. He said that, at the time he wrote his Response to the Report he did not recall having previously been advised of the adjustment. In brief, the Citizens’ Representative, subsequent to the presentation of Report and before the presentation of the Supplementary Report, was advised that the overpayment had been dealt with.

The O'Neill Review

The subject trip was again referenced in the Supplementary Report where the Auditor General provides details of the August 15-16 trip and the cell phone use related to it.

The Citizens Representative Response in the Supplementary Report is noteworthy:

“The Citizens Representative has already clarified with the House of Assembly the question of total mileage on this claim. The personal log of the Citizens’ Representative shows that he travelled 768kms on these days.”

Strangely, that portion of the Response, while stating that the question of the excess mileage had been “clarified”, does not reflect that the fact of the overpayment had already been addressed.

If the adjustment had been made in 2002, I would not expect that the Auditor General would have reported on it in the Report.

If the fact of the claim being resolved in 2002 had formed part of the Citizens’ Representative’s Response in the Supplementary Report, one would expect that the Auditor General would amend his report to reflect that his concern had been resolved.

The “Recap Register” of the House of Assembly relating to Fraser March, being part of the accounting records of the House, was reviewed. The Recap Register is created at the time an individual’s travel claim is being vetted and processed. It revealed that the total amount of the travel claim, which included the claim for the 1,768 kilometers, had been approved and paid as presented.

The Recap Registers relating to all travel claims filed by Mr. March to June 30, 2004 were also reviewed; all were paid as presented with no adjustments. There was no record of any repayment of the excess mileage claim.

The O'Neill Review

The second portion of the Response is to the effect that the “*personal log of the Citizens’ Representative shows that he travelled 768 kms*” on the days in question. This was not mentioned by the Citizens’ Representative when he responded to the Report. One might assume that a typographical or clerical error had occurred in entering the number 1768 onto the travel claim as opposed to the number 768.

The Private Vehicle Usage Report regarding the subject trip reveals the number “1768” clearly written. A review of Mr. March’s calendar dated Friday, August 16, 2002 reveals “1768 km” clearly written. It appears impossible to resolve these entries with the Response the Citizens’ Representative provided in the Supplementary Report.

In summary I have concluded that the entry of 1768 kilometers on the travel claim with respect to that trip was a misrepresentation which resulted in an overpayment to the Citizens’ Representative. That overpayment had not been adjusted, at least not prior to the Auditor General’s supplementary report in 2005. I also find the reference to a personal log entry of 768 in the second Response to be a misrepresentation.

RESIDENCE IN ST. JOHN’S

The Auditor General in the Report noted that “from 1 April 2003 to 30 June 2004, the Citizens’ Representative indicated on the travel claims that his permanent residence was in Blaketown, 100 kilometers from the Office of the Citizens’ Representative headquarters in St. John’s”.

He added:

“[c]ontrary to Government’s travel rules, the Citizens’ Representative incorrectly claimed a total of 13,300 kilometers (\$4,190) relating to travel between his permanent residence in Blaketown and his Office in St. John’s.”

A review of the travel claims submitted by the Citizens’ Representative reveals that during the period from March 2002 until March 2003, his home mailing address was

The O'Neill Review

entered on his claims as a post office box in Churchill Square, St. John's. In April 2003, the home mailing address entered on the travel claims was changed to a post office box in Blaketown, which remained the case until June 2004, the period of the audit. I wrote to the Auditor General and asked if this change in the mailing address formed the basis for his conclusion that Blaketown was the Citizens' Representative's permanent address from April 1, 2003 forward. The Auditor General's reply was that he did not have the authority to provide the answer to this question.

While I would have preferred to have the Auditor General's reply, I will proceed on the basis that the change of address from a post office box in Churchill Park to a post office box in Blaketown was the basis for the Auditor General coming to the conclusion that, from April 1, 2003, the Citizens' Representative's Principal Residence was Blaketown.

In dealing with this part of the Auditor General's report, the Citizens' Representative's Response was:

“When the incumbent Citizens' Representative was appointed the matter of location of a headquarters for our Ombuds service was negotiated at the Executive Council as was travel rules. As a matter of fact the Citizens' Representative was asked where he wished the headquarters to be located. Part of that discussion was an agreement that the Citizens' Representative would have a St. John's residence. Which has been the case since his appointment February 1, 2002. For a period during July and August of 2004 the Citizens' Representative was moving from one St. John's location to another and while he technically had a St. John's residence in that he moved in on friends he spent most of his nights in Blaketown. Otherwise he has lived up to his Agreement with Government and has maintained a St. John's residence. It should be known, however, that the Citizens' Representative does not spend one minute in St. John's other than what is absolutely necessary and spends every minute possible in Blaketown.”

While the Response was lengthy it did not provide clarification. No information, such as the address of the St. John's residence(s), rental information, landlord's names etc. was advanced.

The O'Neill Review

During the course of the Review, the Citizens' Representative provided a number of letters regarding his "residency" in St. John's. In a letter dated April 29, 2005. Michael Coady, the owner of a home on 135 Penney Crescent, St. John's, stated:

"This is to notify that Fraser March and Joan March lived at 135 Penney Crescent during the following periods: February 2002 to September 2002, June 2003 to November 2003, June 2004 to December 2004".

Mr. Coady subsequently advised that he and Joanne March, the daughter of Fraser March and his wife Joan, had cohabited during the time periods mentioned in his letter. He indicated that the Citizens' Representative was provided with full access to the home and he had stayed and slept there when he wished. He indicated that the Citizens' Representative used to be back and forth to Blaketown but that there were times when the Citizens' Representative stayed at Mr. Coady's house for weeks at a time. No rent was paid.

In a letter dated May 13, 2005, The Citizens' Representative's daughter, Joanne March, the tenant in a house at 11A Carlow Place, stated:

"This is to notify that I rented 1A Carlow Place, St. John's from November 2003 to May 2004 and to confirm that Fraser March lived at 11A Carlow Place from November 2003 to May 2004."

In a letter dated April 29, 2005, Charles Smith, the owner of a house on 20 Duntara Crescent, St. John's, stated:

"This is to notify that Fraser March and Joan March rented a house from me, located at 26 Duntara Crescent in the City of St. John's for the period of November 2002 to May 2003."

During the Review, Mr. March provided copies of the electrical receipts related to the Duntara Crescent property. No rent was paid by him. In summary, Mr. March primarily resided with his daughter, either in her apartment, or in the home of her partner, as indicated, save with respect to the 7 month period he resided at Duntara Crescent. No

The O'Neill Review

information has been provided as to where the Citizens' Representative resided in St. John's during the month of October 2003. Mr. March's statement that: "For a period during July and August, 2004, he was moving from one St. John's location to another and while he technically had a St. John's residence in that he moved in on friends" is contrary to the information provided by Michael Coady in his letter.

The Executive Compensation Policies and Procedures Manual is silent on the issue of travel to and from one's residence. The Travel Expense Claim Voucher, however, contains a clause which states "I certify that the whole of the expenses incurred by me were on Government Business and are in accordance with the Treasury Board Travel Rules". The Treasury Board Travel Rules stipulate that the starting point and final point of destination of employees on travel status will normally be the employee's headquarters. Employees may be authorized to proceed on government business directly from their home to a point of call other than headquarters, or return from a point of call directly to their home. Where the distance travelled is greater than the distance employees would have travelled had they proceeded to the point of call directly from headquarters, employees may claim mileage reimbursement for the difference between home and headquarters and home and point of call.

A review of the Citizens' Representative's travel claims, for the period April 1, 2003 to June 30, 2004, does not reveal any specific claim for travel from Blaketown to St. John's or from St. John's to Blaketown, though Blaketown is mentioned 29 times. The Auditor General has imputed to the Citizens' Representative the equivalent of 133 one way trips to or from his Blaketown residence.

In a letter to the Auditor General I requested that he advise me of the dates and particulars of the claims related to travel by the Citizens' Representative between his permanent address in Blaketown and his office in St. John's. For the reasons previously stated, the Auditor General was unable to assist the Review in that regard.

The O'Neill Review

Without further information from the Auditor General, I can make no comment on his findings with respect to travel by Mr. March from Blaketown to St. John's and return.

SUPPLEMENTARY REPORT

As previously indicated, the Auditor General identified 8 inconsistencies between times and location of travel as recorded on travel claims submitted by the Citizens' Representative and times and location of travel identified on the cellular telephone records for the telephone assigned to the Citizens' Representative. The Auditor General addresses these 8 inconsistencies as individual "Items".

The Auditor General reached conclusions as to which members of the Citizens' Representative Office were assigned each of the 5 phones but does not state the actual phone number of each phone. When he was asked to provide the numbers associated with each of the five phones, he advised that his legislation precluded him from doing so. It would, however, appear that the Auditor General has concluded that the cell phone having telephone number 689-9908 was the phone primarily used by Fraser March. That phone's usage and his travel claims information frequently mesh.

I reiterate that the Review was limited to cell phone Standard Invoices which did not reflect details of local area calls.

ITEM 1

The Citizens' Representative completed and filed a Travel Expense Claim Voucher with attached Private Vehicle Usage Report and Receipt (jointly "travel Claim") regarding travel and expenses occurring on September 23 and 24, 2003. The documents filed indicate that the Citizens' Representative, using his private vehicle, departed from "St. John's at 6:00 a.m. on September 23 and drove to Port aux Basques. He stayed over night at the Hotel Port aux Basques checking out at 8:22 a.m. and drove from Port aux

The O'Neill Review

Basques to Port aux Port to Nicholsville to Grand Falls to Main Point to St. John's"; arriving at 9:00 p.m., September 24, working on several Citizens' Representative files during these days. The full meal claims of \$44.00 were advanced for each of the 23 and the 24 (3 meals per day).

The Auditor General states:

"The Citizens' Representative's travel expense claim shows travel from St. John's to Port aux Basques on 23 September 2003; however, the cellular telephone records show calls were made to and from locations within Nova Scotia on the day that travel was claimed for driving across the Province."

I will not restate the findings of the Auditor General. Suffice it to say that his cell phone records found Mr. March to be in Sydney Nova Scotia at a time when he stated he was in Newfoundland and Labrador, as was the case during the July 30 – 31, 2003 trip, previously addressed.

The Citizens' Representative wrote a letter to the Speaker, dated March 1, 2005, wherein he acknowledges "a grievous and significant error related to travel in one travel claim." He advised that he took an early morning airline flight to Halifax on September 23, drove to North Sydney, and crossed over on the ferry to Port aux Basques in time to carry out scheduled meetings in Port aux Basques that day. On September 24, he met citizens regarding complaints and then drove to St. John's.

Mr. March's Response on Item 1 was:

"Please refer to the following letter written to the Speaker of the House of Assembly.

March 1, 2005

*Honourable Harvey Hodder
Speaker
House of Assembly
P.O. Box 8500
St. John's, NL A1B 4J6*

The O'Neill Review

Dear Mr. Hodder:

Since a recent report of the Auditor General, the Citizens' Representative has reviewed in detail the 76 travel claims he submitted between February 1, 2002 and June 30, 2004.

This review has proceeded without identifying any citizen complainant or any citizen involved in an investigation under provisions of the Citizens' Representative Act.

In his review the Citizens' Representative has utilized bank statements, credit card statements, cell phone records, car rental receipts, airline records, Marine Atlantic information and the personal observations of others. These documents clearly demonstrate that the Citizens' Representative traveled to the locations and at the times he described in these travel claims. The Citizens' Representative will produce this documental evidence at the pleasure of the House of Assembly.

However, the described documentation shows a grievous and significant error related to travel in one travel claim.

On September 23, 2003 the Citizens' Representative had meetings scheduled in Port aux Basques area. Further he scheduled meetings at Nicholsville and Main Point for September 24, 2003 to be completed on the return trip from Port aux Basques to St. John's.

At this time the family of the Citizens' Representative had a car in Halifax that was parked in that location because of a medical emergency. Thus the Citizens' Representative used this situation with the help of a local travel agent to take an early morning flight from St. John's to Halifax, to have the family car meet him at the Halifax airport and to motor in the family car to the Newfoundland ferry at North Sydney, to cross to Port aux Basques on said ferry and to arrive in Port aux Basques in time to carry out the meetings scheduled.

On September 24, 2003 the Citizens' Representative completed duties related to the Port aux Basques issues, then proceeded to Nicholsville where a meeting took place with a citizen and then proceeded to Main Point and met a citizen complainant. From there the Citizens' Representative proceeded to St. John's.

When the Citizens' Representative submitted a travel claim for this trip he did not claim any expenses for the Halifax detour. He personally paid for the total cost of the Halifax leg of the trip including airfare, Marine Atlantic fares and the costs of driving through Nova Scotia.

The O'Neill Review

However, when he filled out his expense claim he claimed return highway travel from St. John's to Port aux Basque to St. John's which the above noted documents show was not the case.

The Citizens' Representative believes this to be an error of such magnitude as to warrant the attention of the House of Assembly.

The Citizens' Representative will complete immediate and pressing work by Tuesday, March 8, 2005 and will proceed on leave until he receives further instruction from the House of Assembly.

Sincerely,

*Fraser March
Citizens' Representative*

*c.c. Commission of Internal Economy
Members of the House of Assembly"*

Assuming that the Citizens' Representative had business to conduct in the Port aux Basque area as he indicates, he would have to travel to Port aux Basques in some fashion to carry out such business. In that he paid for his own way to Port aux Basques, albeit by plane and car and ferry, it could well be that he would have been entitled to claim an amount equal to the private vehicle usage mileage, had he asked. He did not.

The travel claim filed by the Citizens' Representative contained false information. The Citizens' Representative in filing the claim as he did, intentionally misrepresented the events of the day. I find this to be a very serious matter.

Mr. March, during the Review, was asked which report he was referring to when he said "*Since a recent report of the Auditor General*". He replied "the first report", being the Report. The Supplementary Report had not been released at the time the March 1 letter was written; as it is contained in Mr. March's Response. Mr. March met with the Auditor General on February 18 and was provided with a draft of the Supplementary Report advising of Item 1. The letter, which was one of a number released by Mr. March as press releases from the Office of the Citizens' Representative, does not reflect this fact

The O'Neill Review

but rather gives the impression that the circumstances he divulged were of his own volition.

ITEM 2

The Citizens' Representative completed and filed a Travel Claim for the period August 15 and 16, 2002. The documents filed indicate that the Citizens' Representative, using his private vehicle, departed from St. John's at 8:00 a.m. on August 15 and drove "to Gander to Lewisporte to Summerford to Gander to St. John's", claiming private overnight accommodations on August 15 and arriving back in St. John's; at 9:30 p.m. on August 16. Meal claims of \$35.20 and \$44.00 were advanced for August 15 and 16. Five Citizens' Representative files were referenced.

The Auditor General states:

"The Citizens' Representative's travel expense claim shows travel from St. John's to Gander at 8:00 a.m. on 15 August 2002; however, the cellular telephone records show a call within the St. John's to Clarenville area at 3:24 p.m. that day. Furthermore, the travel expense claim shows arrival in St. John's from Gander at 9:30 p.m. on 16 August 2002; however the cellular telephone records show a call within the St. John's to Clarenville area at 10:23 a.m. on that day."

The Citizens' Representative responds:

"Hotel Records, credit cards records and bank records show that the Citizens' Representative travelled as he stated on this travel claim of August 15, and 16, 2002. The conflict with the telephone call of 10:23 am on that day has two possible explanations; one, the Citizens' Representative may have been using another office cellular phone or his own personal phone. Accurate records of phone exchanges between staff have not been kept, thus it is impossible to reach a conclusion on this matter. What is clear however, is that the Citizens' Representative did travel from St. John's to Clarenville on August 15 and from Gander to St. John's on August 16 with various stops in between. Written record establishes this fact."

The O'Neill Review

The Review did not have access to the cell phone Detailed Invoices. Were such records available, the Review would have been able, in cases where a cell phone was used during private vehicle travel, to review additional travel detail.

The only conclusions that could be drawn from the information presented by the Auditor General, is that though the Citizens' Representative claimed that he had left St. John's at 8:00 am on August 15, 2002, he was still situated east of Port Blandford seven hours and twenty four minutes later when a call was made. Similarly, though he claimed that he had arrived in St. John's at 9:30 p.m., he was already situated somewhere between Port Blandford and St. John's almost eleven hours earlier when the 10:23 a.m. call was made. Without additional information no firm conclusion can be drawn on the facts presented; the Citizens' Representative may have had interviews or meetings on the way back to St. John's.

ITEMS 3 - 8

The Auditor General observes what he characterized as "inconsistencies" in the remaining six Items. He proceeds to provide details of each travel claim.

The Citizens' Representative's response to each of these six Items was the same:

"the cellular record with other documentation clearly shows that the Citizens' Representative travelled as he described on his expense claim."

I have reviewed each of the remaining six items in detail. Without further information from the Auditor General, I can make no comment on his findings on Items 2-8.

SUMMARY AND CONCLUSION

Before summarizing my findings regarding the Reports I will refer to the relevant recommendations made by the Auditor General in the Report, wherein he states:

The O'Neill Review

“The Citizens’ Representative should:

- *Comply with the Citizens’ Representative Act;*
- *Comply with the Public Tender Act;...”*

Had the Auditor General, in conducting his audit of the Citizens’ Representative Office, become aware of an improper retention or misappropriation of public money or other activity that may constitute an offence under the *Criminal Code* or another Act he was bound, by section 15. (1) of the *Auditor General Act*, to immediately report the improper retention or misappropriation of public money or other activity to the Lieutenant-Governor in Council. No such report was made.

In considering the Reports, I addressed briefly the matters of attendance records and non-compliance by Mr. March with the *Public Tender Act*. My observations respecting these matters are previously set forth. I do not find merit in adding anything further. I have not addressed a number of items contained in the Report which I either did not feel were relevant or were of limited relevance in fulfilling my mandate, items such as entertainment expenses or obtaining prior approval for trips.

My review of mileage claims made while Mr. March was recorded as being on paid leave raised concerns. I found that Mr. March was untruthful in his Response to the Auditor General in claiming that he had commenced leave at 8:00 a.m. on July 30, 2002 and terminated such leave at 1:00 p.m. Cell phone and Marine Atlantic records established that he was in Nova Scotia at 1:00 p.m. and thereafter travelled to Port aux Basques arriving at 10:00 p.m. on that date. I similarly found that he was not being factual in stating that he was on personal leave during the morning of August 26, 2002 and terminated his leave at 2:00 p.m. I found his Response to be untruthful.

The Auditor General found it difficult to determine how there was sufficient time in a day to travel the number of kilometers claimed in a day and also meet with citizens. He

The O'Neill Review

referenced five instances where the Citizens' Representative claimed in excess of 1,000 kilometers in a day. My analysis of the August 26, 2002 and July 30, 2002 trips revealed two additional days when in excess of 1,000 kilometers was claimed, in one case 1,593 kilometers were claimed. While I cannot make any conclusion that such travel did not occur, neither did I find, nor was there presented by Mr. March, conclusive evidence that it did.

The Auditor General reported on an excess mileage claim in his Report, which was also addressed in the Supplementary Report. I concluded that the entry of 1,768 kilometers on the travel claim with respect to that trip was a misrepresentation which resulted in an overpayment to the Citizens' Representative. That overpayment had not been adjusted prior to the supplementary report. I also found the reference to a personal log entry of 768 in the second Response to be a misrepresentation.

Without further information from the Auditor General, I can make no comment on his findings on the issue of travel to and from Blaketown.

The Auditor General utilized cell phone Detailed Invoices and found an instance when Mr. March did not travel as he indicated on his travel claims, a matter serious enough for Mr. March to write the March 1, 2005 letter to the Speaker advising that the Citizens' Representative had made "a grievous and significant error" related to travel on one claim, "as error of such magnitude as to warrant the attention of the House of Assembly". Mr. March's letter amounts to an admission by him that he had made a serious misrepresentation. The travel claim filed by Mr. March, which is the subject of the March 1, 2005 letter, contained false information. I find that Mr. March, in filing the travel claim as he did, intentionally misrepresented the details of travel. Framing the letter in a fashion that would portray that he, rather than the Auditor General, had discovered the problem is deceitful.

The O’Neill Review

Without further information from the Auditor General, I can make no comment on his findings on the remaining seven “items” he references in the Supplementary Report.

When Mr. March filled out his travel claims he had a duty to do so truthfully. When he was asked to respond to the Auditor General concerns he was expected to do so honestly.

I find that Mr. March’s conduct in filing his travel claims and in the contents of his Responses was not honest.

The Supreme Court of Canada in *McKinley v. BC Tel 2001 SCC 38* was of the view that “whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship.”

The Court favoured “an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship”.

As Citizens’ Representative, Mr. March held a position of high authority. He was separate from government, and to a large measure almost totally separate from it, as that office of necessity must be. He owed a high duty of care to ensure that his conduct was above reproach.

I am of the view that Mr. March breached the faith inherent to the work relationship and his conduct was fundamentally inconsistent with his obligations. For these reasons I find there was just cause for his dismissal.

The O'Neill Review

IMPARTIALITY, BIAS, CONFLICT OF INTEREST

Did Mr. March lack impartiality, act in a biased manner or place himself in a conflict of interest situation in his leadership of an investigation into the home care sector contrary to the Mission Statement of his office, the expectations of the Members of the House of Assembly and the provisions of the *Conflict of Interest Act*?

The above issues had been topical several times previously before the Commission and were raised by the Commission in instructing outside legal counsel.

Shortly after the Office of the Citizens' Representatives opened, a number of complaints were filed by various homecare workers and homecare client/consumers. The Citizens' Representative initiated an investigation. This investigation was met by public criticism by individual citizens and by operators of personal care homes. Significant concerns were raised alleging that Mr. March lacked impartiality and acted in a biased matter by virtue of his former work as a union president, and subsequently as a labour consultant, involving organizing meetings and hearings with persons advocating changes in the home care field. As well, it was alleged that he was in a conflict of interest situation. Complaints were made, variously, to the Speaker of the House, the Premier, and to Members of the House of Assembly. The Minutes of the Commission reflect that the matter of the home care investigation came before them on several occasions.

In a letter dated January 21, 2003, a citizen, the parent of a young woman with a disability, wrote to the Speaker saying that:

“[t]he office of the Citizens' Representative informed [her] that these [home support workers] meetings organized by the Citizens' Representative were open only to support workers, that there were no meetings scheduled for recipients of the service, their advocates or family members”.

The O’Neill Review

She stated that when Mr. March was a union president, he actively tried to unionize home support workers and that after he was no longer with the union he went around the province in an effort to “organize” them. The citizen was concerned as to what Mr. March’s agenda was and asked the Commission to take immediate action to ensure that he was acting on behalf of all citizens. Her letter was distributed to all Members of the House of Assembly.

In a letter to the then Minister of Justice, dated January 29, 2003, the Newfoundland and Labrador Employers’ Council (“NLEC”) expressed its concern about the Citizens’ Representative’s then ongoing hearings into the home care industry. This letter was copied to the Premier and the Clerk of the House. Mr. March was accused of overstepping his authority in conducting the review of employment conditions and also was accused of using his position improperly to encourage home care workers to consider joining a union of which he had been president. The NLEC expressed a specific concern that Mr. March did not have the authority under the *Act* to investigate licensed home care agencies or independent employers. Further to that concern, the letter stated:

“while the meetings held around the province were initially declared public, Mr. March has recently announced that the meetings are now private (i.e. for home care workers only) raising more concerns about their scope and intent”.

The NLEC expressed a further concern that:

“Mr. March has appeared on various media articulating his public support for the unionization of home care workers”

The NLEC stated that it felt that Mr. March was in a clear conflict of interest and asked the Minister to intervene under section 20. (1) of the *Act* to require Mr. March to discontinue his investigation of the home care industry.

These letters came before the Commission on February 26, 2003 and Members expressed their concern relating to the complaints raised by citizens with respect to the mandate and

The O’Neill Review

activities of the Citizens’ Representative. It is not clear what, if any, action was taken at that time. On July 17, 2003, the NLEC again wrote to the Minister of Justice of the time, copying its previous correspondence to his predecessor and stating:

“Mr. March clearly overstepped the boundaries of his position, and continues to do so in a less overt manner. He is clearly not able to represent the citizens of this province in a fair and objective manner and should be immediately removed”.

This issue of the removal of the Citizens’ Representative was squarely before the “employer” at this time.

On September 16, 2003, the Minister acknowledged receipt of the letters and replied:

“I have reviewed the situation and it is my opinion that this is not a circumstance in which section 20 of the *Citizens’ Representative Act* may be used to restrict an investigation.” and “[f]urther, it is my view that the actions of the Citizens’ Representative do not warrant his removal from office.”

The Minister advised the NLEC that it was free to explore other legal options and strongly suggested that it seek legal advice.

Whether the Minister was right or wrong in the opinion he expressed, having expressed it, I do not feel that any impartial arbiter would find that cause for dismissal would exist based on the facts which were before the Minister at the time he gave his opinion. Unless the information upon which the Minister’s opinion was based was substantially incomplete, or unless Mr. March’s behaviour thereafter raised some additional incidents indicating bias or lack of impartiality, or he was in some other way additionally conflicted, I feel this issue must be resolved in favour of Mr. March. I will first consider the happenings subsequent to the Minister’s decision.

The NLEC was persistent in its efforts and on March 17, 2004 wrote another letter. This letter enclosed all of the other letters hereinbefore referenced but did not contain any new information or allegations. The March 17 letter came before the Commission on May 26,

The O’Neill Review

2004 which agreed at the time “to review the options available to the Commission with respect to those complaints”. On August 11, 2004 the NLEC wrote an “urgent” letter to the then Minister of Justice regarding the imminent release of the Citizens’ Representative report on home care, asking that it not be released. The minutes of the Commission do not reflect any other information or complaints coming before the Commission prior to the outside legal opinion being sought, save with respect to the reply which the Speaker of the House made to the “urgent” letter from the NLEC. In that respect, he stated:

“With regard to the issues raised in your correspondence, the Speaker has no jurisdictional or monitoring role. This is not to minimize in any way your concerns. However, it appears to me that the only recourse open to the Employers’ Council may be in a court of law where the activities of the Citizen’s Representative together with the specific powers granted in legislation and the rights of other interested parties may be reviewed in a truly impartial setting”.

I should note that there was never any home care investigation report released at any time by the Citizens’ Representative Office.

Subsequent to the Minister’s letter being advanced, I am not aware of any information to convince me that Mr. March acted any differently than he did beforehand with respect to the allegations of bias and lack of impartiality.

I have reviewed the legal opinion provided by outside counsel. In it he addresses the Minister of Justice’s letter and states that at the time that letter was written the Report had not been released and the Minister would not have been aware of Mr. March’s being involved in services for a union for a substantial period beyond the date of his appointment.

In the end, outside legal counsel advised the Commission that it was his opinion that Mr. March’s conduct was “arguably” in conflict with the fundamental interests and expectations of the House of Assembly as his employer, which had been articulated in the

The O’Neill Review

legislature in Mr. March’s presence on December 12, 2001 when his appointment was announced.

The activities carried on by Mr. March were known to the Members of the House of Assembly and in particular to the Members of the Commission. No action was taken by the Commission nor were measures, such as suspension, threatened. Further, the letter of the Minister of Justice, dated September 16, 2003, stating that “having reviewed the situation” it was his opinion that it was not a circumstance in which section 20. of the *Act* may be used to restrict an investigation” and that “the actions of the Citizens’ Representative” do not warrant his removal from office, is persuasive. In conclusion I do not find there was sufficient cause to dismiss Mr. March from his office because of any activity of his into the home care sector.

CLOSING

This exercise has been conducted as a review, not a prosecution or defence of the conduct of Fraser March or of the Government’s actions. Only factual evidence has been relied upon in reaching conclusions. Conducting such a review, and examining evidence and material back to 2001 has presented some obstacles. Constraints, as referenced previously, impacted on the ability of the review to examine and evaluate all relevant evidence.

I will not conclude without expressing my appreciation to my counsel, Tobias F. McDonald, Q.C., for his assistance, his attention, and his good humour, all of which were necessary in the completion of this Review. I am grateful to him.

Respectfully submitted December 12, 2009

JOHN J. O’NEILL