

Fairness, Reliability, and Justification:

ACCOUNTABILITY BASED ON PUBLIC INTEREST DISCLOSURES

The Honourable J. Derek Green
Reviewer

EXECUTIVE SUMMARY

REVIEW OF THE
CITIZENS' REPRESENTATIVE REPORT
RESPECTING THE CHIEF ELECTORAL OFFICER

Submitted to the Honourable Derek Bennett
Chair, House of Assembly Management Commission

September 15, 2022

EXECUTIVE SUMMARY

THE TERMS OF REFERENCE

I was engaged by the House of Assembly Management Commission to review a report by the Citizens' Representative, an officer of the House of Assembly who investigates whistleblower allegations. The Citizens' Representative made ten findings of gross mismanagement against the Chief Electoral Officer, another officer of the House of Assembly who supervises provincial elections in Newfoundland and Labrador.

The Management Commission gave me Terms of Reference asking, essentially, for three things:

1. An analysis of the Citizens' Representative's report (and any procedural, legal, or human resources issues that the report raises).
2. A recommendation and opinion about whether to consider removing or suspending the Chief Electoral Officer under s. 5.3 of the *Elections Act, 1991*.
3. A recommendation about whether any further investigations, proceedings, or analyses are appropriate or desirable.

The Terms of Reference ask me not to re-investigate the allegations or findings of wrongdoing. Instead, my analysis and recommendations should be based on the Citizens' Representative's report.

THE ALLEGATIONS AND THE CITIZENS' REPRESENTATIVE'S INVESTIGATION

Many allegations against the Chief Electoral Officer are connected to the Province's 2021 General Election. This election was originally scheduled for mid-February 2021. However, a sudden outbreak of Covid-19 in early February led to mass resignations by elections staff and then, the night before Election Day, a provincewide lockdown.

Unable to hold the election as planned, the Chief Electoral Officer cancelled in-person voting. All voting would be conducted by mail. To allow enough time for the slow mail-in voting process, he repeatedly extended election deadlines. The election finally concluded in late March.

As the election was concluding in March 2021, the Citizens' Representative received information from whistleblowers. After months of investigation, the Citizens' Representative stated 35 allegations of gross mismanagement against the Chief Electoral Officer.

The Citizens' Representative's investigation included interviews with at least twenty witnesses. He gave the Chief Electoral Officer a 59-page document summarizing the evidence for each charge. However, the summary did not indicate which witnesses had provided what evidence, and the Citizens' Representative did not provide the Chief Electoral Officer with interview notes or recordings.

The Citizens' Representative's final report made ten findings of gross mismanagement against the Chief Electoral Officer. Most of the remaining allegations could not support a finding of gross mismanagement. One allegation was a duplicate. One allegation "may" have amounted to mismanagement but not gross mismanagement. Four allegations were connected to ongoing litigation about the 2021 General Election, and the Citizens' Representative deferred to the findings of the court.

The Citizens' Representative did not recommend any "specific sanctions," but did recommend that "the House of Assembly" consider his findings and "take immediate corrective action".

THE REVIEW

Both the Citizens' Representative and the Chief Electoral Officer cooperated fully with me. I am grateful for their counsel's assistance.

The Citizens' Representative offered to let me listen to his interview recordings, but (to protect witnesses' confidentiality) only if I promised not to share them with anyone, including the Chief Electoral Officer. I felt this would be unfair and declined.

ANALYSIS OF THE CITIZENS' REPRESENTATIVE'S REPORT

My analysis focused on the Citizens' Representative's ten findings of gross mismanagement. I do not believe any of the remaining 25 allegations could justify action under s. 5.3 of the *Elections Act, 1991* or any other investigation or proceeding.

While my report discusses each finding in detail, four themes emerged:

1. Although there were legitimate questions about witnesses' reliability, the Chief Electoral Officer was never informed of the details of the witnesses' evidence. Because he was not able to challenge the witnesses' evidence, the findings are unreliable and procedurally unfair.
2. The Citizens' Representative's Report appears to suggest that any failing or institutional failure establishes gross mismanagement. However, gross mismanagement is about individual actions that depart markedly from reasonable standards. The Citizens' Representative should have analyzed the Chief Electoral Officer's individual actions and considered whether they were serious enough to establish gross mismanagement.
3. The Citizens' Representative's Report is often not clear enough to justify his conclusions. It rarely makes clear findings of fact. When it does, it rarely explains why one witness's story was accepted rather than another. It is often unclear why the evidence established gross mismanagement.
4. Unlike a normal case, where the evidence might explain gaps in the reasoning, the Citizens' Representative declined to share the evidence underlying his conclusions. I had to take the Report at face value.

In my respectful opinion, the Citizens' Representative's findings should not be used as a basis for further action against the Chief Electoral Officer. No one should assume, even casually, that the findings are true or probably true.

NEXT STEPS

The Citizens' Representative's Report should not be used as a basis for removing or suspending the Chief Electoral Officer under s. 5.3 of the *Elections*

Act, 1991. However, some of the allegations might justify removal or suspension if proved after a fair hearing.

To remove or suspend the Chief Electoral Officer, the House of Assembly must pass a resolution finding he committed “misconduct, cause, or neglect of duty”. The House must be convinced (1) that the Chief Electoral Officer’s individual actions were blameworthy and incompatible with his duty to manage elections and (2) that the Chief Electoral Officer had a full and fair opportunity to respond to the allegations.

After the House of Assembly resolution, Cabinet could remove the Chief Electoral Officer if it is also convinced that he committed misconduct, cause, or neglect and that he had a fair opportunity to respond.

In my opinion,

- Two allegations about privacy and oaths require no further action.
- Two harassment allegations should be handled through internal policies.
- One occupational health and safety allegation should be referred to the Occupational Health and Safety Division.
- One allegation raises a policy issue about providing government services in Indigenous and minority languages. This should be investigated as a policy issue, not a personal wrongdoing issue.
- One allegation about personal delivery of ballots depends on a value judgment, but in my opinion, it is not serious enough to justify removal.
- One nepotism allegation could—depending on the facts—possibly justify removal. It also raises an important policy question.
- Two allegations about pre-election planning could—depending on the facts—possibly justify removal. These allegations also raise an important policy question.

While I have given my opinion and recommendations, the House and Cabinet must decide for themselves how to move forward.

Whistleblower investigators must strike a difficult balance between confidentiality and fairness. Although I believe the Citizens’ Representative

misjudged the balance in this case, he should not be blamed for erring on the side of protecting confidentiality. I hope my report may help to bring some clarity to this difficult issue. Whistleblower investigations can help ensure that public institutions enjoy and deserve public confidence, but only through results that are fair and justifiable.