Fairness, Reliability, and Justification:

ACCOUNTABILITY BASED ON PUBLIC INTEREST DISCLOSURES

REVIEW OF THE
CITIZEN'S REPRESENTATIVE'S REPORT
RESPECTING THE CHIEF ELECTORAL OFFICER

The Honourable J. Derek Green, Reviewer

September 15, 2022

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Reviewer

J. Michael Collins
Counsel

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

September 15, 2022

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INTRODUCTION

On July 8, 2022, I was engaged by the Management Commission of the House of Assembly of Newfoundland and Labrador to conduct a review of the findings and report of the Citizens' Representative entitled "A Report on Public Interest Disclosures Regarding the Chief Electoral Officer for Newfoundland and Labrador", dated March 2022.[1]

The Citizens' Representative's Report concluded, after a lengthy investigation, that the Chief Electoral Officer committed "wrongdoing" within the meaning of s. 54(1)(e) of the public interest disclosure (whistleblower) provisions of the *House of Assembly, Accountability, Integrity and Administration Act* and recommended that corrective action be taken.

I was asked to analyze the Report, identifying any procedural, human resources or legal issues, and to express an opinion as to whether, based on that analysis, the Report's findings could form the basis of action leading to suspension or removal of the Chief Electoral Officer in accordance with s. 5.3 of the *Elections Act, 1991*.[2] I was also asked, if I thought it necessary, to make recommendations as to whether any further investigations, proceedings or analyses were desirable or necessary.

The text of the Terms of Reference is set out in Appendix "A" to this report.

The Terms of Reference required me to complete my work and submit my report by September 15, 2022. I commenced work immediately. I was fortunate to engage Mr. Michael Collins, JD, of the law firm Goodland Buckingham, St. John's as my legal counsel to assist in the review. His help, advice and dedication to the project was of inestimable value. Lawyers of the calibre of Michael Collins are a credit to the legal profession and public life of this province. I want to acknowledge and thank him for his valuable contribution.

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1 Hereinafter, the "Report." The Report had been delivered to the Speaker of the House of Assembly pursuant to s. 58(7) of the *House of Assembly Accountability, Integrity and Administration Act,* SNL, 2007 c. H-10 on March 15, 2022 [Hereinafter sometimes referred to as the *Act*]

2 SNL 1992, c. E-3.1

My engagement was not made pursuant to any statutory or prerogative authority. It was a contractual engagement only. As such, I was not acting within any statutory framework, such as the *Public Inquiries Act,* that would have entitled me to conduct public hearings and to issue subpoenas or order document production. As matters developed, this did not pose a significant impediment to my work. The Terms of Reference specifically required me not to perform a re-investigation of the Report. It was a review only. Although there was some disagreement with the Citizens' Representative as to the scope of the documents that should be available to enable me to conduct the review,[3] I received nothing but courtesy and cooperation from counsel for the Chief Electoral Officer and the Citizens' Representative, as well as their clients.

I commenced my analysis of the Report and its appendices, developed a preliminary list of questions pertaining to the procedural, human resources and legal issues perceived to be involved, established procedural guidelines to be followed,[4] made rulings on the role of the Citizens' Representative in the review process,[5] and with respect to the scope of the record for the purpose of the review,[6] met with counsel for the Chief Electoral Officer and the Citizens' Representative, invited submissions from them and others, and conducted necessary research.

Upon receipt of submissions in response to the questions that were posed and in respect of other matters with the Chief Electoral Officer and the Citizens' Representative wished to raise,[7] I spent the remainder of my time researching and writing this report which contains my analysis of the Citizens' Representative's Report, my views on the degree to which it could be relied on for the purposes of further action, and my recommendations as to whether further steps should in fact be taken.

My Report is accompanied by an Executive Summary which summarizes my conclusions. I have endeavoured to prepare the Report and Executive Summary documents without personal information that could pose a difficulty for public release.

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3 See "Factual Information and the Record," below starting at p. 39.

4 See *Procedural Guidelines*, Appendix B.

5 See Ruling 1, Supporting Materials, Item 4.1.

6 See Ruling 2, Supporting Materials, Item 4.2.

7 I set a deadline of August 22, 2022 for receipt of written submissions.

My Report is also accompanied by an electronic collection of Supporting Materials, including the record I relied on, procedural guidelines and rulings, and the final submissions of the Chief Electoral Officer and Citizens' Representative. These Supporting Materials may be of assistance in deciding how to proceed, but they do contain personal information.

PART I: BACKGROUND

THE CHIEF ELECTORAL OFFICER

The Chief Electoral Officer occupies a statutory office which reports to, hires staff and receives budgetary approval from, the legislative, not the executive, branch of government.[8] The theory behind this arrangement is that it reinforces the independence of the office from control by the government (executive branch) of the day. That is particularly important in the case of election management where the current government should not be able to influence to its advantage the preparation and arrangements for and conduct of any future election.

In keeping with the theory of the independence of the office from executive control, the *Elections Act, 1991* provides that the appointment of the Chief Electoral Officer is to be made "on resolution of the House of Assembly."[9] The Lieutenant-Governor in Council is then required to complete the appointment based on the choice of the House. Of course, in the Westminster form of parliamentary government, the government of the day holding a majority of members in the House may effectively control the House's choice.[10] In an assembly where the government does not have a majority, however, House control is more meaningful at a practical level.

When it comes to removal of the Chief Electoral Officer from office (a matter that is relevant to this review), the *Elections Act, 1991* provides:

> 5.3 The Lieutenant-Governor in Council, on resolution of the House of Assembly passed by a majority vote of the members of the House of Assembly actually voting, may suspend or remove the Chief Electoral Officer from office because of an incapacity to act or for misconduct, cause or neglect of duty.

Once again, the legislation appears to contemplate, first, a decision by the House to suspend or remove the Chief Electoral Officer followed by a decision by the executive (the Lieutenant-Governor in Council) to accept the House's resolution. Unlike in the case of appointment, where the executive appears to be required

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8 *Elections Act, 1991, s.* 5(2), 7, 9.

9 s. 4(2).

10 Guided, however, by the processes of the *Independent Appointments Commission Act,* SNL 2006, c. I-2.1.

to act on the House's resolution, the executive appears to have a discretion to decline to suspend or remove even though the House's resolution calls for it.

I have been informed, however, that in practice the process operates somewhat differently, with (at least in the case of a majority government) a decision being taken first in Cabinet to suspend or remove the officer and then the introduction of a resolution by the government in the House calling for the suspension or removal. If passed, the final "decision" to suspend or remove is then implemented *pro forma*.

Whatever way the process operates, it is clear that the office is not an "at pleasure" appointment. The requirement for removal only on the basis of incapacity or of misconduct, cause or neglect of duty, and the requirement for a resolution of the House before removal provides a measure of security of tenure. It is a process that is roughly analogous to the process applicable to removal of superior court judges from office.

The office of Chief Electoral Officer is an important part of the provincial constitution and part of "the web of institutional relationships between the legislature, the executive and the judiciary which continue to form the background of our constitutional system."[11] The fair, inclusive and efficient conduct of elections is fundamental to our democracy. The Chief Electoral Officer's duties are outlined in the *Elections Act, 1991* as follows:

> 5(1) It is the duty of the Chief Electoral Officer
>
> (a) to exercise general direction and supervision over the administrative conduct of elections and to enforce on the part of election officers fairness, impartiality and compliance with this Act;
>
> (b) to issue to election officers those instructions that he or she considers necessary to ensure effective execution of this Act; and
>
> (c) to perform all other duties that are imposed on him or her by or under this Act.

[11] *Cooper v. Canada (Human Rights Commission)*, [1996] 3 SCR 854, at para. 3.

Ultimately, the "general direction and supervision" of the election process devolves on him. The Office of the Chief Electoral Officer ("OCEO") is quite small, consisting of roughly 10 permanent employees. In the lead-up to, and during an actual election, however, that number swells to thousands of part-time employees, including returning officers, election clerks, warehouse workers and administrative staff. The Chief Electoral Officer is responsible, through his senior management staff, for the hiring, training, deployment and coordination of this workforce. He does not, however, have direct responsibility for day-to-day workplace direction (although, of course, his overall authority would allow him to intervene in specific instances, if necessary). For example, the job description of the Election Warehouse Clerk places responsibility on the incumbent to "ensure" the day-to-day safe operation of the warehouse and to manage supplies and equipment in accordance with, amongst other things, health and safety regulations. That person reports directly to the Director of Elections Operations, not the Chief Electoral Officer.[12] Issues arising with respect to occupational health and safety matters on the warehouse floor, therefore, would, in the normal course, only find their way to the Chief Electoral Officer if the Director of Elections Operations felt he or she needed higher level managerial guidance on a specific matter or brought them to the attention of the Chief Electoral Officer as part of his general reporting function, for addressing at a policy level, or the Chief Electoral Officer became personally aware of a problem and decided to address it himself instead of directing a subordinate to deal with it.

Throughout the *Elections Act, 1991*, other powers and duties of the Chief Electoral Officer are also specified. They include hiring necessary officers, clerks and employees, appointment of returning officers and additional election clerks, approving polling divisions, issuing writs of election and appointment of a Special Ballot Administrator.[13] With respect to the conduct of an election, there are some limits on how flexibly the election process can be organized. For example, there is a requirement that a general election must be held on the same day in each district[14] and the Chief Electoral Officer's ability to defer the taking of an election poll

12 Exhibit 7 in the Supporting Materials, Item 3.7.

13 Ss. 7, 11, 15, 18, 28, 61, 86.1.

14 S. 60.

in a particular district because of adverse weather or "another appropriate reason," appears to be limited to deferring it for one day or another succeeding day.[15]

Of relevance in the current context is s. 10 which provides in pertinent part:

> 10(1) Where during the course of an election it appears to the Chief Electoral Officer that, by reason of a mistake, miscalculation, emergency or unusual or unforeseen circumstance, a provision of this Part does not accord with the exigencies of the situation, the Chief Electoral Officer may, by particular or general instructions, extend the time for doing an act, increase the number of election officers or polling stations or otherwise adapt a provision of this Part to the execution of its intent, to the extent that he or she considers necessary.

During the 2021 General Election, the scope of the powers conferred on the Chief Electoral Officer, to enable him to respond to challenges presented by the fact that the election occurred in the middle of a COVID-19 pandemic, were a matter of considerable public discussion and debate. The Chief Electoral Officer was the subject of criticism from some in respect of not being sufficiently pro-active in employing the powers conferred by s. 10 and other provisions, and by others, in respect of overstepping his legislative powers.

The incumbent in the position of Chief Electoral Officer at the time of the election was Mr. Bruce Chaulk. He is the person who was the subject of the Citizens' Representative's investigation. Mr. Chaulk holds Bachelor of Commerce and Master of Business Administration degrees and is a Certified Management Accountant. He was appointed Assistant Chief Electoral Officer and Director of Elections Finance in 2011 and as Chief Electoral Officer in 2016.

Prior to his appointments to the electoral office, he had a lengthy career in both the private and public sectors. He worked as a tax auditor with Revenue Canada, senior manager in a local branch of a national accounting firm, and auditor with the NL Auditor General's Office and the Comptroller General's Office. In the latter office he also served as Manager of Transactional Review and Compliance for three years. This role included responsibility for ensuring transactional compliance with

[15] S. 87.

applicable legislation and policies to (in Mr. Chaulk's words[16]) "ensure that the unit operates in an effective and efficient manner".

On paper, Mr. Chaulk seems an unlikely candidate for accusations of poor and inefficient management practices.

CODE OF CONDUCT

In addition to his statutory duties, the Chief Electoral Officer was also subject, as were all employees in statutory offices, to a *Code of Conduct for Employees of the House of Assembly Service* adopted pursuant to s. 35(3) of the *House of Assembly Accountability, Integrity and Administration Act.* This Code figured prominently in the investigation and report which is the subject of this review.

The *Code of Conduct* came about as a result of recommendations in the 2007 report of the *Review Commission on Constituency Allowances and Related Matters*[17]which addressed, amongst other things, reforms in the legislative branch of government to deal with matters pertaining to financial mismanagement in the way constituency allowances, and potentially other public funds, were administered in the House of Assembly. The *Constituency Allowance Report* focused on mechanisms that would foster "standards of conduct of elected officials, and their ethical and accountable behaviour."[18] That required twin approaches of "establishment of clear expectations" and the creation of "mechanisms for calling persons to account."[19] One of the mechanisms recommended was the adoption of codes of conduct covering House members, House staff and employees in statutory offices.[20]

Section 35 of the *House of Assembly Accountability, Integrity and Administration Act* is a rescript of the language recommended in the *Constituency Allowance Report*. As recommended, the intent was to require members of the House, after appropriate debate, to develop an appropriate code that would be applicable to

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16 Exhibit 10, found in the Supporting Materials, Item 3.10.

17 *Rebuilding Confidence: Report of the Review Commission on Constituency Allowances and Related Matters* (May 2007, J. Derek Green, Commissioner). Available online at <http://www.gov.nl.ca/publicat/greenreport>.

18 Recommendation No. 1. Recommendation No.2(g) called for "definitive guidance and requirements" that would "establish standards of conduct for members and for those charged with the responsibility of administration of operations of the House of Assembly establishment."

19 P. 5-5.

20 Recommendation Nos. 4 and 5.

themselves and staff in the House and statutory offices. The report referred with approval to the observations of Justice L'Heureux-Dube in *R. v. Hinchey*:

> [G]iven the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe.[21]

The *Constituency Allowance Report* also drew a distinction between codes which were expressed in aspirational language and those which purported to set out definitive proscriptive standards that guided action in particular situations.[22] The distinction is often referred to as a distinction between codes of ethics and codes of conduct. The former addresses the ideals to which one should strive and will help in interpreting and applying specific behavioral rules in concrete situations. The latter, by contrast, is more prohibitory in nature and sets standards by which a person's behavior is to be judged, particularly in the context of complaints and discipline. Put another way, codes of ethics are directed to ideals of perfection whereas codes of conduct are directed to minimum standards with which persons must comply. Failure to achieve perfection under a code of ethics should not therefore necessarily result in disciplinary sanction.

Although there is obviously no bright line that can always identify a code as being one intended to be one of ethics as opposed to one of conduct, the *Constituency Allowance Report* expressed the view that what was needed was something more concrete than aspirational standards of perfection:

> If a code of conduct is to be an important element in a political system designed to foster public trust, it must be more than aspirational; in short, there must be some measure for achieving accountability.
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> …

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21 (1996), 111 CCC (3d) 353 (SCC).

22 Pp. 5-7 to 5-10.

> Upon adoption of a code, it should be regarded as setting a standard of behavior for members which, if violated, would expose the violating member to censure.[23]

This approach was ultimately reflected in s. 35(2) of the *House of Assembly Accountability, Integrity and Administration Act*, following the language of the draft Act recommended in the Report:

> 35(2) The code of conduct adopted under subsection (1) shall be:
>
> (a) treated as a standard against which the actions of a member may be judged for the purpose of censure by the House of Assembly[.]

Although the foregoing comments in the Report were expressed while specifically discussing a code applicable to MHAs, the Report later recommended that the same approach be adopted for House staff and statutory officers.[24] The *House of Assembly Accountability, Integrity and Administration Act* follows this recommendation, providing that House staff and statutory officers will have a code of conduct which can be used to assess whether their behaviour is wrongful.[25]

A review of the *Code of Conduct* that was ultimately adopted by the House, however, reveals that some of it was in fact expressed in aspirational language designed to exhort those to whom it applied to standards of perfection rather than to specific minimum standards of action.

For example, Item #2 of the *Code* exhorts those to whom it applies to "perform our duties honestly, faithfully, ethically, impartially and *efficiently*" and to "refrain from conduct that might impair our *effectiveness* or that would compromise our integrity." Amongst other emphases, the emphasis on efficiency and effectiveness is clearly aspirational. There is no absolute standard of conduct that will always result in a perfect state of efficiency or effectiveness. If applied to specific actions, one might always be able to point to something that, if done differently, might have led to a more efficient or effective outcome.

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23 pp. 5-8 to 5-9.

24 p. 5-11.

25 ss. 35(3), 54(e)(ii).

In the context of judging actions for the purpose of discipline or censure, therefore, one must be careful not to fall into the trap – perhaps even inadvertently – of judging the actions against a standard of perfection. That is not to say, however, that one should never be sanctioned or censured for failure to comply with an aspirational goal but in such case, I would suggest, the conclusion must be reached that, by any reasonable standard, the actions or failures under consideration fall so far short of what could be reasonably expected in the circumstances that no reasonable person considering the matter objectively and fairly could come to any other rational conclusion.

In the Citizens' Representative's Report a number of provisions of the *Code,* including the "efficiently" reference in item #2, were specifically relied on in arriving at findings of wrongdoing (by way of gross mismanagement) against the Chief Electoral Officer. A number of findings concluded that there was gross mismanagement because his duties were "*in*efficiently" performed, thereby effectively turning a high aspirational standard (to strive for efficiency) into a minimum standard of censurable conduct (inefficient conduct, i.e. could have been done better). Such conclusions merit close scrutiny to ensure that what was being applied was not a standard of perfection.

The foregoing discussion of the *Code of Conduct* is important in the current context as the term "gross mismanagement" in the definition of "wrongdoing" in the *House of Assembly Accountability, Integrity and Administration Act* is specifically tied to "violation or suspected violation" of the *Code.*[26] The Citizen's Representative's Report's findings are all predicated on findings of gross mismanagement with respect to the Chief Electoral Officer's obligations under the *Code*.

COVID-19 AND THE 2021 GENERAL ELECTION

THE COVID-19 PANDEMIC

The complaints against the Chief Electoral Officer must be understood in the context of the global Covid-19 pandemic.

[26] s. 54(1) (ii).

Covid-19 is a contagious and virulent coronavirus that was initially detected in China in December 2019 and soon spread into a global pandemic. The first probable case in Newfoundland and Labrador was announced on March 14, 2020 and on March 18 the Minister of Health and Community Services declared a public health emergency.[27]

The declaration of a public health emergency gave the Province's Chief Medical Officer of Health ("CMOH") broad emergency powers under the *Public Health Promotion and Protection Act*.[28] Over the following weeks, she issued a series of public health orders closing businesses and public spaces, forbidding gatherings, and requiring individuals arriving from outside the province to isolate themselves.

After a few weeks of lockdown, case numbers levelled off and began to decline. On April 30, 2020, the CMOH announced a system of five Alert Levels for gradually relaxing public health restrictions.[29] The existing lockdown measures were described as Alert Level 5. So long as the pandemic remained under control, the Province would move progressively to the less restrictive Alert Level 4, then Alert Level 3, and so on.

The Province moved steadily through May and June down to Alert Level 2, where it would remain for the remainder of 2020.

LEADUP TO THE 2021 GENERAL ELECTION

In the last General Election in May 2019, the governing Liberal Party won only 20 out of 40 seats in the House of Assembly. The result was a minority government, the Province's first since 1972.

The minority government created a significant likelihood of a sudden election. Unlike a government holding a legislative majority, it needed the support of at least one Independent or opposition MHA to pass spending bills and win confidence

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27 Chief Medical Officer of Health, "Media Advisory" (March 14, 2020), available online at <https://twitter.com/HCS_GovNL/status/1238954088852787200>; *Special Measures Order* (March 18, 2020), available online at <https://www.gov.nl.ca/covid-19/files/Special-Measures-Order-March-18-2020.pdf>.

28 SNL 2020, c. 10, s. 28.

29 Executive Council and Health and Community Services, "Chief Medical Officer of Health Announces Plan for Living with COVID-19 in Newfoundland and Labrador" (April 30, 2020), available online at <https://www.gov.nl.ca/releases/2020/exec/0430n03/>.

motions. It could be defeated at any time and with little notice. A minority government would also have reason to dissolve the legislature prematurely, calling a sudden general election to try to convert strong polling results into a legislative majority.

The risk of a snap election increased in February 2020 when Premier Dwight Ball announced that he would resign as Premier as soon as the Liberal Party chose a replacement party leader. The replacement leader, once sworn in, would have to call a general election within twelve months.[30] The leadership process was complicated by the pandemic, but Andrew Furey was eventually elected and sworn in as Premier in August. From then, the clock was ticking.

Shortly after Premier Furey was sworn in, Dwight Ball resigned his seat as MHA for Humber–Gros Morne. A byelection was held on October 6, 2020, giving the OCEO an opportunity to practice an election under Alert Level 2. OCEO hired additional staff to monitor lineups and clean facilities. It also provided voters with masks, single-use pencils and signage.[31]

The OCEO planned to use similar measures as during the Humber–Gros Morne byelection for the next general election. The Chief Electoral Officer also wrote to Premier Furey in January 2021 expressing two concerns[32]:

1. A short 28-day election would make it difficult to vote by mail. Voters would have only 15 days to receive, complete, and return their special ballot kit—an aggressive timeline even for express mail. A longer 35-day election would give voters more time to vote, whether by mail or in person.

2. A Saturday election would ensure students were not in school, making it easier for OCEO to use schools as polling locations.

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30 *House of Assembly Act,* RSNL 1990, c. H-10, s. 31.

31 Office of the Chief Electoral Officer, *Chief Electoral Officer Report, Humber–Gros Morne By-Election* (October 6, 2020).

32 Exhibit 8, found in the Supporting Materials, Item 3.8.

THE 2021 GENERAL ELECTION

Premier Furey advised the Lieutenant-Governor on January 15, 2021 to call a general election. Election writs were issued naming election day as Saturday, February 13.[33] Across the province, the political parties began campaigning and election officials began preparing for election day.

Meanwhile, a new Covid-19 variant was spreading around the world. Eventually called the "Alpha" variant, it was detected in the United Kingdom in November 2020 and arrived in Canada by December 2020. Alpha outcompeted the original Covid-19 strain and caused a surge of new infections in many parts of the world.

A trickle of new Covid-19 cases emerged in the Province starting in late January 2021. The CMOH announced two new cases on January 27;[34] four cases on January 28 and 29;[35] two on February 3;[36] one on February 4 and 5;[37] three on February 6;[38] and one on February 7.[39]

The trickle swelled as the election approached. On February 8 the CMOH announced eleven new cases and new restrictions in the St. John's metro area.[40] February 9 brought thirty new cases and more restrictions.[41] February 10 saw fifty-

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33 OCEO, "Election Writs Issued for Newfoundland and Labrador's 2021 Provincial General Election" (January 15, 2021), available online: < https://www.gov.nl.ca/releases/2021/elections/0115n17/>.

34 Health and Community Services, "Public Advisory: Two New Cases of COVID-19 in Newfoundland and Labrador" (January 27, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0127n04/>

35 Health and Community Services, "Public Advisory: Four New Cases of COVID-19 in Newfoundland and Labrador" (January 27, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0128n04/> and "Public Advisory: Four New Cases of COVID-19 in Newfoundland and Labrador" (January 28, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0129n02/>.

36 Health and Community Services, "Public Advisory: Two New Cases of COVID-19 in Newfoundland and Labrador" (February 3, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0203n03/>

37 Health and Community Services, "Public Advisory: One New Case of COVID-19 in Newfoundland and Labrador" (February 4, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0204n01/> and "Public Advisory: One New Case of COVID-19 in Newfoundland and Labrador" (February 5, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0205n04/>.

38 Health and Community Services, "Public Advisory: Three New Cases of COVID-19 in Newfoundland and Labrador" (February 6, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0206n01/>.

39 Health and Community Services, "Public Advisory: One New Case of COVID-19 in Newfoundland and Labrador" (February 7, 2021), available online: https://www.gov.nl.ca/releases/2021/health/0207n01/.

40 Health and Community Services, "Public Advisory: Eleven New Cases of COVID-19 in Newfoundland and Labrador" (February 8, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0208n02/>.

41 Health and Community Services, "Public Advisory: 30 New Cases of COVID-19 in Newfoundland and Labrador" (February 9, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0209n02/>.

three new cases and still more restrictions, some provincewide.[42] February 11 there were one hundred new cases.[43]

Rising case numbers raised doubts about the plans for Election Day. Some election workers were unable to work because they were required to isolate on their own property. Other election workers refused to work out of concern for their health. Many voters, unable to leave their home even to attend a community mailbox, had no way to vote.

On February 11, the Chief Electoral Officer wrote all party leaders indicating that "constitutional limitations and other legal implications" limited his ability to prolong the election. He suggested that the CMOH use her emergency powers to delay the election or that the party leaders discuss approaching the Lieutenant Governor.[44]

Later that same day, the CEO moved past his constitutional and legal concerns. He postponed in-person voting for eighteen ridings. The deadline for applying for a special ballot was extended to February 13 and the deadline for returning a ballot to February 25.[45]

On February 12, the night before Election Day, the CMOH held an emergency press conference and announced that the surge in Covid-19 cases was caused by the Alpha variant. She placed the whole province in a Level 5 lockdown effective immediately.[46]

Following the CMOH's announcement, the CEO cancelled in-person voting for all 40 ridings. Voters would be able to apply for special ballots until February 15 and return them by March 1.[47] Two days later, on February 14, the deadlines moved

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42 Health and Community Services, "Public Advisory: 53 New Cases of COVID-19 in Newfoundland and Labrador" (February 10, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0210n09/>.

43 Health and Community Services, "Public Advisory: 100 New Cases of COVID-19 in Newfoundland and Labrador" (February 11, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0211n05/>.

44 Exhibit 9, available in the Supporting Materials, Item 3.9.

45 OCEO, "Statement from the Chief Electoral Officer" (February 11, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0211n02/>.

46 Government of Newfoundland and Labrador, "February 12, 2021 COVID-19 Update #2" (February 12, 2021), available online: <https://www.youtube.com/watch?v=e68GaBbp81c>.

47 OCEO, "Statement from the Chief Electoral Officer" (February 12, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0212n10/>.

again. Voters could apply for a special ballot until February 19 and return completed ballots until March 5.[48]

When the deadline for applying for a special ballot arrived on February 19, the CEO announced that his office had mailed out about 24,000 voting kits so far. With about 110,000 applications received, some requesting ballots on behalf of multiple voters, the March 5 deadline was extended again. Ballots postmarked by March 12 would be accepted.[49]

On March 9, the CEO announced that the last voting kits had been mailed on March 3, and that no ballots would be counted after March 25.[50]

Preliminary election results were announced on March 27.[51]

Shortly thereafter, applications were filed in the Supreme Court of Newfoundland and Labrador challenging the results of the vote in three electoral districts. Amongst the allegations were claims that the election process was not conducted properly by the office of the Chief Electoral Officer.

CONTEXTUAL BACKGROUND PROVIDED BY COUNSEL FOR THE CHIEF ELECTORAL OFFICER

The Citizens' Representative's Report reproduced a "Contextual Background Provided by Counsel to the CEO"[52] which stated, amongst other things, the Chief Electoral Officer's position respecting the impact of the pandemic on the election. The report did not, however, make any finding accepting any or all of the Chief Electoral Officer's statements except by way of a "Commentary," pertinent parts of which are as follows:

> Members of the House of Assembly and the general public should be aware of the immense, and immeasurable stress that the 2021 General Election placed on

48 OCEO, "Statement from the Chief Electoral Officer" (February 14, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0214n01/>.

49 OCEO, "Statement from the Chief Electoral Officer" (February 19, 2021), available online: <https://www.gov.nl.ca/releases/2021/health/0219n07/>.

50 OCEO, "Statement from the Chief Electoral Officer: Return of Mail-In Ballots" (March 9, 2021), available online: <https://www.gov.nl.ca/releases/2021/elections/0309n02/>.

51 OCEO, "Preliminary Results of the 2021 Provincial General Election" (March 27, 2021), available online: <https://www.gov.nl.ca/releases/2021/elections/0327n01-2/>.

52 Report at pp. 23–25, available in the Supporting Materials, Item 2.1.

> the CEO, who was in charge of prosecuting the most difficult electoral event in the province's history. Many of the decisions were "on the spot" where judgement needed to be exercised in an extremely fluid situation. The CEO worked seven days a week for months.
>
> …
>
> The switch to mail-in balloting forced the CEO and the institution to try to perform in a way it had never historically performed.[53]

As will become apparent from the discussion in this report, it is not clear as to the extent to which the Citizens' Representative factored the Chief Electoral Officer's submissions or the observations made by the Citizens' Representative as quoted above, into his analysis leading to his conclusions that gross mismanagement, based on a finding of inefficiency, occurred, especially with respect to allegations known as D15 and D16.

CONTROVERTED ELECTION LITIGATION

Following the conclusion of the election, several proceedings were begun in the Supreme Court of Newfoundland and Labrador challenging the election results.[54] The pleadings make some claims that resemble the allegations the Citizens' Representative investigated: for example, the claim that OCEO was not adequately prepared for a pandemic election.[55] Other claims, like the claim that a returning officer improperly rejected some ballots,[56] are quite different. Although there have been a number of preliminary skirmishes, these proceedings have not yet been heard and will likely not be decided before the matters dealt with in the Citizen's Representative's Report and this report are resolved.

Mention of these matters is being made at this juncture, however, for a number of reasons.

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53 Report at 26, available in the Supporting Materials, Item 2.1.

54 Supreme Court of Newfoundland General Division, St. John's Registry, files 2021 01G 2488, 2021 01G 2556, 2021 01G 2561, and 2021 01G 6408.

55 Statement of Claim, 2021 01G 2561, para. 60.

56 Originating Application, 2021 01G 2488, para. 10.

First, there was evidence filed by way of affidavit that related to matters concerning the management of the election by the Office of the Chief Electoral Officer generally that were also dealt with in the whistleblower allegations that were addressed in the Citizen's Representative's Report. That said, it is important to remember that they are being dealt with from a different perspective. In the election litigation, the focus is on whether the election results must be set aside because of alleged legal errors or institutional failures, whereas in the Report, the focus was on alleged individual wrongdoing by the Chief Electoral Officer personally.

Secondly, the overlap of factual evidence in the election litigation with the information provided by the whistleblowers to the Citizen's Representative led him to decline to make any findings with respect to a number of the allegations, presumably in respect for the *sub judice* convention.

Thirdly, the Chief Electoral Officer submitted to me that evidence obtained during oral discovery in the election litigation reveals that at least one of the whistleblowers making the disclosures to the Citizen's Representative was providing evidence to one of the applicants seeking to overturn the election. He submitted that this is indicative of a political motivation for making the whistleblower complaint and suggests bad faith, thereby throwing the reliability of his evidence to the Citizen's Representative into doubt.

Finally, the continued existence of the unresolved controverted election litigation may have an effect on the degree to which the House of Assembly or the Lieutenant-Governor in Council can or should, under the *sub judice* convention, take account of such matters when deciding to take any further action against the Chief Electoral Officer. This is also a matter which I will deal with later in this report.

LEGISLATIVE STRUCTURE OF THE PUBLIC INTEREST DISCLOSURE (WHISTLEBLOWER COMPLAINTS) PROCESS

The Citizens' Representative's Report was generated as a result of disclosures by whistleblowers in the Office of the Chief Electoral Officer. Under the applicable whistleblower legislation, the Citizens' Representative is tasked, along with a series of other important duties, with investigating and reporting on public interest disclosures (commonly called whistleblower complaints) affecting the public service. His focus is to determine whether "wrongdoing" has occurred and, if so, to

recommend that "corrective action" be taken. The key provision which in effect circumscribes his role is the definition of wrongdoing in s. 54(1)(e) of Part VI of the *Act*, which provides as follows:

> "wrongdoing", with respect to a member, the speaker, an officer of the House of Assembly, and a person employed in the House of Assembly service and the statutory offices, means
>
> (i) an act or omission constituting an offence under this Act,
>
> (ii) gross mismanagement, including of public money under the stewardship of the commission, in violation or suspected violation of a code of conduct,
>
> (iii) failure to disclose information required to be disclosed under this Act, or
>
> (iv) knowingly directing or counselling a person to commit a wrongdoing described in paragraphs (i) to (iii).

The part of the definition that is the focus of the present review is s. 54(1)(e)(ii), which includes within the concept of wrongdoing "gross mismanagement … in violation or suspected violation of a code of conduct."

The Citizens' Representative is, like the Chief Electoral Officer, an officer of the House of Assembly with a degree of security of tenure which supports his independent functioning free from any potential interference from the executive branch of government. The present incumbent has extensive experience in conducting administrative investigations. I was informed that his Office processes and reports on between 600 and 800 matters per year in connection with the variety of functions he performs. He has been associated with the Office of the Citizens' Representative since 2002. He has held his current office since 2019. He holds a Masters degree in Political Science and is a member by virtue of his office of several national organizations relating to ombudsmen. He has given numerous presentations nationally on aspects of administrative and ombudsman investigations and is an instructor at an extension course at Osgoode Hall Law School.

There are, in fact, two parts to the whistleblower law in this province: (i) Part VI, which applies to the legislative branch and the statutory offices; and (ii) the

Public Interest Disclosure and Whistleblower Protection Act,[57] which applies to the executive branch and certain Crown corporations and tribunals. These two statutory frameworks are very similar but not identical. Although it is the former one which is directly engaged in this review, comparisons with the different provisions in the *PIDWPA* are helpful in delineating the scope and effect of the differences in Part VI.

Further, in considering the effect of the Report, an understanding of the origin and manner of adoption of the legislation will help inform as to the intent and scope of the legislative framework of Part VI, as well as how it operates in a practical sense.

Prior to 2007, Newfoundland and Labrador did not have any whistleblower protection legislation governing the provincial public service. In that year, the *Constituency Allowance Report* recommended that the province enact, as part of new legislation reforming the administration of the legislative branch of government, legislation protecting whistleblowers who made good faith disclosures of wrongdoing within the House of Assembly or the statutory offices.[58] This recommendation manifested itself as Part VI of the *House of Assembly Accountability, Integrity and Administration Act.*[59]

The *Constituency Allowance Report* recognized that consideration of the advisability of enacting legislation pertaining to whistleblowers throughout the public service was outside its mandate, so it confined its recommendations solely to within the legislative branch.[60] Subsequently, the enactment of *PIDWPA* extended the program to the executive branch in 2014. It could be said that the whistleblower provisions in Part VI were a limited and specific response to the mischief that was the focus of the 2007 Report.

Both pieces of legislation have the same general goal: to encourage the disclosure of wrongdoing in the public service, to screen out unfounded allegations or those of a malicious or vindictive nature, and to provide protection against reprisals for those who make such disclosures in good faith. Both use the same mechanisms

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57 SNL 2014, c. P-37.2 (hereinafter sometimes referred to as *PIDWPA*).

58 Recommendation 21.

59 Hereinafter referred to as "Part VI".

60 P. 5-49.

for dealing with whistleblower disclosures. They require disclosures to be made in writing containing amongst other things a description of the action or inaction believed to be wrongdoing and the name of the person accused. The identity of the discloser is to be kept confidential "to the extent permitted by law and consistent with the need to conduct a proper investigation."[61] Also, both provide for an "investigation" by the Citizens' Representative and a report on his "findings or recommendations about the disclosure and the wrongdoing" to persons or bodies who would be appropriate to respond to any recommendations.[62]

There are, however, some important differences in the two pieces of legislation. The most important is in respect of the definition of "wrongdoing." *PIDWPA* provides:

> 4(1) This Act applies to the following wrongdoings in or relating to the public service:
>
> (a) an act or omission constituting an offence under an Act of the legislature or the Parliament of Canada, or a regulation made under an Act;
>
> (b) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of duties or functions of an employee;
>
> (c) gross mismanagement, including of public funds or a public asset; and
>
> (d) knowingly directing or counselling a person to commit a wrongdoing described in paragraph (a), (b), or (c).

This definition is wider than that in Part VI. In paragraph (a) it includes an offence under any statute or regulation, whereas under Part VI, it is limited to an offence under only the *House of Assembly Accountability, Integrity and Administration Act*. Paragraph (b) has no equivalent in Part VI. Most importantly, in paragraph (c), gross mismanagement is not tied to violation or suspected violation of a code of conduct.

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61 Part VI, s. 56; *PIDWPA*, s. 7(2).

62 Part VI, s. 58(7); *PIDWPA*, s. 18(1).

There are other differences. In *PIDWPA*, s. 5 specifically provides that an employee who commits wrongdoing is subject to "appropriate disciplinary action, including termination of employment." In contrast, Part VI is silent as to what the consequences of a finding of wrongdoing may be. This is directly relevant to the current review, as I am specifically asked whether in my opinion, based on my analysis of the Citizens' Representative's Report, the possibility of suspension or removal from office under s. 5.3 of the *Elections Act, 1991* may be appropriate.

A further difference is that s. 9 of *PIDWPA* recognizes a mediatory function for the Citizens' Representative by providing that he "may take appropriate steps to help resolve the matter within the public service." This role is absent from Part VI; thus, assuming he does not decline to entertain an allegation because it is vexatious, made in bad faith or is otherwise inappropriate, the Citizens' Representative has no choice but to conduct a full investigation into a whistleblowing disclosure relating to the legislative branch or the statutory offices.

Under both Part VI and *PIDWPA*, once a disclosure is received, there is essentially a three-part process for the Citizens' Representative to follow before proceeding to conduct an investigation. First, he must satisfy himself that the disclosure falls within the scope of the legislation. In the case of Part VI, that means that the disclosure must relate to matters pertaining to the legislative branch or the statutory offices. Secondly, he must satisfy himself that the allegations in the disclosure contain elements that, if established, could possibly fall within the definition of wrongdoing in s. 54(1)(e) of Part VI.

The third preliminary question the Citizens' Representative should ask is whether there are any reasons why he should nevertheless exercise his discretion under s. 58(5) to decline to investigate. Subsection 58(5) provides:

> An investigator is not required to investigate a disclosure and may cease an investigation where he or she is of the opinion that
>
> (a) the disclosure reveals allegations that are frivolous or vexatious or the disclosure has not been made in good faith;
>
> (b) the disclosure does not provide adequate particulars about the alleged wrongdoing as required under subsection 55(2); and

(c) there is another valid reason for not investigating the disclosure.

Under *PIDWPA*, the same discretionary factors appear; however, two additional factors are added. The first relates to lapse of time between the events that occurred and the disclosure.[63] The other is more relevant to the current situation. It specifically provides that the Citizens' Representative may refuse to investigate where the subject matter of the complaint can be more appropriately be dealt with under a procedure provided for under another statute.[64] This is not explicitly mentioned in Part VI. In the course of my review, however, it was suggested that a number of the disclosures could possibly have been dealt with under government workplace harassment or occupational health and safety policies adopted under other legislation rather than involving a formal investigation under the whistleblower regime. It is arguable that the absence of an explicit discretion not to deal with such matters in that way means that an investigation could not be refused on the basis that it could have been dealt with under another procedure. Having considered this matter I am satisfied that the same result could be achieved by application of s. 58(5)(c) in Part VI, which allows for the refusal of an investigation where "there is another valid reason for not investigating the disclosure." I will come back to this matter later.

The Citizens' Representative's Report did not deal with these discretionary considerations in any detail. It merely stated compendiously:

> The whistleblower allegations met the internal threshold test for investigation, and the CEO was placed on formal notice of the investigation on April 20, 2021.

Once the threshold discretionary threshold is passed, the Citizens' Representative is obligated to conduct an "investigation" into the allegations in the disclosure. Although the authority to conduct the investigation comes from Part VI, the investigatory powers of the Citizens' Representative are found in the *Citizens' Representative Act.*[65]

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63 S. 15(c).

64 S. 15(a).

65 SNL 2001, c. C-14.1.

Part VI provides, however, that the investigation is to be conducted "as informally and expeditiously as possible."[66] There is no requirement that the whistleblower or any witnesses who may subsequently be summoned must give their information under oath or that they be subject to cross-examination by the person against whom the allegation is made. In the current case, no oaths were administered and the Chief Electoral Officer was not permitted to be present to hear or directly challenge their information. No written transcript was prepared. However, a summary of the evidence supporting each allegation was prepared and given to the Chief Electoral Officer for him to respond to.

I asked the Citizen's Representative for the recordings of evidence of some of the witnesses for the purpose of satisfying myself that the information broadly supplied some basis for the conclusions and inferences drawn by the Citizen's Representative in making the findings he did. The Citizens' Representative declined to make this information available, even though it would normally be regarded as forming part of the record of his work if this were a judicial review.[67] He took the principled position that confidentiality was a necessary underpinning of the whistleblower process – something he had given qualified assurances about to the witnesses – and that disclosure of exactly what was said, who said it and how (as opposed to a sanitized summary) would undermine the process by creating the risk of reprisals by the Chief Electoral Officer towards the witnesses.

The significance of maintaining confidentiality of the whistleblowers' and other witnesses' information and its impact on my opinions as to the reliability of the Citizens' Representative's Report as a possible basis for application of s. 5.3 of the *Elections Act, 1991* is an important matter and will be discussed in greater detail later in my report.

For now, it is sufficient to say that the requirement for informality and expedition in the conduct of the investigation and the importance of confidentiality must

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66 S. 58(3).

67 The Citizens' Representative did offer to make the recordings available if I were prepared to give an undertaking that they would not be disclosed to anyone else, including the Chief Electoral Officer and the persons to whom my report was to be given or made available. I was not prepared to give that assurance since I could not commit in advance not to make reference to it as a necessary part of my review and report. Further, it did not consider it appropriate to, in effect, censor what information that might be supportive of my report from scrutiny by the House or the Lieutenant Governor in Council and which might be relevant to further deliberations by those bodies.

be viewed in the context of s. 58(4) of the *House of Assembly Accountability, Integrity and Administration Act* which provides:

> The investigator shall ensure that the right to procedural fairness of all persons involved in an investigation is respected, including a person making a disclosure, witnesses and a person alleged to be responsible for wrongdoings.

The level and nature of procedural fairness to which those involved in the process, in particular, the Chief Electoral Officer as the person against whom the accusations are made, is important and, if not present during the investigation, may well be relevant to determinations as to the degree of reliability that can be placed on the Citizens' Representative's Report as a basis for further action.

The question of the standard of procedural fairness that is applicable during a whistleblower investigation will be discussed in considerable detail later.

THE WHISTLEBLOWER DISCLOSURES, THE INVESTIGATION AND THE CITIZENS' REPRESENTATIVE'S REPORT

Although it is not evident from the Report, I understand that only a small number of whistleblowers made disclosures. From their interviews and the evidence of other witnesses who were subsequently interviewed, the Citizens' Representative identified 33 separate allegations that he felt required a response from the Chief Electoral Officer. As the investigation progressed, he added, on his own motion, pursuant to s. 58(6) of the *House of Assembly Accountability, Integrity and Administration Act*, two additional allegations.

He divided the individual allegations into seven broad categories. They are listed here (with the number of individual accusations in each category in brackets) as:

A. Human resources issues (7)

B. Appearances of nepotism and cronyism (3)

C. Occupational health and safety issues (4)

D. Allegations of lack of Election preparation (5)

E. Allegations of lack of Efficiency of electoral activities (14)

F. Allegations of failure to respect the Indigenous franchise (1)

G. Allegation of failure to safeguard privacy (1)

His resulting Report contained a discussion of, and a conclusion and "finding" with respect to all 35 of the accusations. Of those, he concluded, on a balance of probabilities, that the Chief Electoral Officer "grossly mismanaged" his obligations under various sections of the *Code of Conduct* in respect of ten of the allegations. At least one of the ten allegations fell within each of the seven broad categories listed above.[68]

Although he did not expressly describe this as "wrongdoing," it nevertheless follows that this must be the conclusion in light of the fact that the definition of wrongdoing in s. 54(1)(e) of the *House of Assembly Accountability, Integrity and Administration Act* expressly includes:

> *gross mismanagement*, including of public money under the stewardship of the commission, in violation or suspected *violation of a code of conduct*.
>
> (Italics added.)

Of the remaining 25 allegations, he concluded that:

- 18 did not support a finding of gross mismanagement
- 1 (containing numerous individual allegations) "may" have amounted to mismanagement but not gross mismanagement
- 4 involved matters that were the subject of ongoing controverted election litigation and he should defer to the findings of the court

[68] They were denominated in the Report as A1 (Bullying and Harassment); A4 (Screaming and yelling at employees); B8 (Hiring a co-habiting dependent); C14 (Inadequate safety training or briefings); D15 (Failure to prepare for the 2021 Election in pandemic conditions); D16 (Failure to establish solid lines of communication with Chief Medical Officer of Health during the pandemic election); E26 (Delivery of voting kits to candidates and a "celebrity" with the effect of disadvantaging and discouraging voters without public profiles); E29 (Not requiring all employees to swear oaths of confidentiality); F34 (Failure to have election materials in Labrador for electors whose first language was not English); and G35 (Allowing list of electors information to be taken into homes of temporary employees without safeguards). For convenience, my report will use the same identifier letters and numbers.

- 1 was duplicative of 2 other allegations (which he had already concluded constituted gross mismanagement) and was not dealt with separately
- 1 did not support a finding of gross mismanagement but in any event he should defer to the findings of the court in the controverted election litigation as to whether the actions constituted a breach of the Elections legislation.

Although the Report contains, in some cases, a detailed discussion of at least some of the evidence with respect to these other matters, the fact that there was no finding of gross mismanagement, which was the only basis available for a conclusion of wrongdoing, means that it is not possible to rely on the discussion in the Report as a basis of further action based on wrongdoing. Further, the discussion did not contain clear findings of fact that might have otherwise formed a basis for further action even if they did not amount to gross mismanagement.

The allegations deferred to the courts deserve special comment. These allegations question the legality of the OCEO's mid-February 2021 changes to election procedures and thus do resemble some of the issues in the Controverted Elections Cases. However, as discussed above, the Controverted Elections Cases will likely focus on whether OCEO acted legally and, if not, what the appropriate remedy would be. That is a fundamentally different question from whether the Chief Electoral Officer committed wrongdoing.

Whatever the result, the Controverted Elections Cases will not breathe new life into the deferred allegations. Even if OCEO made significant legal errors that justify setting the election results aside, that finding will not imply personal wrongdoing by the Chief Electoral Officer. If the trial reveals personal wrongdoing, that will be a wholly new issue.

At most, therefore, reliance on the Report must be limited to the findings of gross mismanagement in respect of the 10 allegations that did reach this conclusion.

> I am therefore prepared to express my opinion at this point that the Citizens' Representative's Report should not be relied on as a basis for further action by the House of Assembly or the Lieutenant-Governor in Council with respect to any of the material in the Report other than that which led to the ten conclusions of gross mismanagement.

The rest of my review will therefore focus only on those findings that concluded that gross mismanagement occurred and whether, based on my analysis of them, I am prepared to express an opinion that those findings can be used as a basis for further action.

Having concluded that gross mismanagement had been established, the Citizens' Representative reported "with some measure of regret" on the ten findings he had made. As noted, however, his report also contained a discussion of the other unproven allegations. Counsel for the Chief Electoral Officer submitted to me that it was inappropriate for him to have done so. He argued that the statutory mandate of the Citizens' Representative was to investigate allegations and to report any matters of wrongdoing that were found. It was not necessary, therefore, to refer to or publicize any unproven allegations. To do so, could, he submitted, colour the reader's perceptions of the significance of the other findings and lead to an unfair and biased perception of the evidence relating to those other allegations.

I can see some merit in the notion of focusing the resulting report only on those matters which are found to amount to wrongdoing. After all, the purpose of the whole process is to expose wrongdoing, not something different from it. Nevertheless, it would be going too far to say that the Citizens' Representative is precluded from discussing other allegations which, following investigation, are determined not to meet the test for wrongdoing. The wording of s. 58(7) does not appear to contemplate such a stringent approach. It provides that upon completion of an investigation, the investigator is to report in writing his or her "findings or recommendations about the disclosure and the wrongdoing." On a fair reading, it contemplates a report on findings, not only of wrongdoing but also regarding the "disclosure." In other words, the report could encompass a discussion of those disclosures that do not, following investigation, result in a finding of wrongdoing. In

some cases, an investigation that does not reveal wrongdoing may reveal significant institutional failures. In addition, there may be circumstances (and the current investigation may be one) where it would be beneficial to the person under investigation to have it reported that a number of allegations, which perhaps were publicly known, were in fact unfounded.[69]

I see nothing fundamentally wrong, therefore, in the fact that the Citizens' Representative's Report contained a discussion of the allegations that did not ultimately result in a finding of wrongdoing.

Although the Report made findings of wrongdoing by gross mismanagement, it did not make any specific recommendations, although such appear to be contemplated by the words of s. 58(7). Instead, the report simply stated:

> It is not our duty to recommend specific sanctions in this matter. The House of Assembly is autonomous with respect to the supervision, management and discipline of Members and Officers. It is fully within the legitimate sphere and scope of parliamentary privilege that the House now deliberate on this matter and formulate its own conclusions.
>
> I recommend that the *House of Assembly* consider the findings of this report and take immediate *corrective action* to remedy the problems that exist within the OCEO so that the institution can return to full functionality and execution of its core mandate on behalf of the citizens of the province.[70]

(Italics added.)

The Report did not specify what that "corrective action" should be. It is worth noting that "corrective action" does not have to relate to disciplinary action against the person found to have committed wrongdoing. It could contemplate at least three other types of measures:

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69 I recognize that counsel for the Chief Electoral Officer submitted that the words "the disclosure" and "the wrongdoing" in s. 58(7) should be read as referencing each other, and that, therefore, the only disclosure that should be reported on was the one that led to the finding of wrongdoing. That would be logical, of course, if there were only one disclosure and one finding of wrongdoing. However, where there are multiple disclosures, the subsection must be read with changes of number as being a reference to "disclosures" and "the wrongdoings" (see *Interpretation Act*, RSNL 1990, c. I-19, s. 22(h)). The connection to the wrongdoing finding is then not so obvious. His argument in this respect does not change my analysis.

70 Report, p. 185, available in the Supporting Materials, Item 2.1.

(a) Remedial action to repair any damage or loss done to the institution or the person affected by the wrongdoing (e.g. referral to the Attorney General or the Department of Justice to recover money wrongfully taken; or referral of employees for counselling);

(b) Making institutional and procedural improvements to minimize the possibility of such wrongdoing occurring in the future (e.g. adopting new policies or passage of new legislation);

(c) Referral to other agencies or procedural mechanisms to deal with the type of wrongdoing that has been identified (e.g. referral to workplace or occupational health and safety agencies or to respectful workplace programs).

The appropriateness of any of these types of corrective actions in a given case would obviously depend on the type of wrongdoing at issue and the person or agency to whom the wrongdoing has been reported pursuant to s. 58(10) of the *Act.*

It is noteworthy, however, that although the Report did not spell out any specific appropriate action, it recommended that the *House of Assembly* consider the report's findings, noting that it was "within the legitimate sphere and scope of parliamentary privilege that the House now deliberate on this matter." Subsection 58(7) requires the Citizens' Representative to deliver his report to the Clerk of the House and the Speaker but it is for the Speaker (or the chair of the audit committee of the Management Commission, if the Speaker is implicated) to decide to whom the Report should be referred.[71] The referral choices are wide, depending on what type of corrective action may be contemplated. The House of Assembly is not specifically mentioned.

While the House might ultimately (but not necessarily, depending on the type of corrective action that might be engaged) become involved, the referral to the floor of the House for debate would normally have to come from some other mechanism, such as a government motion, than a direct referral by the Speaker.

The one circumstance that would invariably engage the House is where the corrective action being contemplated is the sanction of suspension or removal from office. Under s. 5.3 of the *Elections Act, 1991*, the House must be directly engaged

[71] *Act,* s. 58(10).

in this process. Although his Report specifically eschews making any recommendation as to specific sanctions, the fact that the Citizens' Representative did recommend that the House of Assembly (and not any other agency mentioned in s. 58(10)) consider the report and take corrective action, strongly suggests that the Citizens' Representative nevertheless did in fact have in mind that the circumstances were serious enough that either suspension or removal from office was something that should be considered.

My Terms of Reference also appear to be directed toward the suspension or removal of the Chief Electoral Officer from office as possible "corrective action." As noted previously, unlike *PIDWPA*, Part VI does not contain an express provision which contemplates specific disciplinary action, including dismissal, for wrongdoing as a possible result of the finding. Nevertheless, I believe that it remains within the purview of the Citizens' Representative's authority to recommend, if he thought the circumstances called for it, that the ultimate sanction of dismissal be considered. While it would have been more helpful if a clearer statement to that effect had been made in the Report, I will proceed, for the reasons expressed above, on the basis of drawing an inference from the recommendation that the House consider what corrective action should be taken, that the Report did in fact contemplate that the possibility of removal under s. 5.3 was engaged as a result of the findings in the Report.

In any event, s. 5.3 contains a mechanism for removal of the Chief Electoral Officer regardless of whether an investigation into wrongdoing is carried out under Part VI, and regardless of whether, even if an investigation is carried and a report is presented to the Speaker, wrongdoing is established or not (as long as "misconduct, cause or neglect of duty" is shown). It therefore remains open to the House and the Lieutenant-Governor in Council to consider whether removal from office would be appropriate action to take regardless of whether the Report could be said to have recommended it.

Consequently, I will assess the Citizens' Representative's Report against the backdrop that the findings of wrongdoing in the Report engage the possibility of dismissal of the Chief Electoral Officer.

ANALYSIS OF TERMS OF REFERENCE

The scope and approach to my review mandate is both guided and constrained by the Terms of Reference. My task is to *review* the Citizens' Representative's Report and not to conduct a *re-investigation.* I am to review the Report "based on the evidence and findings contained in it." It is therefore not open to me to reweigh the evidence and come to new conclusions in possible replacement of the Citizens' Representative's as to whether there was gross mismanagement evident in respect of any or all of the ten allegations singled out by him. What, then, is required of me?

Essentially, I have been asked to do three things:

(i) Conduct an *analysis* of the Report and the findings contained in it, identifying "any procedural, human resources or legal issues" arising from the Report;[72] and

(ii) Provide a *recommendation and opinion,* based on my analysis of the Report, as to whether suspension or removal from office of the Chief Electoral Officer under s. 5.3 of the *Elections Act, 1991* may be considered appropriate.[73]

(iii) Provide a *recommendation* as to whether any further investigations, proceedings or analyses are appropriate or desirable in the circumstances.[74]

The first two of these tasks are the most fundamental. The third would only arise if I had any concerns, following my analysis in (i), about the reliability of the Report for the purposes of its use as a basis of action in (ii).

I infer from the direction to identify any procedural, human resources or legal issues that the purpose of seeking an analysis of the Report is a desire to identify any concerns that might affect the usefulness of the Report as a platform for further action that might be taken by the House of Assembly and the Lieutenant-Governor in Council. In that sense, the requirements in (i) and (ii) are linked.

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72 Terms of Reference, 6(a).

73 Ibid., 6(b).

74 Ibid., 6(a) and 6(c).

A review is different from a re-investigation or even an appeal. It does not normally lead to the setting aside of the original determination and substitution of a new decision.

In the context of a review by a court (known as a *judicial* review) the focus is, in the vast majority of cases, on the reasonableness of the original determination and whether it is defensible as being within the parameters of the legal and factual constraints imposed by the legislative framework in which the decision maker is operating. If it is not, then the determination will, in most cases, be set aside and the matter remitted to the original decision maker to try again. Among the things that a court looks at in a judicial review are:

- Whether necessary findings of fact were made
- Whether the findings and conclusions that were made were supported by some form of plausible reasoning
- Whether the decision maker identified and received evidence from all appropriate sources
- Whether the decision maker formulated and applied proper, or at least reasonably supportable, legal tests and standards.

The legal principles applicable to the scope of the ability of a court on judicial review to interfere with and set aside administrative decisions have recently been restated and explained by the Supreme Court of Canada in a trilogy of decisions, the most pertinent for present purposes being *Canada (Minister of Citizenship and Immigration) v. Vavilov.*[75]

These considerations discussed in *Vavilov*, if found wanting, could lead to a conclusion that the decision is unreasonable and should therefore be set aside if the decision is not supportable as a reasonable conclusion within the applicable legal and factual constraints that apply to the process in question.

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[75] 2019 SCC 65, [2019] 4 SCR 653. The other two decisions are *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900 and *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66 (CanLII), [2019] 4 SCR 845.

A further consideration that a court on judicial review will deal with is whether the decision maker properly complied with his or her obligation of procedural fairness. If not, then usually that in itself will result in the decision being set aside.[76]

Unlike an appeal or a judicial review, the review contemplated by the Terms of Reference has no power to set aside the Citizens' Representative's Report or to remit the matter to him for a new investigation, hearing, analysis or decision. It is advisory only. Its purpose is different, too. Judicial review seeks to keep executive action within legal and factual parameters to ensure it is consistent with the rule of law and our constitutional order. My review, on the other hand, focuses on whether the Report, following a review analysis, can or should be relied on or used for other purposes, in particular, whether it can form the basis, at least in part, for decisions to be made regarding the application of s. 5.3 of the *Elections Act, 1991* relative to the Chief Electoral Officer's suspension or removal from office. This is something that the Report did not, and was not expected to, address.

While there is much in the *Vavilov* decision that is pertinent to my review, the approach to be taken cannot parallel it exactly. The *Vavilov* principles are predicated on the notion of deference to administrative decision making. This is based on the desire of the courts not to intrude unnecessarily into executive functions which the legislature has decided in its wisdom to delegate to an administrative decision maker rather than the courts. As a consequence of this approach, the whole idea of not interfering unless a decision can be characterized as being "unreasonable" (instead of applying a general standard of correctness) undergirds much of the law of judicial review.[77]

In respect of my review, on the other hand, there can be no concern about interfering with an administrative process by potentially setting aside the Citizens' Representative's findings. His Report and his 10 findings identifying gross mismanagement stand for what they are. Nothing I may say can affect that. I am not performing a rectification function. Rather, my review looks forward with a view to advising the Management Commission on whether the Report can be used and relied on

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[76] A breach of procedural fairness can, in exceptional cases, be disregarded if correcting the breach would not have any effect on the outcome of the case: *Chapman v. Canada (A.G.),* 2019 FC 975, citing *Mobil Oil Canada v. Canada-Newfoundland Offshore Petroleum Board,* [1994] 1 SCR 202.

[77] *Vavilov*, para. 26: "The central rationale for applying a deferential standard of review in administrative law has been a respect for the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute."

for a purpose not specifically contemplated by the legislative scheme under which the Citizens' Representative has functioned in reaching the conclusions he did: whether reliance can be placed on it for purposes related to a different statute, s. 5.3 of the *Elections Act, 1991*.

In this role, I see no impediment to my expressing a view about the concerns I might have regarding the reasoning and analysis in the Citizens' Representative's Report even if, had this been a *judicial* review, I would have had, as a matter of law, to defer to the decisions that the Citizens' Representative had made.

I conclude, therefore, that my advice to the Management Commission, based on my analysis of the Report, is not constrained by this aspect of the *Vavilov* analysis.

My review of the Report, based on my analysis of the applicable legal principles, the report's reasoning, and any procedural, human resource issues and other legal issues that are identified, as required by Term 6 (a) of the Terms of Reference, will be the subject of Part II of my report.

In Part III, I will address Term 6(b) of the Terms of Reference: the formulation of an opinion and recommendation as to whether, *based on the Report*, any action contemplated by s. 5.3 of the *Elections Act, 1991* (suspension or removal) may be appropriate.

I am not asked for a free-standing opinion as to whether the Chief Electoral Officer should or should not be removed from office. My opinion is to be based on the Citizens' Representative's Report. If, as a result of my analysis of the Report in Part II, I conclude that there are procedural, human resources, legal or possibly other issues that raise questions as to the reliability of the Report as a basis for s. 5.3 decision making, that will clearly affect any recommendation that I can make.

It is important to note that the test for wrongdoing applied in the Report ("gross mismanagement") is not the same as the test for removal or suspension under s. 5.3 ("misconduct, cause or neglect of duty"). It does not follow, therefore, that even if the Report's findings of gross mismanagement are deemed to be solid, supportable and reliable, the test for suspension or removal will necessarily be met. It will be necessary to pass the factual findings of the Report through the potentially different lens of "misconduct, cause or neglect of duty" in s. 5.3 before it can be said that the remedies of suspension or removal "may be considered appropriate."

I will therefore engage in a discussion of the meaning of "misconduct, cause and neglect of duty" and how it would be applicable to a statutory officer like the Chief Electoral Officer who has security of tenure. This discussion may still be of relevance even if my conclusion in Part II is that all or some of the Report should not be relied upon. It is certainly possible that, even if my opinion is that action under s. 5.3 is not appropriate based on the existing Report, consideration will have to be given as to whether other investigations, proceedings and analyses should be undertaken before any remedy is considered appropriate. A discussion of the legal principles involved in determining the meaning of s. 5.3 may be of assistance to any further proceedings, investigations or analyses or to the House of Assembly or the Lieutenant-Governor in Council in their subsequent dealings with this matter.

It is also worth emphasizing that the requirement under s. 6(b) of the Terms of Reference is to express an *opinion* as to whether the s. 5.3 remedies *may* be considered appropriate. It is not a final adjudication. Rather, it involves an opinion as to whether the Report is *capable* of supporting a conclusion that suspension or removal may be appropriate.

The final decision on this issue is for the House of Assembly and the Lieutenant-Governor in Council to make. The decision is a two-fold one: (i) a resolution of the House calling for suspension or removal; and (ii) if so, a decision to that effect by the Lieutenant-Governor in Council. It is a substantive statutory duty which cannot be delegated to others. It must be independently and fairly arrived at. The process is not a rubber stamp of anything I might say.

Although I am providing an analysis of the Report, highlighting any concerns I have about it, and although I am providing an interpretation of the scope of the application of s. 5.3 and whether, and if so, how it should, in my opinion, be applied, the House and Lieutenant-Governor in Council may accept or reject all or part of it and make their own independent decision.

Although the House operates under the protective veil of parliamentary privilege which shields its deliberations from judicial scrutiny in many respects,[78] the House nevertheless has a duty to proceed fairly and lawfully, as I discuss below. As I have been asked for my opinion, I consider it appropriate to provide some suggestions as to how the decision-making process under s. 5.3 can fairly and properly

[78] See *R. v. Vaid*, 2005 SCC 30.

be accomplished, together with suggestions as to how any further investigations, proceedings or analyses (assuming some may be needed) could be conducted.

PROCEDURE FOR THIS REVIEW

INITIAL GUIDING DOCUMENTS

Soon after receiving the Terms of Reference, I drew up three documents to help guide and structure the review. The first, called *Approach to the Mandate*, provided a preliminary and tentative analysis of the scope of and proper approach to the review mandate. This gave an idea to the Chief Electoral Officer and the Citizens' Representative of my thinking. I asked for their submissions on my proposed approach. I received nothing of substance from either. The approach I ultimately settled on is described in this report.

The second document was entitled *Procedural Guidelines*. It outlined how the Citizens' Representative and Chief Electoral Officer could participate in the review, what information I would consider, and how I could seek comment or information from other individuals. The *Procedural Guidelines* aimed to encourage free, informal, and frequent discussion to allow a thorough and fair discussion of the issues within the short timeframe. A copy of the *Procedural Guidelines* is found in Appendix B.

The third document was a preliminary *Issue List*, containing a list of potential issues. This document was intended to help assist counsel for the Citizens' Representative and the Chief Electoral Officer.

The Citizens' Representative and the Chief Electoral Officer received copies of the *Approach to the Mandate*, *Procedural Guidelines*, and *Issue List* on July 17, 2022.

SCOPE OF CITIZENS' REPRESENTATIVE'S PARTICIPATION

The Terms of Reference raised one urgent issue: what was the appropriate role for the Citizens' Representative in the review? The proper role of an administrative tribunal in a judicial review has been the subject of extensive commentary, such as

the current leading case, *Ontario (Energy Board) v. Ontario Power Generation Inc.*[79]

Soon after the Terms of Reference were issued, counsel for both the Citizens' Representative and Chief Electoral Officer were invited to comment on the appropriate role for the Citizens' Representative. The parties made very helpful submissions.

On July 20 I ruled that the Citizens' Representative could participate broadly in the Review. However, he could not "bootstrap" or raise new arguments to support his findings. Nor could he make submissions on the interpretation of the *Elections Act, 1991*; about the level of procedural fairness the Chief Electoral Officer could expect under s. 5.3 of the *Elections Act, 1991*; or about whether to recommend the suspension or removal of the Chief Electoral Officer. My ruling can be found in the Supporting Documents.

FACTUAL INFORMATION AND THE RECORD

The *Procedural Guidelines* indicate that I would rely solely on factual information

1. from the Citizens' Representative's Report;[80]
2. from documentary exhibits, which would be accepted if there was some reasonably arguable basis for concluding they may be relevant to the Review or the Terms of Reference;[81] or
3. that is so notorious or generally accepted or so capable of immediate and accurate demonstration as not to be subject to reasonable dispute for the purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the issue in question.[82]

79 2015 SCC 44, paras. 41-72

80 Procedural Guidelines, ss. 11, 15

81 Ibid., ss. 11, 15–17.

82 Ibid., s. 15.

On July 22, the Citizens' Representative and the Chief Electoral Officer were asked to provide a significant range of information about the Citizens' Representative's investigation, the disclosure the Citizens' Representative provided the Chief Electoral Officer, and whether any other relevant information ought to be considered. The parties again responded with helpful submissions.

On July 25 I issued a ruling indicating that, in principle, the Citizens' Representative's report must be read in the context of the record of the Citizens' Representative's investigation, including recordings or summaries of witness interviews or documents collected. Information about procedural fairness issues would also be relevant, but not information about a potential leak of the Citizens' Representative report or *Hansard* statements about the Report. My ruling can be found in the Supporting Documents.

One issue the July 25 ruling left unresolved was whether the Chief Electoral Officer could introduce information from the discoveries in the Controverted Elections Cases. Counsel for the Chief Electoral Officer raised this early in the process, and I indicated that the Chief Electoral Officer would need a Court order relieving him of the application of the implied undertaking rule, which limits the use of discovery evidence. He applied for this relief on July 27 and received it on August 2. Eventually, the discovery evidence was marked as an exhibit.

The July 25 ruling also left another significant issue outstanding: the confidentiality of the Citizens' Representative's investigation. The Citizens' Representative took a firm stance that the confidentiality of disclosures was integral to the operation of part VI of *House of Assembly Accountability, Integrity and Administration Act*. He felt his duty to protect witnesses' confidentiality would not allow him to disclose summaries or recordings of witnesses' statements without an undertaking that I would not disclose them to anyone (including the Chief Electoral Officer, the Management Commission, the House of Assembly and the Lieutenant-Governor in Council) except my counsel.

After further submissions from both counsel, including correspondence, I concluded that I could not fairly accept information subject to these conditions. Consequently, I have not had access to any of the actual information provided to the Citizens' Representative by whistleblowers and witnesses in support of the allegations that were made. Instead, I was limited to summaries of that evidence prepared by

the Citizens' Representative (the accuracy of which has not been tested) that were referred to in his Report.

This is a significant limitation. As I noted in my second Ruling, if this were a judicial review, the record for the purposes of the review would invariably include not only the written decision itself, but also the oral evidence obtained, the documents produced and consulted and the submissions made in respect of them. While I appreciate the laudable objective of the Citizens' Representative to protect the anonymity of whistleblowers and the confidentiality of what they and other witnesses said, in order to further the policy of preventing the possibility of reprisals which is an integral part of the whistleblower program, I must respectfully disagree with him that he has, as he submitted, an absolute duty not to disclose such information.

Section 56 of the *House of Assembly Accountability, Integrity and Administration Act* provides that the identity of a whistleblower shall be kept confidential "to the extent permitted by law and consistent with the need to conduct a proper investigation." It does not (in contradistinction to s. 42.8 of the Act which deals with investigations of harassment in relation to House members) apply to witnesses who are not also whistleblowers. As well, it must be read in context with s. 58(4) which requires that procedural fairness be observed during the investigation towards, amongst others, the Chief Electoral Officer. As will be explained during my later discussion regarding the application of the principles of procedural fairness,[83] this requirement tempers the degree to which the Citizens' Representative could keep the sound recordings of the evidence from the Chief Electoral Officer and, by extension, from me during this review process.

In initial discussions with counsel, I indicated that I would be willing to meet personally with the Citizens' Representative and the Chief Electoral Officer and hear their perspectives. The Chief Electoral Officer indicated through counsel that he would be interested in a meeting, and on August 18 I met him along with our counsel. Ultimately, I concluded that the interview did not reveal any significant new information calling for a new exhibit or any significant new legal issue.

Ultimately, eleven exhibits were added to the record and may be found in the Supporting Materials:

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[83] See "Procedural Fairness Issues", below starting at page 61.

Exhibit 1: Information and an August 1 affidavit from the Citizens' Representative about his investigative procedure

Exhibit 2: A May 31, 2021 letter from the CEO's counsel to the Citizens' Representative

Exhibit 3: An August 9, 2022 affidavit from the Citizens' Representative

Exhibit 4: An affidavit from a senior official in the Office of the Chief Electoral Officer

Exhibit 5: A sound recording of the Citizens' Representative's 2021 interview with the Chief Electoral Officer

Exhibit 6: A transcript of the discovery of two former elections officials in the Controverted Elections Cases

Exhibit 7: An August 18, 2022 affidavit from the Chief Electoral Officer

Exhibit 8: A January 6, 2021 letter from the Chief Electoral Officer to the Premier

Exhibit 9: A February 11, 2021 letter from the Chief Electoral Officer to all party leaders

Exhibit 10: Information from the Citizens' Representative about witness confidentiality.

Exhibit 11: The Chief Electoral Officer's CV.

Exhibit 12: August 21, 2020 letter from the Chief Electoral Officer to the Minister of Education

PARTICIPATION BY THE LEGISLATIVE AND EXECUTIVE BRANCHES

The Terms of Reference raise questions about the procedure and test for dismissal of the Chief Electoral Officer as a statutory officer. Because these questions could affect the interests of both the legislative and executive branches, after consulting with counsel, the Clerk of the House of Assembly and the Clerk of the Executive Council were asked on August 2 for submissions on the test and procedure for removal.

On August 10, the Clerk of the Executive Council declined to provide substantive answers to my questions "out of respect for an investigative and review process which is ongoing and in which the executive branch is not a participant". The Clerk of the House of Assembly, on the other hand, provided thorough and helpful submissions. These materials may be found in the Supporting Documents.

TIMELINES

The original *Procedural Guidelines* set an ambitious timeframe, with both the Citizens' Representative and Chief Electoral Officer expected to provide final submissions by August 15, 2022. As the Review progressed, the deadline for providing submissions was moved to August 22, with replies to be received by August 25.

I wish to express my appreciation to counsel for both the Citizens' Representative and the Chief Electoral Officer for their good-humoured cooperation and their willingness to respond to the tight timeframes that were imposed to ensure my review could be completed on time.

I will now move, in Part II of my report, to an analysis of the Citizens' Representative's Report in accordance with item 6(a) of the Terms of Reference.

PART II: ANALYSIS OF THE CITIZENS' REPRESENTATIVE'S REPORT

ANALYTICAL APPROACH

In addition to providing a general analysis of the findings in respect of the 10 allegations where gross mismanagement was found to exist, I must also specifically identify "any procedural, human resources or legal issues" that in my opinion need to be addressed.[84]

In respect of procedural issues, that will involve primarily an analysis of matters pertaining to the question of whether the proper level of procedural fairness was provided to the parties, in particular, to the Chief Electoral Officer. The duty to provide procedural fairness in the current case arises from s. 58(4) of the *House of Assembly Accountability, Integrity and Administration Act* as well as from common law principles. The *Act's* provision must be interpreted and applied in a contextual way taking into account the structure of the whistleblower scheme in Part VI as a whole.

With regard to human resources issues, consideration will have to be given to at least two matters: (i) whether the approach of the Citizens' Representative to whistleblower complaints could or should have been affected by the presence of other human resource, managerial or policy making processes where such issues were raised in the complaints that were made; and (ii) the degree to which human resources problems must exist before their presence could rise to the level of "gross mismanagement", or whether the existence of any such matters could in appropriate circumstances, in themselves, be sufficient to constitute wrongdoing.

With respect to legal issues, a number of matters are engaged: (i) the interpretation and application of the concept of "wrongdoing" and in particular, "gross mismanagement," within the definition in s. 54(1)(e); (ii) the scope and role of the threshold for investigation contained in s. 58(5); and (iii) the scope of the ability of the Citizens' Representative to make recommendations under s. 58(7) and (10), especially as to the specific types of corrective action that could or should be taken if wrongdoing is found.

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84 Terms of Reference, 6(a).

Some of the discussion of these matters will have application to all of the 10 findings made by the Citizens' Representative and in some other cases only to some of them. Some of the discussion will also be relevant to portions of Part III.

I propose to discuss some of the legal and procedural issues first, as they will provide a context for analysis of the individual findings to come.

As I noted in the discussion of my Terms of Reference in Part I, in conducting my general analysis of the Report I will generally, but not entirely, follow the analytical framework for judicial review on the basis of reasonableness that was described in the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov.*

As *Vavilov* reminds us, the freedom of any decision maker, including the Citizens' Representative, to make a decision is subject to legal constraints including internal rationality, the language and scope of the statutory scheme under which the decision maker is operating, and the principles of statutory interpretation.[85] The Terms of Reference ask broadly for "an analysis of the Report." This invites an analysis of the legal constraints binding the Citizens' Representative.

In doing so, I will have to examine the reasoning processes used by the Citizens' Representative in reaching the 10 findings that he made, to see whether, to use *Vavilov's* phrase, the reasoning "adds up."[86] *Vavilov* is particularly helpful in its discussion of how to determine whether a line of analysis within a decision maker's reasons could lead from the evidence to the conclusion arrived at.

As well, it is necessary to consider the scope of the governing statutory scheme as a point of reference to determine whether the Report complied with the overall rationale and purview of the statutory scheme under which the findings were made. It is also relevant to assist in interpreting relevant statutory language, particularly the notion of gross mismanagement. I will discuss it further in that context.

Further, the principles of statutory interpretation, particularly in respect of the meaning of gross mismanagement, must be applied properly by the decision maker in accordance the modern approach to interpretation which places emphasis on not

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85 Paras. 102–104, 108–110, 115–124.

86 Para. 104.

only text but also context and purpose.[87] *Vavilov* emphasizes, however, that in conducting a reasonableness analysis, the reviewer should not undertake a *de novo* analysis of the question or ask itself what the "correct decision" would have been.[88] Instead, applying the degree of deference to the original decision that a reasonableness analysis requires, the question is whether the decision maker adopted an interpretation that can be defended as reasonable, considering the decision as a whole, the reasons and the outcome. The task of the decision maker is to interpret the statutory provision in question in a manner *consistent* with the text, context and purpose, applying its own insight into the statutory scheme at issue,[89] not necessarily to find the "best" interpretation.

As discussed earlier, I do not consider the scope of my review to be constrained by *this* aspect of the *Vavilov* analysis.[90] Unlike a *judicial* review, which is directed to the possibility of setting aside a decision, my focus is on the potential use of the Report as a basis for further action. I see no impediment under the Terms of Reference to my expressing my considered view as to what is the proper statutory meaning of applicable statutory provisions. It is not an adjudication. It is the expression of an opinion which the body to whom my report is directed is free to accept or reject. Furthermore, an analysis might provide some guidance for future application.

In so doing, however, I will also try to express an opinion as to whether, assuming my interpretation differs from that of the Citizens' Representative, his interpretation is nevertheless *consistent* with the text, context and purpose of the whistleblower scheme. This might be helpful to those receiving my report if they disagreed with my interpretation but still wanted to know whether the Citizens' Representative's interpretation was a reasonable one that could be relied on as an alternative.

WRONGDOING – GROSS MISMANAGEMENT

Gross mismanagement is the only subset of wrongdoing that is relevant to this review. It is one of the "factual and legal constraints," to use words in *Vavilov*, to

87 *Archean Resources Ltd. v. Newfoundland (Minister of Finance and Attorney General)*, 2002 NFCA 43; *Vavilov,* para 118.

88 *Vavilov*, para. 116.

89 Para. 121.

90 See above, p. 35.

determine the scope of the authority of the Citizens' Representative to investigate and make determinations relating to the complaints received. In fact, the scope of "wrongdoing" (and by extension wrongdoing based on a finding of gross mismanagement) is a fundamental limit on the Citizen's Representative's mandate under Part VI.

Gross mismanagement is not a stand-alone ground for finding wrongdoing. Under s. 54(1)(e), it is tied to violation or suspected violation of a code of conduct (in this case the *Code of Conduct for Employees of the House of Assembly Service).* The scope of the term gross mismanagement therefore also indirectly determines the nature and severity of any *Code* violation that will justify a finding of wrongdoing. It is an important concept.

For convenience, I will repeat the relevant statutory provision here:

> 54(1) In this Part
>
> …
>
> (e) "wrongdoing" with respect to a member, the speaker, an officer of the House of Assembly and a person employed in the House of Assembly service and the statutory offices, means
>
> …
>
> (ii) gross mismanagement, including of public money under the stewardship of the commission, in violation of a code of conduct[.]

In accordance with the approach to statutory interpretation in this province, as mandated by *Archean Resources,* one must look to the text of the statute, its purpose and the broader legislative context, including legislative history and the mischief to which the legislation was directed, and then try to assimilate and reconcile those individual indicators of meaning to come up with the "true meaning" that "best ensures the attainment of the objects of the Act", as mandated by s. 16 of the *Interpretation Act.*[91]

[91] RSNL 1990, c. I-19.

First, as to the text. The term gross mismanagement can be divided into three parts: the suffix "-management"; the prefix "mis-"; and the modifier "gross". Each requires consideration.

The suffix "management" refers to a process of organizing, directing, planning and supervising people and other resources relating to a project or organization to achieve a goal or objective.[92] It is a process, not a single action. How management is exercised depends on assumptions about human behavior. It can involve different management styles and approaches. Much has been written about which "styles" are more effective and should be emulated.[93] Some traditional styles were based on the assumption that employees have an inherent dislike of work and will avoid it if they can; consequently, they have to be motivated by control and threats of discipline to get them to use sufficient effort to achieve organizational objectives. Other styles are less authoritarian. They are, instead, based on assumptions that work can be in itself be a satisfying endeavour to which employees can have commitment and that motivation can be achieved in a variety of more subtle ways. Within a range of styles, however, it cannot be said that one style is necessarily wrong and another right in all circumstances.

*Mis*management cannot therefore simply amount to the adoption of one management style in a recognized range of styles, even if one of those other styles were considered superior. For the purpose of determining what constitutes gross mismanagement, it is not appropriate, therefore, to criticize someone for failing to manage on the basis of poor management just because they could have done something better or acted in another way. The bar is higher than this; the managerial "style" must be one that is works counter to the basic concept of management as a process of organizing and directing towards a goal, as referred to above, and be seen as having an evident detrimental effect on the institution as a whole.

The prefix "mis-" involves the negation of, or detraction from, the suffix to which it is attached. It means "wrongly, badly or unsuitably," expressing a negative

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92 Catherine Soanes and Sara Hawker (eds.), *Compact Oxford English Dictionary of Current English* 3d ed. Rev. (Oxford University Press, 2008). "'Management,' noun, process of managing people or things; 'Manage,' verb, (i) be in charge of people or an organization; (ii) control the use of money, time or other resources."

93 See e.g. Douglas McGregor, *The Human Side of Enterprise* (New York: McGraw-Hill Book Company, Inc., 1960)

connotation.[94] Its presence in the word "mismanagement" suggests that the management under consideration must not be just poorly or less than perfectly done but must be wrongly or unsuitably done. It must be a negation or contradiction of any reasonable management standards or antithetical to recognized management practices.

For the purpose of Part VI, however, even if there is "mismanagement," it must amount to "gross" mismanagement before it will attract the appellation "wrongdoing." "Gross" connotes notions of being unattractively large, obvious and unacceptable.[95] In other legal contexts, such as in gross negligence, it is used in the context of a "marked departure" from acceptable standards or reckless disregard for them. It could be said that there is an aspect of moral blameworthiness associated with the behavior. That raises the bar even further.

The word "wrongdoing," of which the term gross mismanagement forms a subset, itself connotes individual fault rather than mere inadvertent failure to meet performance standards. While a word in a statutory definition can be stretched to include more than its ordinary meaning, there is no indication of this here. In fact, the other forms of wrongdoing mentioned in the definition are offences, statutory breaches and knowingly counselling other wrongdoing.[96] In my view, the use of the word wrongdoing gives meaning to the use of gross mismanagement in the definition.

Turning to purpose and context, I state later that the broad purpose of the whistleblower legislation in this province was to encourage the disclosure of wrongdoing in the public service that might otherwise remain hidden, to screen out unfounded allegations of those of a malicious or vindictive nature, and to provide protection against reprisals for those who make disclosures in good faith.[97] Under Part VI, public interest disclosures can only be made against named individual wrongdoers, not against institutions.[98] The emphasis is on individual responsibility.

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94 Soanes and Hawker (eds), *Compact Oxford English Dictionary*: "1 wrongly, badly or unsuitably; 2 expressing a negative sense."

95 *Ibid*. "1. Unattractively large. 2 very obvious. 3 very unpleasant. 4 rude or vulgar."

96 S. 54(1)(e)(i) and (iv).

97 See "Fairness, Confidentiality, and the Whistleblower Regime," below, starting at p. 72.

98 S. 55(2)(b).

As previously noted, the enactment of Part VI was the result of recommendations in the *Constituency Allowance Report* which addressed the need for reforms within the legislative branch of government to counteract financial mismanagement relative to constituency allowances and other spending. Whistleblower legislation was one recommended mechanism to address this problem. In the words of the Report, it is designed:

> to encourage persons within an organization to report instances of behavior of others in the organization that is considered *improper, unethical and wrong.*[99]

(Emphasis added.)

This language, with its focus on impropriety, lack of rectitude and wrong behavior suggests that what was being addressed by the Report's recommendations was individual fault or at least behavior to which one could attribute individual responsibility, not simply institutional failings with which the person accused had been associated and for which the individual, as head of the organization, had general overall managerial responsibility. It was dealing with serious, fault-laden behavior that violated criminal, ethical or other accepted standards. Indeed, the specific actions which gave rise to the appointment of the Constituency Allowance Review Commission involved actions of individual responsibility: individuals were charged and ultimately convicted of criminal offences relating to their improper spending practices.

Although the focus of the *Constituency Allowance Report* was on financial irregularity, it cannot be said that was the only focus. The language of the whistleblower legislation it recommended was broader in coverage than this. It referred to "gross mismanagement, *including of public money*… [Emphasis added.][100] This language found its way into Part VI. Gross mismanagement as a form of wrongdoing was not therefore to be limited to *financial* mismanagement.

What is clear from the Report and the resulting recommendations, however, is that there was a focus on individual fault or responsibility for serious, wrongful or improper actions that might otherwise remain hidden, as being the mischief to which the whistleblower recommendations were addressed.

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99 P. 5-47.

100 Chapter 13, Draft Act, Schedule I, s. 54(e).

At a higher level, the concept of wrongdoing is also informed by basic legal norms that wrongful behavior must be voluntary and must involve either subjective fault or a significant departure from community standards. These norms have ancient roots and are deeply embedded within the common law tradition and Canada's constitutional order.[101]

Although there have been a number of judicial and tribunal decisions in other jurisdictions which have discussed or referred to gross mismanagement in the context of whistleblower legislation (albeit with slightly different wording in their definition of wrongdoing), few were called on to formulate a comprehensive definition. Perhaps that is understandable, since "gross", like beauty, to some extent exists in the eye of the beholder. There will likely not be agreement as to what the outer parameters are.

That is not to say, however, that it is not useful to try to isolate essential core characteristics of the concept, so as to limit the possibility of a too broad or uncontrollable application.

In *Burclau v. Canada (Attorney General),*[102] for example, which dealt with the federal *Public Servants Disclosure Protection Act,*[103] it was argued that the concept of wrongdoing (which also included the notion of "contravention of any Act of Parliament or of the legislature of a province") encompassed any administrative error or contravention of a statute or policy which may be subject to judicial review or appeal. Relying in part on Parliamentary debates and evidence before the House of Commons Standing Committee on Government Operations and Estimates, LeBlanc JA, writing for the Federal Court of Appeal, stated: "I very much doubt Parliament intended reviewable or appealable errors to be 'wrongdoing'"[104] and that "Parliament intended, in adopting the Act, to address serious wrongdoings, not any type of wrongdoing."[105] He also referred with approval to comments in the Parliamentary record to the effect that expectations under the whistleblower regime

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101 See *Re B.C. Motor Vehicle Act,* [1985] 2 SCR 486; *R. v. Brown*, 2022 SCC 18.

102 2022 FCA 10.

103 SC 2005, c. 46. In s. 8, the Act defines wrongdoing to include "gross mismanagement in the public sector." This is arguably a broader definition than that in Part VI, since gross mismanagement is not tied to violation of a code of conduct. In fact, a separate subsection refers to " a serious breach of a code of conduct."

104 *Burlacu,* para 27.

105 Para 36.

ought not to be to somehow solve "human resources complaints, or general complaints or matters related to policy directions or decisions of government."[106]

In arriving at this conclusion that wrongdoing had to be "serious" and that it did not encompass, without more, contravention of statutory or policy requirements which were nevertheless subject to being set aside on judicial review or appeal, the Court relied on the presence of the term "gross mismanagement" in the definition of wrongdoing. LeBlanc JA referred to attempts, while the legislation was in committee, to remove the qualifier "gross" from the language. He commented:

> [35] … those attempts failed as it was felt that the absence of qualifiers would 'make it difficult to know where to draw the line to get to actual wrongdoing' as 'some guidance' was required as to where to cross that line…
>
> [36] … According to paragraph 8(c), a case of mismanagement in the public sector is only a 'wrongdoing' if it amounts to 'gross mismanagement' …

It is apparent that his view was that the modifier "gross" was intended to limit the type of activity that could constitute wrongdoing by, at the very least, requiring it to be regarded as "serious" and not something that is simply administrative or procedural error.

Some tribunal decisions in other jurisdictions also take the same approach. In *Ois v. Ontario (Minister of Community Safety and Correctional Services)*[107] Vice Chair O'Neil observed:

> [34] The definition of wrongdoing in Part VI [of the *Public Service of Ontario Act*] makes clear that it is not aimed at all behavior which is "wrong" in the sense of not being done correctly. The wrongdoing of which Part VI is speaking is at the high level of a breach of a statute, something creating a grave and unreasonable danger or constituting gross mismanagement in the work of the public service.

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106 Para 30.

107 2014 CanLII 76835 (Ontario Public Service Grievance Board).

A reconciliation of all of these different indicators of meaning leads in one direction, to a conclusion that gross mismanagement must have the following essential characteristics:

(a) It must relate to an individual's own action or inaction, not institutional failings with which the person being accused may have been associated;

(b) It requires an element of individual fault, either subjectively or through a marked departure from accepted standards of individual behavior relative to the performance of management functions.

In interpreting the term gross mismanagement and applying it to given factual circumstances, therefore, I believe the following approach should be followed:

1. A finding of gross mismanagement must identify voluntary individual actions or inaction departing markedly from the standard of a reasonable public servant;

2. Such a finding must also conclude that the individual knew, was reckless of, or was wilfully blind to the context, risks, or consequences of the action or inaction that constitute the marked departure; and

3. The focus at all times must remain on individual wrongdoing, not institutional outcomes or failures.

4. Evidence of outcomes or institutional failures may still be relevant and capable of constituting gross mismanagement, however, if it can be concluded that sustained and inexplicable inaction by the person accused, in the face of known institutional failures, occurred.

With regard to the last point, it is important to note that it is not the institutional dysfunction or chaos *itself* that constitutes the gross mismanagement; rather it is the *individual managerial actions or inaction* contributing to the institutional dysfunction that makes the case. In other words, presiding over a poorly managed entity that fails to be functioning would not be enough to constitute gross mismanagement, but a complete disregard of responsibilities or derogation from or abandonment of duties (e.g. Nero fiddling while Rome burns) could be, because it is the individual behavior that substantially allows the institutional dysfunction to occur.

I would also observe that, while Part VI does not expressly say this, I believe it is a fair inference from the scheme of the legislation, with its emphasis on "public interest" disclosures, that the allegations must involve more than a complaint about a personal dispute or individual grievance seeking a remedy in favour of the person making the disclosure. There must be an element that affects the broader public interest, such as where the institutional integrity of part of the public service may be imperilled.

Thus, whistleblower processes should not generally be used to investigate complaints of harassment or intimidation between two individuals that could also be resolved under other respectful workplace procedures. However, they may be appropriate if a person in authority repeatedly harassed multiple employees or systematically facilitated or turned a blind eye to a culture of harassment, thereby creating an environment that was inimical to proper organization and management of the institution, and seriously compromised its objectives. The difference is not the seriousness of the harassment, but whether it has an institutional or public interest dimension transcending respectful workplace policies and engaging the whistleblower regime.

As noted previously, the only form of gross mismanagement that can attract the label of wrongdoing in Part VI is gross mismanagement that involves "violation or suspected violation of a code of conduct." The departure from accepted standards that is inherent in the notion of gross mismanagement must therefore be found in a *Code* violation. In my previous discussion about the applicable *Code of Conduct*[108] I pointed out that the language of the applicable code is couched in some cases in aspirational language. The more generalized the language, the more difficult it will

[108] See "Code of Conduct," above, starting at p. 9.

be to identify a precise standard that can be used against which the action or inaction of the person accused can be judged to amount to gross mismanagement. If it is *gross* mismanagement, it is incumbent on the decision maker to state a rational reason why failure to rise to the aspirational standard in question constitutes that level of mismanagement, as opposed to being just an inadequate or poor response or could have been done better. What was it that elevated it to that higher level?

The Citizens' Representative took a somewhat different approach to the notion of gross mismanagement in his Report. He asserted that the fact that the term was not defined in the legislation was "helpful" because it permitted the investigator "to adapt the concept to a wide variety of circumstances and situations that are fluid and unique."[109] While recognizing that the lack of definition did not give him a "blank cheque," he did not attempt to isolate any core characteristics of the term and, instead, took "guidance" from the Office of the Public Sector Integrity Commissioner of Canada which, in applying a different but similar definition of wrongdoing, adopted an unweighted multi-factor approach.

The Citizens' Representative then set out a "nonexclusive" list of factors that in his view would "help" in determining whether gross mismanagement occurred:

- Matters of significant importance
- Serious errors that are not debatable among reasonable people
- More than trivial wrongdoing or negligence
- Management action or inaction that creates a substantial risk of significant adverse impact upon the ability of an organization, office or unit to carry out its mandate
- Management action or inaction that poses a significant threat to public confidence in the integrity of the public service, and that does not only concern a personal matter, such as individual harassment complaints or individual workplace grievances
- The deliberate nature of the wrongdoing
- The systemic nature of the wrongdoing

[109] Report at p. 29, available in the Supporting Materials, Item 4.1.

These factors do emphasize matters that overlap the concept I have recommended above. Words such as "significant importance," "serious errors," and "substantial risk" emphasize that the action or inaction has to be more than "trivial." However, the list is "non-exclusive" and is not linked in any way to the requirement that there must be a departure from a recognized standard, in this case, the *Code of Conduct* (something that was not a requirement under the federal legislation which the Public Sector Integrity Commissioner of Canada was required to apply). Nor does the list implicitly suggest a standard or principle for identifying gross mismanagement.

The concern I have about the use of a multi-factor list, without more, is that it is impossible to determine what weight to give to the application of each factor, whether some factors are generally to be regarded as more important (or essential) than others or could even be disregarded, and whether other circumstances not within the list and without the same characteristics can be relied on in their place. It is difficult to determine, even approximately, the outer parameters of the concept.[110]

Certainly, the fact that the legislation is being applied by a respected public officer like the Citizens' Representative who has experience in investigating matters of this nature, is not to be discounted. However, it is not unreasonable to expect that in applying the term gross mismanagement, the resulting analysis and decision should, at the least, provide useful guidance on what kinds of conduct are or are not gross mismanagement, whether conveyed through concepts, categories or core characteristics.

In saying this, I recognize that the multi-factor approach is adopted and applied by many other jurisdictions across Canada (albeit with slightly different language in their definition of wrongdoing). It is obvious that these other jurisdictions have also struggled with how to get a handle on the standard of gross mismanagement. I cannot say that this approach is wrong or completely inappropriate. Nevertheless, I do believe that an approach that tries to identify essential core characteristics of the term is a better approach.

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[110] In a submission made to me by counsel for the Citizens' Representative, he stressed the Citizens' Representative's background and extensive experience in conducting administrative investigations and asserted that "[t]hese facts support the presumption that the House can rely upon his findings."

That said, because I cannot say that the multi-factor approach adopted by the Citizens' Representative is completely inappropriate or is inconsistent with the text, context and purpose of the whistleblower scheme in Part VI. Consequently, I will, where appropriate, review the individual findings in the Report against the essential core approach I have proposed and also against the multi-factor approach adopted by the Citizens' Representative.

THRESHOLD FOR INVESTIGATION

In Part I of this report, I mentioned the fact that one of the preliminary questions the Citizens' Representative should ask himself before embarking on an investigation of a whistleblower disclosure is whether he should exercise his discretion under s. 58(5) of the *House of Assembly Accountability, Integrity and Administration Act* to decline to investigate because, amongst other things, the allegations are frivolous, vexatious or not made in good faith or because of "another valid reason" for not investigating.

The Citizens' Representative has a wide discretion as to whether to decline to investigate in a given case. The bar for declining an investigation on the basis of the disclosure being frivolous or vexatious is very low. Further, he does not have to search for badges of good faith with respect to every disclosure that comes in the door. He is entitled to move forward if there is nothing that raises an obvious question as to appropriateness.

In the current case, the Citizens' Representative did not decline to exercise his discretion not to investigate.

In the submissions made to me, it was suggested on behalf of the Chief Electoral Officer that the fact that persons providing evidence in support of the court applications in the controverted elections litigation were also whistleblowers raised questions as to whether they were acting for an ulterior or political motive and were therefore not acting in good faith. In September of 2021, counsel for the Chief Electoral Officer wrote the Citizens' Representative indicating that counsel for one of parties in the litigation had said one of the whistleblowers had communicated with him and that there appeared to be cooperation between them. He inquired about confidentiality arrangements that existed between the Citizens' Representa-

tive and the whistleblowers and suggested that this raised questions about collusion, bad faith and procedural fairness.[111] The Citizens' Representative replied and advised that witnesses had been advised to keep their evidence to him confidential and that he had not discerned any bad faith on the part of the witnesses.

His Report did not explain why he declined to investigate on this basis. Nevertheless, I am satisfied that it was not unreasonable for him, without more than the suspicion that was raised (but not confirmed by his own observations), to decline to exercise his discretion not to investigate further. The fact that a whistleblower is participating as a potential witness in separate litigation is not, without more, suggestive of impropriety.

Another issue that arose during my review raised the question as to whether the Citizens' Representative should have exercised his discretion to decline to investigate the disclosures relating to harassment and bullying because they were more properly dealt with under respectful workplace policies. In other words, there was "another valid reason" for not investigating, under s. 58(5)(c) of the *Act.*

The general view in many jurisdictions is that public interest disclosure legislation is not intended to address human resource issues, for example, matters that involve bullying and harassment which often can be addressed and remedied under other legislative schemes or government policies. The decision in *Burlacu* supports this view.[112] It also appears to be the view of the investigatory authorities under whistleblower legislation in some other jurisdictions. For example, the Public Sector Integrity Commissioner of Canada asserts in its multi-factor approach that gross mismanagement must "not only concern a personal matter, such as individual harassment complaints or individual workplace grievances."[113] As noted, the federal Commissioner's list was adopted by the Citizens' Representative in his Report, including the statement excluding personal matters.

I agree with these views but with several caveats. First, I note the similar approach taken in the United Kingdom. On its website under the heading "Complaints that do not count as Whistleblowing" the following appears:

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111 See Report, Volume 2, Appendix 3, available in the Supporting Materials, Item 4.2.

112 *Burlacu*, para 30.

113 Public Sector Integrity Commissioner of Canada website, www.psic-ispc.gc.ca (accessed August 31, 2022).

> Personal grievances (for example bullying, harassment, discrimination) are not covered by whistleblowing law *unless your particular case is in the public interest.*

(Emphasis added.)

The United Kingdom position recognizes that if a personal grievance is of such a nature that it implicates the wider public interest, it may be the proper subject of a whistleblowing complaint. In the terminology within Part VI, that would mean that if a bullying, harassment or discrimination complaint was such that it engaged not only the possibility of a personal remedy for the person making the complaint but suggested the possibility of "corrective action" at an institutional level, or implicated the broader public interest at a policy level, it would be within the Citizens' Representative's purview to investigate and find wrongdoing, provided, following his investigation, the personal complaint, together with its implications for the public interest, constituted gross mismanagement. I agree with this view.

A second caveat relates to complaints that, though raising issues of bullying, harassment or discrimination, involve action directed at, not the whistleblower, but against someone else identified by the whistleblower. In other words, the person directly affected has chosen to remain silent. Depending on the seriousness and frequency of the actions alleged and the willingness of the actual victim to participate in the investigation, this could engage a public interest aspect of the disclosure, since a personal remedy is not being sought by the whistleblower and it may engage institutional-wide issues that could theoretically amount to gross mismanagement, as discussed previously.

It cannot be stated categorically, therefore, that disclosures raising issues of bullying, harassment and discrimination are in all cases excluded from the purview of the whistleblower regime. The Citizens' Representative may in a principled exercise of his discretion proceed to investigate such matters. As part of the investigation, however, if gross mismanagement is found to exist, it will be incumbent on him to explain why the harassment has considerations calling for examination under the whistleblower regime rather than simply a personal grievance that can be properly dealt with under other government policies, in other words, why it rises to the level of *gross* mismanagement.

There is also another reason why in this case it cannot be said that the Citizens' Representative's declining to exercise his discretion not to investigate the bullying and harassment allegations was inappropriate. In an affidavit filed during the course of my review, he explained in considerable detail why he felt it appropriate to proceed with investigating these allegations and why the persons involved were not referred to government harassment policies. It is not necessary to recite the full explanation here.[114] It is sufficient to state that the information he provided, including the fact that there were suggestions in the harassment complaint forms that filing such a complaint did not preclude making other complaints to the Office of the Citizens' Representative which were separate from the policy, are sufficient to justify the Citizens' Representative to move forward with an investigation without derailing it at the threshold stage.

I will come back to this issue when discussing the findings relating to the individual disclosures.

PROCEDURAL FAIRNESS ISSUES

THE CITIZENS' REPRESENTATIVE'S INVESTIGATION

Initial Notice

The Chief Electoral Officer was first informed of the allegations against him in an April 2021 letter entitled "Notice of Intent to Investigate the CEO."[115] This letter described 33 of the 35 charges analyzed in the Citizens' Representative's eventual report in language that closely resembles the final charges. No additional information was provided.

The Initial Notice asked the Chief Electoral Officer to provide a wide range of information within a month. It indicated that he was entitled to an opportunity to be heard and that later in the investigation the Citizens' Representative would discuss the evidence or further allegations with him.

A couple of weeks after the initial notice, the Chief Electoral Officer's counsel wrote the Citizens' Representative requesting an extension to provide disclosure.

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114 The full affidavit is reproduced in Exhibit 3, available in the Supporting Materials, Item 3.3.

115 *Report*, Volume 2, Appendix I; available in the Supporting Materials, Item 2.2.

He also requested "all relevant information to defend the allegations against him".[116]

Disclosure

As requested, the Citizens' Representative extended the disclosure deadline into June and then, when the June deadline was missed, to July 5. The Chief Electoral Officer provided two volumes of disclosure on July 5, with another fifteen volumes following shortly thereafter.

Expanded notice

In mid-August 2021, the Citizens' Representative sent the Chief Electoral Officer an expanded notice of allegations.[117] This 59-page document identified 20 witnesses who had been interviewed so far and provided descriptions of the evidence supporting the allegations.

The level of detail the expanded notice provided about the evidence can be illustrated using the details of Allegation A1 (harassment of a particular employee). The expanded notice contains seven bullet points describing different behaviours that (allegedly) relate to the allegation. Each bullet indicated that the behaviour was described by "witnesses", "four witnesses", "multiple witnesses", etc. However, the bullets

- do not identify which witness described each behaviour.
- do not describe how the witnesses observed the behaviours or the limits of their observation. Some bullets describe behaviour occurring before "onlookers"; it is unclear whether the witnesses were the onlookers or whether the accounts were hearsay.
- do not indicate whether the witnesses' statements included inconsistencies, whether they had discussed their evidence with each other, or whether they were asked suggestive or leading questions.
- do not provide any detail about the witnesses' memory, sincerity, or the risk that their narration might have been inaccurate or confusing.

116 Exhibit 2, available in the Supporting Materials, Item 3.2.

117 *Report,* Volume 2, Appendix 2, available in the Supporting Materials, Item 2.2.

After the summary of the thirty-three original allegations, the expanded notice described two new allegations.[118] It requested a written response by September 20.

The CEO's written response and interview

In early September, the Chief Electoral Officer's counsel indicated that the discovery process associated with the Controverted Elections litigation cases suggested some of the Citizens' Representative's witnesses were cooperating with a party.[119] He raised concerns about collusion, good faith, and procedural fairness.

The Citizens' Representative responded that witnesses were advised to keep their evidence confidential and that so far, the interviews had not raised indications of collusion or bad faith.[120]

After a discussion about the Citizens' Representative's duty to proceed expeditiously and about procedural fairness, the Citizens' Representative agreed to postpone the Chief Electoral Officer's written response till October and his interview until November.

Disclosure continued to arrive into October, and the Chief Electoral Officer's written response arrived ten days late.[121] The 28-page document provided his response to the allegations and incidents described in the expanded notice.

The Chief Electoral Officer's interview went ahead as scheduled, and the investigation was completed by mid-November.

PROCEDURAL FAIRNESS: PRINCIPLES AND APPROACH

The Citizens' Representative had a duty to treat the Chief Electoral Officer fairly during his investigation. This duty of fairness is codified in s. 58(4) of the *House of Assembly Accountability, Integrity and Administration Act*, but it also arises at common law whenever an official makes an administrative decision affecting an individual's interests.[122]

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118 The eventual allegations F34 and G35.

119 *Report,* Volume 2, Appendix 3, available in the Supporting Materials, Item 2.2.

120 *Report,* Volume 2, Appendix 4, available in the Supporting Materials, Item 2.2.

121 *Report,* Volume 2, Appendix 5, available in the Supporting Materials, Item 2.2.

122 *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 20.

The demands of fairness vary depending on the circumstances. For decades, courts performing judicial review have evaluated whether the administrative decision-maker acted fairly using a list of five factors described in the Supreme Court's *Baker* decision (the "*Baker* factors"):[123]

1. the nature of the decision being made and the process followed in making it;
2. the nature of the statutory scheme;
3. the importance of the decision to the individual or individuals affected;
4. the legitimate expectations of the person challenging the decision; and
5. the choices made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures.

The Supreme Court of Canada has recently revisited the approach to procedural fairness in a statutory appeal in *Law Society of Saskatchewan v. Abrametz*.[124] Although *Abrametz* may have significant implications for how procedural fairness issues are analyzed in statutory appeals and judicial reviews,[125] its implications are about the role of a reviewing court and not about procedural fairness itself. I am not performing a judicial review or statutory appeal, but instead analyzing procedural fairness; and so I will rely on the mature *Baker* jurisprudence, which remains the best guide to what procedural fairness requires.

The central procedural fairness issue focuses on the Citizens' Representative's decision not to allow the Chief Electoral Officer to interview the witnesses or to review summaries, recordings, or transcripts of what each witness said. Instead, he provided the Chief Electoral Officer with a list of factual claims that the Citizens' Representative believed emerged from the witnesses' evidence. The Chief Electoral Officer had an opportunity to deny or explain these factual claims, but not to interrogate whether the witnesses' evidence supported them.

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123 Paras 23–27.

124 2022 SCC 29.

125 See generally Paul Daly "Deference on Questions of Procedural Fairness after Law Society of Saskatchewan v. Abrametz, 2022 SCC 29, The Implications", in *Administrative Law Matters*, (August 26, 2022), <https://www.administrativelawmatters.com/blog/2022/08/26/deference-on-questions-of-procedural-fairness-after-law-society-of-saskatchewan-v-abrametz-2022-scc-29-the-implications/>.

I will begin by considering whether this approach was fair to the Chief Electoral Officer using the *Baker* factors. Having dominated the procedural fairness jurisprudence for decades, these factors are currently the best available measure, not only of whether the Citizens' Representative complied with *Baker*, but also of whether his decisions were unreasonable or affected by a material error of law.

THE BAKER FACTORS

The Nature of the Decision

The Citizen's Representative's process does not closely resemble an adversarial trial or judicial decision-making. The Citizens' Representative conducts an "investigation"[126] leading to, not a decision or order, but a "report" with "findings and recommendations."[127] Because the process is unlike a judicial process, the Citizens' Representative had more latitude to craft procedures that do not resemble the trial model of fairness.

Investigators often can and do fairly employ the kind of procedure the Citizens' Representative employed here. For example, in *Syndicat des Employés de Production d Québec et et l'Acadie v. Canada (Canadian Human Rights Commission)*,[128] the Canadian Human Rights Commission adopted an investigator's conclusion that a pay equity complaint was unfounded and did not need to be referred for a formal hearing. The investigator provided the complainant with a summary of the evidence but not notes of individual witnesses' statements. Sopinka J. for the majority found no breach of procedural fairness, adopting Lord Denning M.R.'s words from *Selvarajan v. Race Relations Board*:[129]

> The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It

126 *House of Assembly Accountability, Integrity and Administration Act,* s. 58(1).

127 *Act*, s. 58(7).

128 [1989] 2 SCR 879.

129 [1976] 1 All ER 12 (CA) at 19.

> need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only.

This relatively low level of procedural fairness is often engaged when an investigation serves a screening function.[130]

The Nature of the Statutory Scheme

The statutory scheme suggests that the Citizens' Representative should act "as informally and expeditiously *as possible*" (italics added)[131] and that he should keep disclosers' identities confidential "to the extent permitted by law and consistent with the need to conduct a proper investigation."[132]. The qualifiers show that expeditiousness and confidentiality are subordinate to procedural fairness. Further, the statutory protection of confidentiality is limited to people providing disclosures, not witnesses.

Ordinarily, more generous participation rights are required for a final decision than for a decision that is advisory or subject to appeal.[133] The Citizens' Representative's Report does not have explicit legal effects, but a formal finding of wrongdoing may have significant effects for an official's career prospects or reputation, while giving the official little opportunity to appeal or contest the finding. This suggests that relatively generous participation rights should be provided.

A finding of wrongdoing can also lead to a recommendation of corrective action. This recommendation is advisory, and in many contexts, an official might have several opportunities to raise concerns about the Citizens' Representative's findings before a final decision is made. For example, a report referring allegations to the police or a tribunal could be compared to an investigator's report in a human rights or professional discipline context, where a lower level of participation rights can be provided.[134]

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130 See e.g. *Kuny v College of Registered Nurses of Manitoba*, 2017 MBCA 111; *Roy v. Newfoundland Medical Board*, 1996 CanLII 11079 (NL CA).

131 S. 58(3).

132 S. 56.

133 *Baker*, at para. 24.

134 *Syndicat des employés*, *Kuny*, and *Roy*, above.

When the Citizens' Representative recommends that a report be referred directly to a decision-maker, however, its recommendation will be far more valuable if the officials who receive the report can rely on it without further investigation. A report whose conclusions are demonstrably reliable can lead directly to action. Nagging questions about procedural fairness make reliance impossible, creating unnecessary cost or delay or even effectively negating the Citizens' Representative's recommendations.

Here, the Citizens' Representative contemplated that his report would be referred directly to the House of Assembly. In principle, the House of Assembly could hold or direct a full adversarial hearing into the allegations, but there is no recent precedent.[135] There was no basis for assuming the Citizens' Representative's findings would receive further scrutiny before a final decision. Indeed, in this very case, the Terms of Reference contemplate whether "based on the analysis in the Report, action contemplated under s. 5.3 of the *Elections Act, 1991* [suspension or removal] may be considered appropriate."

The Importance of the Decision

Though the Citizens' Representative declined to recommend *specific* sanctions, he did contemplate that his findings of wrongdoing would be put before the House of Assembly. This could only be appropriate if the Report were reliable enough to support suspending or removing the Chief Electoral Officer. A high level of procedural fairness would ordinarily be required to suspend or dismiss a statutory officer with security of tenure.

Under the federal *Public Servants Disclosure Protection Act*,[136] which resembles *Part VI* in many respects, courts have often concluded that investigators had a duty to provide extensive disclosure. In *Marchand v. Public Sector Integrity Commissioner*,[137] a former senior civil servant challenging findings of gross mismanagement (misappropriation of funds) was granted access to the whole investigation

135 The last two times the House removed a statutory officer, the persons affected asked to appear at the Bar of the House to make their case directly to the members, but this request was denied: Newfoundland and Labrador, *House of Assembly Proceedings*, 45th General Assembly, 2nd session, Vol. XIV, No. 41 (December 5, 2005) (the "March Debate") and 46th General Assembly, 2nd session, Vol. XLVI, No. 42 (December 17, 2009) (the "Neville Debate").

136 SC 2005, c. 46.

137 2014 FC 329.

file, including all information from witnesses. The Court concluded that the protection of confidentiality in the *PSDPA* is subordinate to ensuring procedural fairness and that even a discloser's identity must be disclosed if there is a concern about personal interest or ill-will, as when there is a workplace dispute.

In *Chapman v. Canada (Attorney General)*,[138] a senior civil servant challenged findings of gross mismanagement (failing to accommodate a disability). The Court found the investigator ought at least to have disclosed the identity of the individual she was alleged to have harassed (who was not the whistleblower) and the evidence of all the witnesses.

The Citizens' Representative referred to two recent decisions about the disclosure of investigative materials under the *Act*. One held that the Commissioner for Legislative Standards should not provide notes from an investigation under the *Act* in response to an access to information request.[139] The second held that the Citizens' Representative did not have to disclose, in response to a police production order, the content of files under the *Citizens' Representative Act*.[140] However, the first decision is about the interpretation of access to information legislation and the scope of parliamentary privilege. The second is about the interaction between the *Criminal Code* and the *Citizens' Representative Act*. Neither decision is about procedural fairness.

Legitimate Expectations

The Chief Electoral Officer had no legitimate expectation of being treated differently than he was. The Citizens' Representative did not promise any more disclosure or participation than he provided. He does not appear to have treated the Chief Electoral Officer differently from other respondents. Further, because the Chief Electoral Officer also served as Commissioner for Legislative Standards, he was familiar with the Citizens' Representative's methods and would have known what to expect.

138 2019 FC 975 at para 43.

139 *Kirby v. Chaulk*, 2021 NLSC 86.

140 *Newfoundland and Labrador (Citizens' Representative) v. HMQ*, 2013 NLTD(G) 134.

The Chief Electoral Officer cannot claim he was entitled to more advantageous procedures because of the doctrine of legitimate expectations. At the same time, he was entitled to be treated fairly even if he could not expect to be.

The Citizens' Representative's Choices

The Citizens' Representative is responsible to give meaning to the public disclosure regime, and his choices are entitled to a margin of respect and deference.

ANALYSIS: THE RIGHT TO BE HEARD

The *Baker* analysis suggests the Citizens' Representative had no duty to employ formal trial-like procedures. He had a wide margin to craft investigative procedures, especially procedures to resolve the inherent tension between the respondent's right to know the case to meet and a discloser's interest in confidentiality.

At the same time, officials can only rely on the Citizens' Representative's findings and recommendations if the respondent already had a full opportunity to respond to the case to meet. The Citizens' Representative process cannot be used as a back door to circumvent the high standard of procedural fairness that an official might be able to expect elsewhere. From a practical perspective, the Citizens' Representative can employ creative investigatory procedures, but only so far as they provide the respondent with a full opportunity to respond to the allegations. Here, the Citizens' Representative conducted the largest investigation in the office's history, leading to significant findings of wrongdoing that the Citizens' Representative indicated ought to be placed before the House of Assembly. As a result, the Citizens' Representative had a duty to ensure that his findings were reliable enough to support the consequences he must have contemplated.

The allegations against the Chief Electoral Officer raised real concerns about witnesses' perception, memory, sincerity, and narration:

- Many charges arise out of the Chief Electoral Officer's personal interactions with employees or his human resources or Occupational Health and Safety decisions, and the Citizens' Representative's Report refers repeatedly to office morale concerns. When complaints arise out of workplace relationships and conflicts with management, there is always a possibility

that witnesses may be motivated by ill will or that coworkers may unconsciously have influenced each others' perceptions.[141]

- The Chief Electoral Officer raised specific concerns about one witness's motives and about the possibility of collusion.
- Many charges arise out of controversial policy decisions, and the Citizens' Representative's report quotes extensively from media coverage of these controversies. When complaints arise out of public controversy, there is a possibility that witnesses may have detailed and confident opinions without having personal knowledge of the discussions that shaped these decisions or the Chief Electoral Officer's role in making them. There is also a possibility that witnesses could blame the Chief Electoral Officer to exculpate themselves.

Without knowing who said what, the Chief Electoral Officer had little opportunity to be heard about which witnesses were credible or what findings or inferences could be drawn from their evidence. This significantly impaired his ability to respond to the charges against him.

Taking the full context into account, the limited disclosure the Citizens' Representative provided did not meet the standard of procedural fairness from *Baker*. The Chief Electoral Officer cannot be said to have waived his right to more complete disclosure: he requested all relevant evidence early in the process. Nor can it be said that the outcome was inevitable regardless. The findings turned on characterizing evidence about institutional dynamics, relying on witnesses whose evidence may have raised perception, memory, sincerity, and narration issues. The Chief Electoral Officer may well have been able to formulate more persuasive answers with better knowledge of the case to meet.

In my view, this circumstance in itself raises serious concerns that affect the reliability of the conclusions reached in the Report, thereby affecting the degree to which it should be relied upon as a basis for further action.

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[141] See *Marchand,* paras 89–91.

ANALYSIS: REASONS

The structure and content of the Citizens' Representative's reasons also pose a question about procedural fairness. As I describe in more detail in my General Observations on the Reasons below, the Citizens' Representative often fails to distinguish between evidence, fact, norm, and law. Instead, a narration of evidence leads to a conclusion, leaving it unclear what facts were established by the evidence, why these findings were justified, or why they led to a finding of gross mismanagement

Courts are reluctant to evaluate the adequacy of reasons as a question of procedural fairness.[142] There are policy reasons for limiting this kind of argument: it could lead to formalism, a confusion of substantive and procedural arguments, and an inappropriate imposition of judicial standards on administrative bodies. If reasons contain a gap on an essential element, a judicial review court will (as explained below) try to infer the rationale for from the record and context.[143] In statutory appeals, courts will only intervene if the reasons deprive the appellant of the right to meaningful appellate review.[144]

Unlike the courts in judicial review and appeal proceedings, I do not need to narrow my approach to procedural fairness for policy reasons. There are also specific reasons to treat procedural fairness more broadly in this context:

1. The Citizens' Representative's Report was intended to form a reliable basis for the House of Assembly and Cabinet to act. As a result, there was a practical, functional reason why the Report ought to have been drafted to enable the House and the Cabinet to apply independent judgment to the Citizens' Representative's findings and recommendations. By failing to distinguish evidence, fact, normative conclusions, and law, the reasons in this case resisted independent analysis, creating a risk that the conclusions would be adopted blindly.

142 *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 91–9.

143 *Vavilov*, at para. 98.

144 *R. v. REM*, 2008 SCC 51 at para. 57

2. By declining to provide the evidence supporting his conclusions, the Citizens' Representative ensured that his reasons could only be read in a vacuum. Reasons are usually interpreted in light of the record, allowing courts and readers to understand the decision despite apparent gaps or ambiguities in the reasons. With no supporting record, these reasons must be held to a stricter standard.

Although the Citizens' Representative's reasons would not ordinarily support a legal challenge for procedural fairness, I am satisfied, based on the analysis that follows, that they were inadequate in material respects and that this inadequacy could have caused unfairness.

I recommend that future reports draw a clearer distinction between evidence, fact, norm, and law.

FAIRNESS, CONFIDENTIALITY, AND THE WHISTLEBLOWER REGIME

My decision to favour the dictates of procedural fairness over the importance of confidentiality in the particular circumstances of this case may cause some to be concerned that such an approach will undermine one of the pillars of any whistleblower regime: the encouragement of people to come forward to expose wrongdoing by protecting the anonymity of whistleblowers and witnesses so as to minimize the possibility of reprisals. There can be no doubt there is a risk associated with this approach. But I believe the risk is far less than it may seem, and that in the interests of ensuring a process that is fair to the person accused, it is a risk worth taking.

Although whistleblowers' confidentiality is protected under Part VI only when it is "consistent with the need to conduct a proper investigation,"[145] a whistleblower's identity will almost always be irrelevant. The Citizens' Representative will investigate by interviewing witnesses, and the witnesses' evidence rather than the whistleblower's disclosure is the case to meet.

Witnesses' confidentiality, unlike whistleblowers', is not protected under Part VI. There are good reasons for this distinction. Whistleblowers must come forward voluntarily and will naturally fear that their voluntary disclosure will instill ill-will

[145] s. 56.

in the powerful figures they implicate. Witnesses, on the other hand, are expected to cooperate with an investigation as part of their employment and can be convicted of an offence for making a false or misleading statement.[146] Further, reprisals are forbidden by the legislation and proceedings can be instituted if reprisals did occur following disclosure.[147]

In addition, not all cases will require the disclosure even of witnesses' evidence. The duty of fairness varies depending on the circumstances. Many allegations may not require any witness's testimony: for example, some allegations can be investigated merely by asking the respondent to explain various documents. In other cases, the nature of a witness' evidence may not raise any concerns about perception, memory, sincerity, or narration, and it may be possible to disclose the whole case without disclosing a witness's identity. Finally, most senior officials in government are employed under contract rather than under a statutory office with security of tenure, and this distinction may justify a different approach to procedural fairness under the *Act.*[148]

Part VI provides tools to protect legitimate confidentiality concerns. The Citizens' Representative can seek information from redundant sources and consider creative ways to guarantee procedural fairness while protecting legitimate privacy interests. Disclosure would only be necessary if the Citizens' Representative thinks there are valid grounds for proceeding.[149] Finally, a witness who has a legitimate interest in confidentiality despite the statutory protections is also entitled to procedural fairness from the Citizens' Representative.[150] In some cases, the Citizens' Representative could decide not to proceed with an investigation, if protecting a witness's privacy is more important than proceeding with the investigation.[151]

The Citizens' Representative and his office demonstrated in this case a high degree of commitment to protecting the confidentiality of witnesses and disclosers. While I believe the position he took was ultimately not reasonable, it should give disclosers and witnesses confidence placing their trust in him.

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146 See s. 60(1), 61.

147 See s. 59(3), 60(2).

148 See generally *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paras. 79–118.

149 s. 58(5).

150 s. 58(4).

151 s. 58(5)(c).

While a whistleblower regime depends vitally on confidentiality, it must also be able to create credible records that allow reliable and procedurally fair results. I am satisfied that the balance I have suggested between procedural fairness and protecting confidentiality, while not eliminating all concerns, is the right one.

ANALYSIS OF INDIVIDUAL FINDINGS

APPROACH

In addition to my observations dealing with general procedural, human resources and legal issues as discussed above, it is necessary to analyze the reasoning process engaged in by the Citizens' Representative in respect of the individual findings.

In conducting this analysis, I propose to follow the approach to assessing the reasonableness of reasons as discussed in the *Vavilov* decision of the Supreme Court of Canada to which I have previously made reference.

As noted in *Vavilov*, "reasons are the means by which the decision maker communicates the rationale for its decision."[152] The Court described a reasonable decision as follows:

> [85] … a reasonable decision is one that is based on an internally consistent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker.
>
> [86] … it is not enough for the outcome of the decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified* by way of those reasons, by the decision maker to those to whom the decision applies.

That does not mean that the reviewer should engage in a picayune search for some flaw, however small. The reasons must be "read holistically and contextually, for the very purpose of understanding the basis on which the decision was

[152] Para. 84.

made."[153] The search is for fundamental flaws that expose a failure of rationality. In *Vavilov*'s words:

> [102] … a decision must be based on reasoning that is both rational and logical. …[T]he reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that *"there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion to which it arrived* … [R]easons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment" …
>
> [103] While … formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, *a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. … A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken … or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point. …*
>
> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such a circular reasoning, false dilemmas, unfounded generalizations, or an absurd premise. … [A] reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> (Italics added; citations omitted.]

It is not any omission from a chain of reasoning, however, that will justify the conclusion that the resulting decision is unreasonable. As *Vavilov* explains:

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153 Para. 97.

> [122] … omissions are not stand-alone grounds for judicial intervention; the key question is whether the omitted aspect of the analysis *causes the reviewing court to lose confidence in the outcome* reached by the decision maker.
>
> (Italics added.)

As discussed above, the Citizens' Representative felt his obligation to protect witnesses' confidentiality did not permit him to share notes and recordings of witness' interviews with me. As a result, I am unable to read the report "in light of the record".[154]

Analyzing the Citizens' Representative's reasons without the benefit of his record, I have tried to bear in mind the necessary limitations of this approach. Apparent shortcomings in the Citizens' Representative's reasons may be fully justified in context.[155] Conversely, conclusions that seem plausible within the context of the report may prove to be flawed once the underlying evidence is examined.[156] The full record might make the Citizens' Representative's conclusions seem stronger or weaker.

Given the nature of my mandate, the uncertainty created by the absence of the record makes it more difficult to recommend reliance on the Citizens' Representative's report. If any reader of this report is tempted to criticize the Citizens' Representative, the same uncertainty calls for humility. The Citizens' Representative's firm stance on confidentiality limited his ability to defend his analysis and conclusions. Though I believe this position was mistaken, there is no basis for doubting that it was sincere and principled.

GENERAL OBSERVATIONS ON THE REASONS

Reasons of decision makers should never be judged by a standard of perfection. If they are based on a rational chain of analysis that, either in the reasons themselves or as disclosed in the record or as available as a matter of public knowledge, gives an indication as to how the decision maker reached his or her

154 *Vavilov*, para. 96.

155 *Vavilov*, para. 94.

156 *Vavilov*, para. 126.

conclusion based on the evidence, that will be enough, regardless of whether, in hindsight, a better or more cogent analysis could have been used.

The key is logical analysis that, based on the record, can provide an understandable conclusion on critical points. As the majority in *Vavilov* stated, "where reasons are provided but they fail to provide a transparent and intelligible justification … the decision will be unreasonable"[157] and liable to be set aside on judicial review.

In the current review, however, the issue is not whether the decision should be set aside but whether, in my opinion, it can be relied on by the House of Assembly and the Lieutenant-Governor in Council as a basis for further action. The considerations are very similar to a judicial review in this regard. As noted above, the key question is whether an omitted aspect of the analysis causes the reviewer "to lose confidence in the outcome." That is essentially the same test that I am asked to apply. Put another way, can the decision makers under s 5.3 of the *Elections Act, 1991* have confidence in the reliability of Citizens' Representative's Report *for their purposes*, so that its findings of fact and conclusions can be used as a basis for deciding whether there was misconduct, cause, or failure of duty on the part of the Chief Electoral Officer? *Vavilov* retains its relevance for this purpose.

It also must be remembered that, as previously mentioned, reliance on the record as a means of supplementing the reasoning in the current case is hampered by the fact that there is no transcript of most of the evidence, and by the decision of the Citizens' Representative to decline to allow me access to the sound recordings of that evidence. That has the potential of limiting my ability, when analyzing the reasoning expressed in the Report, to use the record of the evidence to fill in what would otherwise be gaps in the analysis and therefore make the conclusions it reached understandable. This is a consideration that affects the analysis of all 10 allegations.

Another general concern is that, although the Citizens' Representative provided an extensive description of witnesses' evidence as part of his reasons leading up to his findings and recommendations, the reasons often fail to resolve issues of credibility or disputed fact. For example, the reasons finding the Chief Electoral Officer committed gross mismanagement on Allegation A1 indicate that the Chief Electoral

[157] *Vavilov*, para 136.

Officer denied many details of the allegations against him, but do not indicate whether the Citizens' Representative accepted or rejected his denials or explanations. This obscures the basis of the finding: did the Citizens' Representative accept every detail of the evidence against the Chief Electoral Officer, or did he conclude that the charge could be made out even if some details were false?

Similarly, the Citizens' Representative's reasons often fail to explain the essence of his finding. For example, Allegation D16 accused the Chief Electoral Officer of failing to establish adequate lines of communication with the Chief Medical Officer of Health. He responded that he did communicate with the Chief Medical Officer by phone and that another election official also engaged with her. In his last sentence before finding the Chief Electoral Officer committed gross mismanagement, the Citizens' Representative concluded:

> The evidence suggests the CEO did not engage in direct, regular, documented communications with Public Health and the [Chief Medical Officer of Health] in particular, in contrast to what was happening in other Canadian jurisdictions.

Did the Citizens' Representative conclude that the Chief Electoral Officer ought to have communicated directly with the Chief Medical Officer rather than delegating? If he ought to have communicated more regularly, how regularly? Ought he to have documented his communications rather than speaking by phone? Or are these mere examples of a single underlying failure?

A further concern relates to the multi-factor guideline the Citizens' Representative used to identify gross mismanagement. There is little attempt to identify which factors applied, what weight should be given to those applicable factors (and why), and why the circumstances were elevated from mismanagement to gross mismanagement. This makes it difficult to distinguish an imperfect human attempt to reach aspirational standards from poor management, poor management from mismanagement, and mismanagement from gross mismanagement.

Despite the imperfect transparency of the Citizens' Representative's reasoning, some other general concerns about his analysis are apparent:

- Although the Citizens' Representative acknowledges that the Chief Electoral Officer was subject to great personal stress during the 2021 election, he generally fails to consider, when dealing with particular allegations,

how this or other personal factors could explain or mitigate behaviour, avoiding a finding of gross mismanagement.

- Similarly, there is little recognition in the analysis of the individual allegations of the general "Contextual Background" submitted by the Chief Electoral Officer,[158] which was obviously intended to be considered in relation to each allegation, and no explanation as to why the points made by the Chief Electoral Officer in the background submission did not affect the result of the Citizens' Representative's analysis.
- In reaching conclusions that action or inaction on the part of the Chief Electoral Officer constituted gross mismanagement, often there was a failure to distinguish between individual and institutional fault and, if institutional fault or dysfunction was involved, how action by the Chief Electoral Officer contributed to that fault or dysfunction.
- In applying the *Code of Conduct*, which contains in section 2 an aspirational goal of striving for "efficiency", there was little or no explanation of how inefficiency, in the sense of falling below a standard of perfect efficiency, should nevertheless be regarded, in the particular case based on the evidence, as constituting *gross mismanagement* as opposed to some other form of less-than-perfect performance such as poor management or mismanagement.

Given that the Citizens' Representative contemplated that the report would be placed before the House of Assembly to allow the House to determine an appropriate sanction, the Citizens' Representative's reasons should have (1) resolved disputed evidence into clear factual findings and (2) explained why those facts, applying proper legal tests and identifying the relevant factors, constituted wrongdoing, so that the House could reach an independent conclusion about whether misconduct, cause, or neglect or duty had occurred.

Finally, as discussed above, the question of procedural fairness looms over all the Citizens' Representative's findings. Without some adequate opportunity to respond to the evidence justifying the findings, the findings are unreliable in that

[158] *Report*, Volume 1, pp. 23–25, available in the Supporting Materials, Item 2.1.

they have not been fully tested and also unreliable in that it would be unfair to rely on them.

These matters, considered in the context of the particular allegations, have affected my conclusions as to whether the report can be used as a platform for making further decisions about the application of s. 5.3 of the *Elections Act, 1991*. I will now turn to an analysis of the individual findings of gross mismanagement.

ALLEGATION A1: BULLYING AND HARASSMENT OF ONE EMPLOYEE

This allegation states that the Chief Electoral Officer engaged in "bullying and harassment of one long-term permanent employee … leading to the early retirement of the employee."

The Citizens' Representative's Reasoning and Finding

The Citizens' Representative's finding was that "the CEO grossly mismanaged his obligations with respect to Section 4 of the Code when he bullied and harassed a long-term employee, leading to that employee's early retirement."

The provision of the *Code* to which the Citizens' Representative referred provided:

> We will treat colleagues, Members and the public with courtesy and respect.

The allegation with respect to this complaint related to a long-term permanent employee who was well-liked in the office and had no discipline history. He was not the whistleblower.

In coming to the conclusion that the Chief Electoral Officer violated the *Code* in a manner that constituted gross mismanagement, he relied on factual and opinion evidence from a number of witnesses that:[159]

- On one occasion he "yelled and cursed" at the employee;
- On two occasions he told him to go home as there was no work to do at a time when 30 people had been temporarily employed;

[159] The full, detailed description of all of the incidents is described in the Report, Volume 1, pp. 31–33, 37, available in the Supporting Materials, Item 2.1.

- He used other employees to deliver election materials to election districts instead of using the employee even though it was part of his job description;
- He "degraded" the employee's position such that three other employees were performing his job;
- He would by-pass the employee and approach other warehouse employees to perform work which was within the employee's job description;
- He hired another person to perform random checks on the employee's work;
- He swore and yelled at the employee for moving 6–8 bottles of water from the warehouse to a refrigerator where it was consumed by other employees and threatened to install surveillance cameras;
- On one occasion he yelled at the employee in front of onlookers over a misplaced binder;
- The CEO failed to appreciate the value of the employee; and
- The employee had to leave "for [his or her] own sanity".

The opinion of various employees was that the treatment humiliated the employee, diminished his sense of self-worth, and undermined workplace morale, which in turn diminished the employee's effectiveness.

The Chief Electoral Officer gave a detailed response to each of these allegations which, if accepted, could have provided a potential defence to them. He asserted that when each event was considered in context, there was a valid explanation for what happened. For example, with respect to the allegation that he used other workers to deliver election materials instead of the employee in question, he explained that this related to a by-election that occurred while the employee was on leave and that the employee had been upset at being deprived of overtime because someone else got to do the work. The employee resigned shortly thereafter. The Chief Electoral Officer suggested that this was the reason why the employee resigned and that the allegation was made in bad faith and coloured by the employee not getting what he or she wanted.

With respect to the allegations of yelling and shouting, the Chief Electoral Officer asserted that he was a mild-mannered individual and that it was not his practice to yell at employees. He said, as well, the warehouse was large and often one has to raise one's voice to communicate. In any event, "Interpretations by witnesses are subjective and a tantrum for one person may be viewed as a stern warning by another."

With respect to the allegation that he told the employee to go home because of lack of work when other people were being temporarily employed, the Chief Electoral Officer asserted that this related to processing special ballots and if the election official managing the special ballot counts had anything for the employee to do, the employee would have been asked to stay. The employee was not the only person who was not required to stay.

The Chief Electoral Officer said that the employee was "a valued member of our staff" and that the allegation of mistreatment and undermining morale, thereby diminishing the office's effectiveness, was "preposterous." He related that the employee in question had been upset several times when changes had been made with respect to delivery of materials to districts and that the change to using a logistics provider, which resulted in more efficient delivery of materials, was resented because it deprived the employee of overtime and because the employee did not get his or her own way. Some employees felt that elections should be conducted "exactly the same way that you've doing it for the last 150 years."

When asked about the multiple descriptions of him yelling, having a tantrum and a "hissy fit" over the incident involving the movement of the water bottles, and whether he was asserting that these descriptions were "preconceived," (which I take to mean the product of collaboration because the Chief Electoral Officer was not liked), he responded:

> You know, I wouldn't put it past them to get together on it. But you know, like as you say, *I don't know who they are*.
>
> (Emphasis added.)

This was in effect an assertion that he could not properly defend himself against the details of this allegation because he had not been given the names of the people who were accusing him.

Having set out what had been alleged and how the Chief Electoral Officer responded, the totality of the Citizens' Representative's reasoning was as follows:

> The totality of the evidence suggests the employee was uncomfortable in the workplace and it was widely known among staff.
>
> We find the [Chief Electoral Officer] grossly mismanaged his obligations under Section 4 of the Code of Conduct when he orchestrated the retirement of that employee. More specifically, he grossly mismanaged his obligation to treat colleagues with respect. Multiple witnesses stated his treatment of the employee had a profound impact on the morale of the OCEO and the cumulative morale problem that spread through the organization affected OCEO's ability to fulfill its mandate to the greatest extent possible. Amongst numerous factors considered in finding a breach of a Code of Conduct is the impact of the breach on the public body's employees.
>
> We appreciate workplace norms are evolving with a greater understanding of respectful workplace communication. We are mindful of the [Chief Electoral Officer]'s response to this allegation however we find that the evidence, in its entirety, suggests that on a balance of probabilities, he grossly mismanaged his obligations with respect to this section of the Code of Conduct.

Analysis of Reasoning and Finding

The Report does not contain any express findings of fact adopting the witnesses' perception of events and rejecting the Chief Electoral Officer's version, which was either conflicting or placed the events in a more benign perspective. That said, it seems a fair inference, given the conclusion reached, that the Citizens' Representative must have accepted the witnesses' version where it conflicted with the Chief Electoral Officer's. However, no explanation is given for the apparent rejection of the Chief Electoral Officer's explanations. Was it because he did not find the Chief Electoral Officer credible? Or because his evidence was proven false by other independently known facts? Or for some other reason?

In a case which largely is based on subjective perceptions as to how a person acted and where the correct inferences to be drawn are vital to the result, it is not unreasonable to expect that some analysis would be provided on this crucial issue. This analysis is particularly necessary when the reasons are intended to be relied

on by a decision-maker who will not have access to the underlying record. This allegation, in many respects, turns on a finding of credibility, but the rationale for the finding cannot be found within the Citizens' Representative's reasons or inferred from the withheld record. As a result, the finding of credibility is not transparently and intelligibly justified.[160]

Further, although the issue of a possible motive to explain the employee's disgruntlement and the Chief Electoral Officer's view that resistance to change in the office could have contributed to employee dissatisfaction and coloured their perceptions, none of this was addressed. Had the Chief Electoral Officer been able to confront the witnesses on these matters, the issues could have been properly aired.

Counsel for the Chief Electoral Officer drew attention to the fact that had this matter been referred for resolution to the executive's *Harassment Free Workplace Policy*, it would have afforded the Chief Electoral Officer greater procedural rights, including the right to be presented with the complaint, to know his accuser and to respond to the specifics. The choice to proceed under the whistleblower processes and the decision of the Citizens' Representative to maintain confidentiality of the witnesses (only giving him summaries) impacted the degree to which the Chief Electoral Officer could respond.

Further, the Citizens' Representative concluded the Chief Electoral Officer grossly mismanaged his obligations under the *Code* "when he *orchestrated* the retirement of that employee" (italics added). This suggests a deliberate scheme to rid the office of the employee. Clearly, if that was what happened, it would be hard not to conclude that he failed to treat the employee with respect under section 4 of the *Code*. But there is no evidence of such intent and no discussion of the evidence explaining why it would be proper to draw that inference in the circumstances. The reference to "orchestration" of the retirement comes at the end of the Report's analysis without any indication that that was even under consideration before that.

Absent the finding of "orchestration," would the finding of gross mismanagement still have been made? Perhaps, but it is unclear. It must be remembered that violation of the *Code* (in this case, failure to show courtesy or respect) does not in itself automatically constitute gross mismanagement. As explained earlier in this

[160] *Vavilov*, at para. 98.

report,[161] to reach the level of gross mismanagement requires at least individual fault either subjectively or through a marked departure from accepted standards of individual behavior. Such a finding must conclude that the individual knew or was reckless or was wilfully blind to the context, risks, of the consequences of the action or inaction that constitute the marked departure. These considerations are not dealt with in the Report.

Alternatively, if one were applying the multi-factor approach outlined in the Report, one factor includes action or inaction "that poses a serious threat to public confidence in the integrity of the public service, and that does not only concern a personal matter, such as individual harassment complaints or individual workplace grievances." There was no attempt to apply this factor in the context of this allegation. While the Report referred to witness *evidence* about the "profound impact on the morale of the OCEO" and a cumulative morale problem that spread through the organization affecting it ability to fulfill its mandate, the Report does not indicate whether this was accepted and whether, in the circumstances, it met the standard of posing "a serious threat to public confidence in the integrity of the public service" which could elevate the circumstances to *gross* mismanagement instead of an individual grievance.

Of interest in this context, is the fact that Allegation A4 also involves allegations of an improper management style (yelling and screaming at employees and slamming his fist on a table) that allegedly affected the workplace culture. Yet the finding by the Citizens' Representative of gross mismanagement in that case was not referred to or relied on in support of any conclusion that there was a general morale problem that spread throughout the organization. Allegations A1 and A4 were treated separately (as were five other human relations allegations that were rejected on the evidence). That suggests that the Citizens' Representative did not approach Allegations A1 and A4 as cumulatively as establishing gross mismanagement based on a systemic management issue. Instead, the Citizens' Representative appears to have treated Allegations A1 and A4 as independent. To establish gross mismanagement based on isolated incidents of inappropriate behaviour, the evidence must disclose far more serious misconduct than if a pattern of behaviour is alleged.

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[161] See "Wrongdoing – Gross Mismanagement", above, starting at p. 47.

The failure to make findings of fact on crucial matters, or to explain why certain evidence was accepted to enable key inferences to be drawn, and the failure to relate the evidence to the tests for determining whether gross mismanagement existed, leads me to the conclusion that

> The finding of gross mismanagement and the conclusions drawn from the evidence with respect to Allegation A1 should not be relied upon by the House of Assembly or the Lieutenant-Governor in Council as a basis for further action against the Chief Electoral Officer.

ALLEGATION A4: SCREAMING AND YELLING AT EMPLOYEES

This allegation states that the Chief Electoral Officer "screamed and yelled at employees and on one occasion pounded on a table in a manner that was perceived to be an act of bullying and intimidation."

The Citizens' Representative's Reasoning and Finding

The allegations under this heading consisted of

- "dressing down" Employee #1 in front of others;
- yelling at Employee #2 (who had raised occupational health and safety concerns about the return of some employees who had worked from home during the Level 5 lockdown), saying that if Employee #2 was not comfortable working in the environment they could quit;
- slamming his fist on a table and swearing when Employee #1 disagreed with the Chief Electoral Officer's request to count specific ballots on the basis that he had been told to use a different system, saying, "I want them counted now!"

Some temporary employees witnessed these exchanges and were "taken aback" by the Chief Electoral Officer's tone, which they "perceived to be unbecoming a

Statutory Officer of the House of Assembly." One witness told the Citizens' Representative that they believed the behavior "bordered on harassment." Another witness described him as condescending and derogatory.

The Chief Electoral Officer responded by stressing that these matters had to be viewed in context, including "the extreme stress and siege the CEO and staff of Elections NL [were] under" during the election. He pointed out that, with respect to Employee #1, he was wearing a mask when communicating with this employee so he felt he had to speak louder which may have been perceived as angry comments. With respect to Employee #2, he said that they were particularly sensitive to COVID- 19 infection risks and decided to quit. He said, "[G]iven the balance the CEO was attempting to manage between election administration and public safety," he did his best to appease the concerns of employees.

With respect to the "slamming the table" incident, he acknowledged that in retrospect he should not have struck the table; however, contextually, the employee was being insubordinate, the Chief Electoral Officer was under "tremendous pressure", and the action was out of character for him. Further, although he raised his voice, he was trying to get the employee to understand the importance of doing the ballot counting the way he wanted it done rather than the way the employee had been told by another subordinate elections official. The Chief Electoral Officer asserted, "I am by nature a soft spoken person and if I'm trying to make myself heard, I've got to raise my voice, it might sound like I'm shouting."

In assessing the evidence, the Citizens' Representative concluded:

> We accept the testimony of the multiple witnesses here. They were nuanced in their descriptions of the events that occurred. Each provided their personal views and there was no evidence of coached or collaborative testimony.

Although the Citizens' Representative accepted the description of the events as relayed by the witnesses, he did not, however, make any finding with respect to the context in which the events occurred and did not, therefore, address the points made by the Chief Electoral Officer that the significance of what happened must be viewed against the contextual backdrop.

The Citizens' Representative was apparently impressed by the stark nature of the events themselves and must have felt that, no matter what the context, they were serious enough to constitute gross mismanagement. He put it this way:

> All Members, Officers, managers and employees of the House of Assembly are expected to act towards others respectfully and professionally. … This is a fundamental precept that contributes to a safe and healthy work environment free from harassment, abuse and discrimination…
>
> Certain behaviors by the CEO during the 2021 Election … were unacceptable and not those expected of an Officer of the House of Assembly. In our view they violate Section 4 of the House of Assembly Code of Conduct as it relates to treating employees and members of the public with courtesy and respect. They demeaned and demoralized temporary employees… They further diminished permanent staff morale, and were detrimental to the reputation of the OCEO…

The Citizens' Representative decided, on the basis of "the evidence assessed in its entirety," that the Chief Electoral Officer grossly mismanaged his obligations under Section 4 of the *Code of Conduct* "when he screamed and yelled at employees, and on one occasion pounded on a table in a manner that was perceived as an act of bullying and intimidation."

Section 4 of the *Code* provided:

> We will treat colleagues, members and the public with courtesy and respect

Analysis of Reasoning and Finding

This is one of the few occasions where the Citizens' Representative made a clear finding of fact: based on all the evidence, he accepted the witnesses' evidence that screaming, yelling and pounding on a table did occur and that these actions were (presumably reasonably) perceived as bullying and intimidation.

On these findings, it was not unreasonable to conclude that this behavior was inappropriate or unacceptable. The question that had to be addressed, however, is not whether it was inappropriate or unacceptable but whether this behavior amounted to *gross mismanagement.* The reasoning in the Report appears to make

the leap that inappropriate or unacceptable behavior of the type described must *of course* be gross mismanagement without any analysis or explanation why, on the facts of this case, it should be so regarded.

It is not hard to conclude that the factual findings by the Citizens' Representative evince a very poor management style which probably requires remedial training. However, is *any* inappropriate behavior of this type, even if it happens once, always to be regarded as gross mismanagement? What if it is not characteristic of the manager's general management approach? What if the manager's inappropriate behaviour was mitigated by stress or personal or external pressures?

The Report does not address the question as to why the three instances addressed were either indicative of a general managerial style that was generally affecting the institution or otherwise were so serious in themselves that they had to be elevated to the level of gross mismanagement. No explanation is given. Not only are these questions central to the analysis of gross mismanagement as I have described it above, but they are also among the factors the Citizens' Representative adopted in his multifactor approach. Yet he did not, in his reasons, attempt to relate the incidents to the factors he described: "[m]atters of significant importance"; "[s]erious errors that are not debatable among reasonable people"; "[t]he systemic nature of the wrongdoing". One cannot follow the reasoning except by making one's own intuitive assessment based on the idea "I'll know it when I see it."

True, the Report does conclude that the actions demeaned and demoralized temporary employees and diminished permanent staff morale. But there is no analysis of whether this was a general pattern of management or out of character, as the Chief Electoral Officer asserted. In other contexts as well as the current one, the Chief Electoral Officer had emphasized that he was, and was generally perceived to be, a very mild-mannered and soft-spoken man. In addition, he gave evidence that he was experiencing some personal problems which were distracting him, in addition to the great stress he was experiencing as a result of having to deal with the unanticipated problems of a pandemic election. In fact, the Citizens' Representative did acknowledge, in the opening pages of his Report, "the immense, and immeasurable stress that the 2021 General Election placed on the CEO."[162] But,

[162] Report, Volume 1, p. 26, available in the Supporting Materials, Item 2.1.

none of this surfaces in the reasoning leading from the facts as found and the conclusion reached regarding Allegation A4.

It may be that the Citizens' Representative was of the belief that the Chief Electoral Officer's behavior on the three occasions in issue was indicative of a general toxic institutional culture that showed an inability to manage generally. But he does not say so. Nor does the Citizens' Representative relate any evidence that would support a finding that the Chief Electoral Officer's behaviour was so egregious that a small number of instances would establish gross mismanagement. If anything, statements like "[bordering] on harassment" suggest that his behaviour was inappropriate but fell short of harassment.

If the Chief Electoral Officer's behaviour was neither egregious nor characteristic, then this might well be a case where the broader public interest was not engaged[163] and, instead, the matter should have been referred to be dealt with under respectful workplace policies. While it is true that, perhaps, the Citizens' Representative could not be faulted for not declining to investigate at the outset under s. 58(5) of the *Act,* these considerations are also engaged when also analyzing the actual allegations. There is no indication from the reasons that the Citizens' Representative turned his mind to this when deciding whether, instead, he should characterize it as wrongdoing by gross mismanagement.

Finally, the type of allegations in this case, involving assessments as to the nuances associated with the behavior, how widespread the perceptions were, and whether there could have been misunderstandings or even an alternative explanation, points out the need for a person facing such allegations that are potentially wide-ranging in their implications, to be able adequately to meet the allegations and defend himself against them. I have already expressed concerns about the procedural fairness implications of the way the investigation was conducted, with the Chief Electoral Officer not being able to see transcripts of the evidence of the witnesses or hear the recordings of their evidence and thereby be able to challenge their actual testimony, as opposed to unverifiable summaries of the evidence.[164] These concerns are particularly acute with respect to the current allegations.

For the foregoing reasons, I have come to the conclusion that

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163 See the discussion of this issue in "Threshold for Investigation" above, starting at p.58.

164 See "Analysis: The Right to Be Heard" above, starting at p.69.

The finding of gross mismanagement and the conclusions drawn from the evidence with respect to Allegation A4 should not be relied upon by the House of Assembly or the Lieutenant-Governor in Council as a basis for further action against the Chief Electoral Officer.

ALLEGATION B8: HIRING A COHABITING DEPENDENT

This allegation states that "[t]he [Chief Electoral Officer] engaged in nepotism in violation of the House of Assembly Code of Conduct and potentially the *Conflict of Interest Act 1995*, resulting in the erosion of staff morale and inefficient allocation of public resources."

The Citizens' Representative's Analysis and Finding

The Chief Electoral Officer's minor child (the "Child"), who lived at his address, was sworn in as a House of Assembly employee during the 2019 General Election. The Child worked during the election at a polling station and processing special ballots. In total, the Child earned about $1,000 for about 55 regular hours and 3 overtime hours. Pay was deposited to a bank account connected with the Chief Electoral Officer's address, and the Chief Electoral Officer was listed as an emergency contact.

In January 2021, witnesses told the Citizens' Representative that two of the Chief Electoral Officer's children entered the Elections NL headquarters. The Chief Electoral Officer said they were "there to help".

On January 26, a CBC reporter emailed OCEO to ask if the Chief Electoral Officer's children were working there. Twenty-five minutes later an official replied that the children were helping to prepare voting kits but were not being paid.

Some witnesses indicated that the Chief Electoral Officer only declared his children to be "volunteers" after the media inquiry, directing that payroll documents not be submitted for processing. One witness overheard the Chief Electoral Officer saying he would "now have to pay them out of [his] own pocket".

Two days after informing the CBC that his children were volunteers, the Child signed payroll forms claiming payment for three hours' work as a Deputy Returning Officer.[165] Eight days later, the Chief Electoral Officer signed a form appointing the same child who had worked in 2019 as a Deputy Returning Officer. Ultimately, the Citizens' Representative indicated that no pay was issued.

The Citizens' Representative indicated that neither House of Assembly nor Executive Council policy permits volunteers. In addition, an injured volunteer without paperwork would fall outside the workers compensation regime, creating a potential cause of action against the government.

The Citizens' Representative observed that, under s. 3 of the *Conflict of Interest Act, 1995*,

> A public office holder shall not make or participate in making a decision in his or her capacity as a public office holder where the public office holder knows or ought reasonably to know that in the making of the decision there is the opportunity to benefit himself or herself or a member of his or her family improperly, directly or indirectly.

The definition of "family" includes a dependent cohabitating relative like the Child.[166]

The Citizens' Representative also referred to a 2006 Auditor General's report which found that several OCEO temporary employees were direct dependants of permanent employees. In addition, "contrary to sound management practices, there were no advertisements, no competitions held and no other objective process for the hiring of any temporary employees." The Auditor General described the hiring of direct dependents as a violation of the *Conflict of Interest Act, 1995* and recommended that OCEO comply with the law and "use an objective process for hiring temporary employees".

In interviewing the Chief Electoral Officer, the Citizens' Representative also emphasized perceptions, saying that "[t]here's a difference between what's permitted and what is – what gives you a good look" and "the optics are terrible".

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165 This form can be found at Report, Volume 2, Appendix 7, available in the Supporting Materials, Item 2.2.

166 *Conflict of Interest Act, 1995*, SNL 1995, c. C-30.1, s. 2(d)(ii) and (iii).

The Chief Electoral Officer responded by emphasizing that the OCEO has incredible difficulty recruiting election workers: "[t]he remuneration is insignificant, the work can be tedious, and involves long hours of dealing with the public". The children of public servants, including OCEO employees, often work as temporary election workers. The Chief Electoral Officer's position was that the *Conflict of Interest Act, 1995*, did not forbid employing family when no one else was willing or available to perform the work.

In response to the Child's employment as a Deputy Returning Officer shortly after telling the CBC his children were volunteering, the Chief Electoral Officer said that although he formally appointed Deputy Returning Officers, he did not play any role in hiring them: those hiring decisions were made by the district returning office.

Overall, the Chief Electoral Officer acknowledged that engaging the Child as an employee and volunteer "when viewed in context is poor judgment" but not gross mismanagement.

The Citizens' Representative rejected the Chief Electoral Officer's claim that his children were volunteering:

> Further, witnesses … state their strident belief that the only reason the child or children were declared "volunteers" was because the [Chief Electoral Officer] had been caught by the media. As one of the children had already been on public payroll, and the same child was subsequently appointed and had completed forms to be paid as a Deputy Returning Officer just two days after the January 26 incident, the theory that there would be an intermittent period of volunteerism between two periods of paid work is, on a balance of probabilities, implausible.

The Citizens' Representative concluded the Chief Electoral Officer grossly mismanaged his obligations under s. 5 of the *Code of Conduct*, which states:

> We will avoid circumstances in which personal interests compromise or conflict with the interests of the House of Assembly and avoid circumstances in which there will be the appearance of conflict. We are subject to the provisions of the *Conflict of Interest Act, 1995*.

Analysis of Reasoning and Finding

The Citizens' Representative's reasons leave the basic nature of the Chief Electoral Officer's wrongdoing unclear. Was the Chief Electoral Officer in an actual conflict of interest (such as a breach of the *Conflict of Interest Act, 1995*) or did he instead fail to avoid the appearance of a conflict?[167]

These theories are not mutually exclusive. The same facts often suggest both an actual conflict of interest and the appearance of a conflict. However, a finding of wrongdoing must be tied either to an actual conflict, an apparent conflict, or both. Combining concerns about actual conflict and perception creates a significant risk of double-counting concerns that arise from the same facts, creating a vague implication of wrongdoing even though neither an actual nor apparent conflict exists.

Here, the allegation referred to a "potential violation" of the *Conflict of Interest Act, 1995*, and the facts raise a real concern about both an actual conflict and an apparent sense conflict. In different parts of his reasons, the Citizens' Representative concludes that hiring the Child was "arguably" a violation of the *Conflict of Interest Act, 1995* and that "[t]he cumulative evidence suggests" a violation. At the same time, the Citizens' Representative pressed the Chief Electoral Officer on "what gives you a good look" and "the optics", suggesting a shift to a theory of apparent conflict.

Most of the Chief Electoral Officer's response related to an actual conflict. If temporary election positions are as unattractive and difficult to fill as the Chief Electoral Officer describes, it is at least arguable that appointing a family member to one might not "benefit" a family member "improperly" under the *Conflict of Interest Act, 1995* and might not establish a conflict of interest under the *Code of Conduct*. The Chief Electoral Officer's counsel points out that, for government contracts, there is an explicit exception allowing public office holders to enter into a contract with a family member "[i]n a case where no other person is qualified and available to provide the goods or services."[168]

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167 An official could also breach of s. 5 of the *Code of Conduct* by failing to avoid circumstances that could create an actual conflict, even if no actual conflict emerges. Nothing in the Citizens' Representative's reasons suggests he relied on this theory.

168 *Conflict of Interest Act, 1995*, s. 8(4)(d).

The 2006 Auditor General report concluded that hiring family members was improper because in 2006 OCEO was not advertising the positions. In this case, the Citizens' Representative posed interview questions about the Chief Electoral Officer's recruitment efforts, and the Chief Electoral Officer responded with some detail. The Citizens' Representative's report does not challenge the Chief Electoral Officer's assertion that it was very difficult to fill temporary elections positions and he does not address the impact of this evidence in his reasoning leading to the finding of gross mismanagement.

An apparent conflict of interest provides another way of establishing wrongdoing without rejecting the Chief Electoral Officer's assertions. In his interview, the Citizens' Representative did raise concerns about perception or apparent conflict when the Chief Electoral Officer denied an actual conflict of interest. However, these interview quotes are the only parts of the Citizens' Representative's final reasons that address apparent conflict.

The Citizens' Representative's reasons, read in light of the limited portions of the record he was willing to provide, do not allow me to understand his rationale for this essential element of a finding of wrongdoing.[169] His reasons do not meet the standard of justification, transparency, and intelligibility, and I cannot recommend reliance on these reasons alone as a basis for further action against the Chief Electoral Officer.

Procedural fairness concerns also preclude reliance on the Citizens' Representative's conclusions. The Chief Electoral Officer notes that he was never advised that the Auditor General's 2006 report formed part of the case against him. But more fundamentally, the Citizens' Representative's findings of fact required him to reject the Chief Electoral Officer's evidence in favour of that of unnamed other witnesses, but the Chief Electoral Officer was never told who contradicted him or what they said. It is not fair to rely on credibility findings that the Chief Electoral Officer had no practical ability to challenge. As a result, I conclude that

169 *Vavilov*, para. 98.

The finding of gross mismanagement and the conclusions drawn from the evidence with respect to Allegation B8 should not be relied upon by the House of Assembly or the Lieutenant-Governor in Council as a basis for further action against the Chief Electoral Officer.

Despite these concerns, the evidence collected by the Citizens' Representative does raise questions about actual and apparent conflicts of interest. Without reliance on the Citizens' Representative's findings, I cannot express an opinion on these concerns, except to say that they could legitimately form the basis for future investigation.

ALLEGATION C14: SAFETY TRAINING FOR TEMPORARY EMPLOYEES

This allegation states that "OCEO provided no, or adequate, safety training or briefings, including best practices for heavy lifting and working around forklift operations, to many temporary employees hired."

The Citizens' Representative's Analysis and Finding

Employers have a duty, "where it is reasonably practicable", to ensure workers' health, safety and welfare; to provide any information, training, and supervision this requires; and to make workers familiar with health and safety hazards.[170] Here, the Citizens' Representative found that OCEO operated warehouse spaces where workers stored materials on high shelves and moved them with hand carts and pallet jacks. The influx of new and returning temporary employees each election made training particularly necessary.

Witnesses informed the Citizens' Representative that they received no occupational health and safety training. They were not advised of hazards or best practices for heavy lifting. They were not provided with protective footwear or hard hats. OCEO's safety committee had not met since Fall 2020. Protective equipment had been required in the warehouse years before, but not during the 2021 election.

[170] *Occupational Health and Safety Act*, s. 4, 5(b), and 5(c).

The Chief Electoral Officer agreed that the lack of training for temporary employees was an "oversight" and that all employees have a role in ensuring occupational health and safety. However, other election officials were responsible for warehouse safety. The direct duty for ensuring warehouse safety rested on the Election Warehouse Clerk whose superior was the Director of Election Operations. No concerns were brought to the Chief Electoral Officer's attention. He submitted that the individual conduct of the Chief Electoral Officer, when viewed in context of who was responsible for warehouse safety could not amount to gross mismanagement.

The Chief Electoral Officer noted that the original allegation referred to a forklift, but OCEO does not have a forklift. He also noted that, while warehouse workers were expected to lift 50 pounds, election officials were instructed to ensure that districts only received election materials light enough for district returning office staff.

The Citizens' Representative found that the Chief Electoral Officer would be the person held responsible for a workplace accident under the *Occupational Health and Safety Act.*[171] He "was on site for every day of the 2021 General Election and would have witnessed circumstances that would have made reasonable people question whether occupational health and safety imperatives were being followed in the OCEO warehouse." The Citizens' Representative concluded:

> Ultimate responsibility rests with the CEO as the employer and section 5(c) of the *Occupational Health and Safety Act* does not download this responsibility. … This is not merely an oversight. Arguably, it is a violation.

As a result, the Citizens' Representative decided that the Chief Electoral Officer "inefficiently performed his duties as required under occupational health and safety law to the point that his actions can be characterized as gross mismanagement of his Section 2 Code [of Conduct] duty."

Section 2 of the *Code of Conduct* states in pertinent part:

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[171] Section 5(c) provides that an employer "shall ensure that his or her workers, and particularly his or her supervisors, are made familiar with health or safety hazards that may be met by them in the workplace."

> We will perform our duties honestly, faithfully, ethically, impartially and efficiently, respecting the rights of the public and our colleagues.

Analysis of Reasoning and Finding

As expressed in the Report, there are two possible bases for the Citizens' Representative's ruling.

The first is that, notwithstanding the fact that others in the OCEO had direct responsibility for managing occupational health and safety issues, the Chief Electoral Officer had "ultimate responsibility" under the *Occupational Health and Safety Act* and that was sufficient in itself to constitute gross mismanagement if, as was apparent, occupational health and safety issues were not being addressed.

The second possible basis is that the Chief Electoral Officer would have witnessed circumstances that ought to have raised doubts to a reasonable person about safety standards.

It is unclear whether the Report regards these two bases, *taken together*, as constituting gross mismanagement or whether either one of them would have been sufficient. From my reading of the Report, I think the better view is that the two bases, collectively, were regarded as meeting the gross mismanagement bar. The reference to the Chief Electoral Officer being onsite every day and witnessing the existing safety circumstances is immediately followed by the assertion that ultimate responsibility rested on the Chief Electoral Officer under the *Occupational Health and Safety Act.*[172] As well, in the same paragraph, the Report rejects the notion that the Chief Electoral Officer could have assumed that training had been done by others because his statutory responsibility was, in any event, to "ensure" the workers were trained. If this is the correct interpretation of the reasoning, then if either basis for the ruling is incorrect or not supportable, the finding of gross mismanagement cannot stand.

Nevertheless, because it is possible that the Report could be interpreted, alternatively, as relying on the two bases independently, I will analyze the reliability of the ruling on that basis.

[172] See Report, Volume 1, p. 84, available in the Supporting Materials, Item 2.1.

As to the first basis ("ultimate responsibility" rested on the Chief Electoral Officer by statute), there is a fatal flaw in this analysis. The Chief Electoral Officer would have duties under the *Occupational Health and Safety Act*, but that does not mean the Chief Electoral Officer personally contravened the *Occupational Health and Safety Act*. The Chief Electoral Officer's acknowledgement that there were oversights in implementing the *Act* is not a confession of guilt. The Citizens' Representative did not perform an analysis of the elements of an offence under the *Act* or of the Chief Electoral Officer's possible defences,[173] even if such an analysis were appropriate. Even if the Citizens' Representative had established quasi-criminal liability, that would not determine whether he grossly mismanaged his office. Gross mismanagement is not the same thing as being guilty of a violation of a provincial statute, including under this province's *PIWDPA*. It must be remembered that, unlike in some other jurisdictions, the definition of wrongdoing does not include a breach of a federal or provincial statute. Section 54 (1)(e)(i) of the *House of Assembly Accountability, Integrity and Administration Act* only includes as wrongdoing "an act or omission constituting an offence *under this Act*" (italics added).[174]

Further, even if another statute, for the purpose of the operation and application of *that statute*, places ultimate quasi-criminal responsibility on the Chief Electoral Officer, that cannot be used to modify the test for gross mismanagement, which as explained earlier in this report, must relate to individual actions or inaction that depart markedly from a reasonable standard. It does not require the Chief Electoral Officer to "ensure" (as the Citizens' Representative wrote) that occupational health and safety training be given, such that if the guarantee is not fulfilled in even the slightest respect, he would be guilty of gross mismanagement. While the Chief Electoral Officer bears ultimate managerial responsibility for workplace safety, gross mismanagement must relate to his individual actions. The Act does not require him to conduct all safety training and briefings personally. It does not therefore allow a finding of gross mismanagement without an evaluation of what he individually did or failed to do.

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173 The test is discussed in *R. v, St. John's (City)*, 2017 NLCA 71.

174 The rationale for this, coming out of the *Constituency Allowance Report*, is explained in "Legislative Structure of the Public Interest Disclosure (Whistleblower complaints) Process", above, starting at p. 22.

The Chief Electoral Officer's responsibility under the *Occupational Health and Safety Act* is therefore not a valid stand-alone basis for establishing gross mismanagement. While the Chief Electoral Officer bears ultimate responsibility for workplace safety, gross mismanagement relates to his individual actions or inaction. The *Occupational Health and Safety Act* does not require the Chief Electoral Officer to conduct all safety training and briefings personally and nor does it allow a finding of gross mismanagement without evaluating what the Chief Electoral Officer individually did or failed to do. To treat his statutory duty as such a basis for the finding would be (wrongly) to conflate the two tests which are different in concept and purpose.

With respect to the second possible basis for the ruling (i.e. the witnessing of the warehouse circumstances ought to have raised doubts about safety standards), the statement in the Report that the Chief Electoral Officer "would have witnessed" circumstances raising reasonable questions implies that the Chief Electoral Officer actually did witness these circumstances. This raises two possibilities: either (1) he consciously realized that occupational health and safety standards were questionable and chose to do nothing about it or (2) he failed to connect the dots as a reasonable person in his shoes would have done.

As to the first possibility, the interpretation that the Chief Electoral Officer deliberately turned a blind eye to occupational health and safety violations cannot be reconciled with the Citizens' Representative's Report. The elliptical statement that the Chief Electoral Officer "would have witnessed circumstances that would have made reasonable people question" means something less direct than "the Chief Electoral Officer actually questioned". A wilful disregard of legal and moral responsibilities would, under s. 2 of the *Code of Conduct*, be described as unethical not inefficient. Further, the Report indicates the Chief Electoral Officer's response "would lead a reasonable person to conclude he only assumed workers were trained on safe warehouse operations, when his responsibility is to ensure they were trained": a portrait of complacency not dereliction of duty.

The gravamen of this finding, then, must be that the Chief Electoral Officer missed signs of poor occupational health and safety standards that a reasonable person would have noticed. On this interpretation, the Citizens' Representative's

Report adopts a theory justifying a finding of gross mismanagement that is fundamentally flawed, because it does not properly address the question of individual fault.

As I observed earlier in this report, a finding of gross mismanagement (1) should identify voluntary individual actions or inaction departing markedly from the standard of the reasonable public servant; (2) should conclude that the individual knew or was reckless of or was wilfully blind to the context, risks or consequences of the action or inaction that constitute the marked departure; and (3) must focus on individual wrongdoing, not institutional outcomes or failures, unless the institutional failure is the result of individual managerial actions or inaction that contributes to the institutional dysfunction. The Report did not address these matters by explaining how they were satisfied.

The Citizens' Representative compares the Chief Electoral Officer's behaviour to what a reasonable person in his situation would have done, suggesting that the Chief Electoral Officer was negligent. As I have discussed, a finding of gross mismanagement requires something more than ordinary negligence: either subjective wrongdoing or a marked departure from reasonable standards. The Citizens' Representative's Report does not suggest this higher standard was met.

The Report does not make the findings that would be necessary to evaluate individual fault. For example, it is unclear what the Chief Electoral Officer saw. Did he fail to notice urgent and serious safety risks? Or did he fail to notice a pattern of small discrepancies that should have alerted him that some temporary employees were unaware of best practices? Either would be a personal failure, but disregarding urgent and serious risks would be far more serious.

Similarly, the Report does not consider whether there were any factors that could explain or mitigate the Chief Electoral Officer's conclusion that there was a failure to meet reasonable standards. The Chief Electoral Officer would have been very busy throughout the election and especially after the lockdown, when the Citizens' Representative acknowledges that he was under great personal stress. In fact, the Report acknowledges, in its general "commentary" on the Chief Electoral Officer's general submissions on "Contextual Background"[175] that:

[175] Report, Volume 1, p. 26, available in the Supporting Materials, Item 2.1.

> Many of the decisions required were "on the spot" where quick judgment needed to be exercised in an extremely fluid situation. The CEO worked seven days a week for months.

Yet there is no discussion when addressing Allegation C14 of how workload, responsibilities, distraction, or stress might explain or mitigate the failing. It is not even clear whether concerns about safety ought to have arisen immediately or later during the campaign. If there were mitigating factors, then the failure may not be characterized as "gross mismanagement."

Accordingly, from the description of the evidence, the lack of findings of fact and the failure to analyze individual fault, I cannot tell from the factual findings or from the limited other information at my disposal (such as the Chief Electoral Officer's interview or the expanded notice of allegations) how the Citizens' Representative dealt with the question of individual fault which is, in my view, an essential part of any finding of gross mismanagement. It is not possible to follow the reasoning to the conclusion reached in the Report. The finding of gross mismanagement therefore cannot meet the "standard of justification, transparency and intelligibility" where the rationale for this "essential element of the decision" "is not addressed in the reasons and cannot be inferred from the record".[176]

Alternatively, analyzing the matter by applying the non-exclusive multi-factor approach described by the Citizens' Representative in the Report, there was no attempt to describe which factors were regarded as applicable or not applicable, as the case may be, and if an additional factor not in the list were regarded as applicable, the Report does not identify it as nevertheless a relevant consideration.

In addition to these substantive concerns, this allegation raises particularly pressing procedural fairness concerns. Neither the initial nor the expanded notice of allegations suggested that the Chief Electoral Officer personally saw circumstances that ought to have raised safety concerns. He was not even asked in his interview whether he personally saw lapses from occupational health and safety best practices. This failure does not only undermine the finding of gross mismanagement, but any confidence in the Citizens' Representative's finding that a reasonable

[176] *Vavilov*, at para. 98.

person in the Chief Electoral Officer would have asked questions about occupational health and safety.

Finally, I would note that occupational health and safety violations are already addressed by a separate regime under the *Occupational Health and Safety Act*. The Occupational Health and Safety Division has wide powers to investigate workplaces,[177] order remedial measures and issue stop-work orders,[178] and establish codes of practice.[179] The Minister can appoint boards of inquiry to inquire into health and safety issues.[180] Individuals and corporations can also be prosecuted.[181]

It is not clear why the Citizens' Representative recommended that this finding of wrongdoing be referred to the House of Assembly rather than to the Occupational Health and Safety Division. At first glance, the Occupational Health and Safety Division is not only better able to consider the Chief Electoral Officer's individual responsibility, if any, but also has the tools to address institutional problems with safety culture. If the Chief Electoral Officer engaged in any wrongdoing, the underlying issue was his failure to address institutional health and safety faults, and it is not clear why corrective action should be directed at the Chief Electoral Officer personally but not the underlying institutional problem.

Accordingly, I am of the view that

> The finding of gross mismanagement and the conclusions drawn from the evidence with respect to Allegation C14 should not be relied upon by the House of Assembly or the Lieutenant-Governor in Council as a basis for further action against the Chief Electoral Officer.

177 *Occupational Health and Safety Act*, s. 26.

178 *Occupational Health and Safety Act*, s. 27 and 28.

179 *Occupational Health and Safety Act*, s. 36.

180 *Occupational Health and Safety Act*, s. 63.

181 *Occupational Health and Safety Act*, s. 67,

This allegation states that "[t]here was never developed a comprehensive plan for holding an election during the various Alert Levels of the pandemic even though staff had drafted several contingencies for the CEO's review and organization-wide implementation."

The Citizens' Representative's Reasoning and Finding

During Summer 2020, in the wake of the initial Covid-19 lockdown, OCEO staff prepared two documents about pandemic election planning:

- A backgrounder analyzed a potential Fall 2020 election.[182] It indicated that Alert Level 4 or 5 posed a "significant risk of inability to conduct election activities", "significant risk of inability to meet delivery timelines of election materials", and a severely restricted ability to hire and train election workers. The backgrounder included recommendations about masking, social distancing, and contact reduction for in-person voting, but no recommendations about how to conduct voting during a lockdown, let alone a late-emerging lockdown.
- A Covid-19 Election Preparedness Planning document[183] provided more detailed recommendations about staffing, communications, training, polling stations, special ballots, returning offices, internal government departments, external suppliers, headquarter space, PPE, and extraordinary circumstances. This document notes that public health restrictions could affect mail delivery times, special ballots counting, election workers' access to personal care homes, and staffing levels.

The Planning document's most significant recommendations concerned legislative reforms to allow public servants to work at individual polls and healthcare workers to fill staffing holes and to administer votes in hospitals and long-term care homes. It also indicated a "significant rework" of statutory timelines would be necessary to allow expanded use of special ballots. Another significant recommendation was to encourage electors to vote by mail to deal with the possibility of the unavailability of schools as voting locations. Further discussion of the extensive

182 Report, Volume 2, Appendix 8, available in the Supporting Materials, Item 2.2.

183 Report, Volume 2, Appendix 9, available in the Supporting Materials, Item 2.2.

recommendations and suggestions, including the use of Special Ballot voting and implementing alternative voting periods, can be found in the Citizens' Representative's Report.[184]

The Chief Electoral Officer did not produce either the Backgrounder or the Planning Document in response to the requests by the Citizens' Representative for general document disclosure. Instead, the Citizens' Representative became aware of them by other means. When they were brought to his attention, the Chief Electoral Officer indicated through counsel that "[t]here is no reference in your disclosure that these documents were ever provided to the CEO for review". However, a witness provided the Citizens' Representative with a June 2020 email to the Chief Electoral Officer attaching the draft planning document and addressing "next steps", including development of a statement of principles for addressing COVID concerns, production of training videos, involving the Election Policy and Systems Analyst to deal with building occupancy and sanitization, and documenting election-day processes for electors to follow. The document recommended that the documentation, when developed, be brought to the attention of Chief Medical Officer of Health for discussions. There was no evidence of a response from the Chief Electoral Officer. In his interview, the Chief Electoral Officer responded that he didn't remember the planning document, but it was "pretty standard stuff".

As for legislative reform, the Chief Electoral Officer doubted that it was appropriate for him as a statutory officer to suggest legislative reforms. Another elections official indicated that legislative reform was discussed early in the planning stages but was rejected as being "outside the realm of possibility" given the political climate. The June 2020 email sending the Planning document to the Chief Electoral Officer corroborates this:

> The scope of our review was primarily done to try and identify issues / solutions that are within the current legislation. We felt that opening up too many solutions to legislative changes was a bad idea, as those changes may not materialize. … [One official] did look at some alternative voting arrangements, but they would require significant rework of the legislation, and would require a complete overhaul of our election planning and processes. Given we could be in a full general election by the fall we felt those options were just not feasible.

[184] Report, Volume 1, pp. 86-90, available in the Supporting Materials, Item 2.2.

OCEO witnesses told the Citizens' Representative the aftermath of the February 2021 lockdown was confused and chaotic. This evidence was corroborated by returning officers' post-election reports, which noted that many supplies arrived late. One OCEO witness was quoted by the Citizens' Representative as saying, "There was no thought to Level 5 until it happened."

The Citizens' Representative noted that Elections Canada had identified in May 2020 that special election measures could lead to legal challenges and disenfranchisement. He also noted that, despite low case counts, New Brunswick had experienced poll workers quitting and other difficulties in its September 2020 general election. He also noted that, in the leadup to the 2021 General Election, OCEO had three unfilled permanent positions.

The Chief Electoral Officer responded that he and another election official had been in contact with election officials across the country and had reviewed election literature. The OCEO had a plan for voting at all alert levels. He stated that he had looked at elections that had occurred in the pandemic around the world and he was "confident that we could conduct an election, as other jurisdictions had, using the same processes that were in the public health guidelines." In hindsight, a plan for mass resignations at the last minute would have been beneficial, but that scenario was unprecedented and unanticipated.

As he explained:

> Elections NL did not anticipate, and to its knowledge, neither did any other election office in Canada, the mass resignation of staff in the days leading up to the election which required a pivot to exclusive special ballot voting. While some may characterize this as a failure, it was not reasonably anticipated given no other jurisdiction had to deal with this issue. In retrospect, a plan would have been beneficial, but every contingency cannot be contemplated. However, to equate the lack of availability of a plan for such an unanticipated and unprecedented scenario with gross mismanagement is not fair to the CEO and such a finding is not warranted.

The Citizens' Representative made a number of observations and drew conclusions as follows:

> [T]here was no evidence that the CEO proactively sought out or otherwise monitored election readiness plans for his office during the pandemic. It begs the question as to why he did not inquire on the subject of the status of a plan if he hadn't seen a plan. When asked to produce a plan, the CEO sent OCR documents from other jurisdictions. The facts show a plan was given to the CEO more than five months before the election call. It would appear as if the yardstick, or substitute for a plan was the execution of a safe in-person by-election in the fall of 2020.
>
> …
>
> In a pandemic that had already inflicted a total lockdown on the populace, and the distinct possibility of future lockdowns based on national and international trends, the failure to acknowledge the existence of the plan, meet internally on the plan, discuss the plan with government and the political parties and generally make the facts as discerned by his organization known publicly cannot be construed as anything other than gross mismanagement.

The Citizens' Representative also laid comparative emphasis on the sorts of COVID election preparation engaged in by other electoral bodies in Canada. He questioned why the Chief Electoral Officer had not heeded the advice that came from other jurisdictions and why he had not advocated for changes to the *Elections Act, 1991*. He referred to "key testimony" from another elections official commenting on the assertion of the Chief Electoral Officer that he and his Assistant had been in regular contact with elections officials across the country to discuss the impacts of COVID-19 on a general election. The Citizens' Representative stated in his Report that another elections official had stated "as for any party-to-party contact with Elections Canada alone … if I recall, one of them e-mailed to ask something about personal care homes, but beyond that there was not much communication." The fact that the Report calls this "key testimony" suggests that the Citizens' Representative accepted it as justifying the drawing of inferences that the Chief Electoral Officer was wrong to assert that the OCEO had been in contact with other jurisdictions and that significant communications did not in fact occur.

Counsel for the Chief Electoral Officer provided me with an affidavit addressing this matter sworn by the same elections official the Citizens' Representative relied on.[185] The affidavit stated that "the [Citizens' Representative] was incorrect in asserting that Elections NL was not collaborating or monitoring other jurisdictions' pandemic planning." It is evident from the affidavit that the references in the Report were selective. The affidavit pointed out that while it was correct that the official only spoke to Elections Canada once or twice leading into the 2021 general election, it was incorrect to use that fact to infer that there was no communication or sharing of knowledge between Elections NL and other jurisdictions. It explained:

> That is factually incorrect. Elections Canada was not responsible for facilitating discussions between jurisdictions and sharing of knowledge. That task was specifically done by the Secretariat for Electoral Coordination (SEC). The SEC created a working group 'Election Planning in a Pandemic' for all jurisdictions (including Elections Canada as a participant) to discuss COVID-19 planning considerations. I was the Elections NL representative on that working group and the initial meeting was held on May 26, 2020.

The affidavit also referred to the creation of a Sharepoint site by the SEC working group for all provinces to upload their planning materials and to answer questions. It stated, "Elections NL reviewed our COVID-19 planning in conjunction with the plans that were shared by other jurisdictions." It further stated that the reference materials from the Sharepoint site were provided to the Citizens' Representative as part of his investigation but that the Citizens' Representative was "dismissive" of them during the election official's interview.

The foregoing is a good example of the concerns that can arise from a procedural fairness point of view when access to the record of the evidence by the person defending himself is restricted. It can throw into question the degree to which reliance can be placed on the conclusions reached when the person facing the allegations cannot fully respond.

The Citizens' Representative concluded the Chief Electoral Officer "grossly mismanaged" his obligations under Section 2 of the *Code of Conduct* when he "inefficiently performed his duties with respect to pandemic planning." Section 2 of

[185] Exhibit 3, available in the Supporting Materials, Item 3.3.

the *Code* placed an obligation to perform one's duties "honestly, faithfully, ethically, impartially and *efficiently*, respecting the rights of the public and our colleagues."

Analysis of Reasoning and Finding

This allegation, more than any others, raises in stark terms the basic question, discussed earlier in my report, of how to determine whether deficiencies in general managerial leadership can be treated as gross mismanagement (and thus amounting to wrongdoing), as opposed to some other lesser form of criticisable behavior such as poor management or just mismanagement. The Report concluded that by *inefficiently* performing his duties, the Chief Electoral Officer did so in a manner that constituted *gross* mismanagement.

This allegation also highlights the concerns, which I have also expressed elsewhere,[186] about using an aspirational goal in a code of conduct as a standard for censure, and the risk in so doing of – perhaps inadvertently – imposing a standard of perfection instead of a realistic attainable standard.

To conclude the Chief Electoral Officer grossly mismanaged pre-election planning, the Citizen's Representative would have to conclude that (1) OCEO was unprepared (2) because of the Chief Electoral Officer's personal action or inaction (3) which contained an element of individual fault. The fault could only consist of "inefficiency" if the degree of inefficiency exhibited by the Chief Electoral Officer was so marked that by any reasonable standard his approach fell far short of what could reasonably be expected in the circumstances.

There can be little doubt that the general duties imposed on the Chief Electoral Officer by s. 5(1) of the *Elections Act, 1991* "to exercise general direction and supervision over the administrative conduct of elections" include a duty to anticipate and plan for reasonably anticipated contingencies and risks that could affect election processes. Clearly, that would include reasonably anticipating problems associated with conducting an election in a pandemic. The Chief Electoral Officer was aware that other Canadian jurisdictions had conducted pandemic elections and how they dealt with problems they faced.

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186 See "Code of Conduct," above, starting at p. 9.

At first glance, the 2021 general election's improvisation and extensive delays may seem like proof that OCEO was unprepared. This impression may seem to be confirmed by the backgrounder and Planning documents and the apparent general lack of awareness of their existence by the Chief Electoral Officer. While the planning documents did not identify the possibility of a sudden outbreak and lockdown and the possible mass resignation of a large percentage of the OCEO staff on the eve of the election, these documents did identify the risk of a lockdown and many of the challenges that eventually emerged: staffing shortages, postal delays, and the difficulty of managing the special ballot process within the statutory timelines.

Nevertheless, the Citizen's Representative did not answer a critical question: what should or could OCEO have done differently? In particular, given that in this case an inference of poor preparation is drawn from specific events: what should or could OCEO have done differently that would have had a realistic chance of enabling a specific response to the specific events that occurred? While in theory, gross mismanagement does not depend on consequences, the fact that management decisions led to disastrous consequences can support the inference that they were markedly bad ones. However, this inference is only possible if better decisions would have avoided the consequences. The backgrounder and the Planning document suggest it was understandable that OCEO was not prepared for a large-scale shift away from in-person voting:

- Most recommendations were about in-person voting. OCEO incorporated many of these ideas in its in-person voting procedures, and the Citizen's Representative provides no reason for doubting that these procedures would have worked had they not been overtaken by other complicating events.[187]
- The Planning document concluded legislative reform would be necessary to allow widespread alternatives to in-person voting: legislative reform would be necessary to use special ballots to mitigate difficulties accessing the polls in person or even to allow public servants and healthcare workers to remedy

[187] In fact, what evidence exists on this point (admittedly not given during the Citizens' Representative's investigation) suggests that but for the last-minute lockdown and staff resignations, the OCEO *was* ready to conduct the election in pandemic conditions. See the evidence of an election official, given on examination for discovery in the controverted election litigation, to the effect that no one had expected to have to pivot to Special Ballot voting, they were faced with an "unprecedented situation" and that, otherwise, they were prepared for the election, which could have gone ahead but for the last minute events that occurred: Exhibit 6, pp. 33, 37, 45, and 62, available in the Supporting Materials, Item 3.6.

staffing shortages and difficulties accessing hospitals and personal care homes.

- OCEO staff concluded that legislative reform, while desirable, was not feasible and should not be pursued. The Citizens' Representative provides no basis for rejecting their evaluation.
- The conclusion that statutory timelines were incompatible with a large-scale move to special ballots was borne out by events. The move only became possible after the Chief Electoral Officer – facing mass resignations two days before the election – changed his position and asserted that he could change statutory deadlines.
- Whether the Chief Electoral Officer had the power to move statutory timelines or not, it is understandable that OCEO would plan around the limits of its legal powers as it understood them during the planning process.

I do not mean to suggest that the OCEO could not have prepared better. That conclusion would require a reinvestigation and a thorough analysis of more evidence than I have been able to review. But the starting point for a finding of gross mismanagement would have to be a conclusion that OCEO could have done better. Here, the evidence shows that OCEO anticipated many of the risks and concluded it had no feasible legal options. The Citizens' Representative's Report does not allow me to understand what it should have done differently.

The Report does not provide any reasoning why the level of unpreparedness of OCEO (if that was what it was) and the Chief Electoral Officer's role in it rose to the level of gross mismanagement. The Citizens' Representative, instead, makes the conclusory statement (as if it were self-evident) that the Chief Electoral Officer's "failure to acknowledge the existence of the plan, meet internally on the plan, discuss the plan with government and the political parties and generally make the facts as discerned by his organization" could not be construed "as anything other than gross mismanagement."

The Citizens' Representative's reasoning does not explain why he rejected the explanation the Chief Electoral Officer provided in his interview: that he was dealing with a personal issue when the Planning document arrived and had left matters in the hands of another elections official who he felt was capable of managing them. Nor does it account for the Chief Electoral Officer's evidence that he had

taken other steps to anticipate the problems associated with pandemic elections. He said that the fall 2020 by-election in Humber–Gros Morne was a trial-run and a learning experience. He took account of experiences in other jurisdictions. He made suggestions to the Premier about holding the election on a Saturday, making schools available and extending the writ period to allow more time for delivery and receipt of special ballots. He wrote the political parties about certain issues. He increased advertising to encourage voting by mail. He hired additional staff to work the polls and administer special ballot voting. He assigned an elections official to liaise and coordinate with public health officials.

The affidavit of the Assistant Chief Electoral Officer referred to above also demonstrates that the Citizens' Representative may have misinterpreted his evidence (described as "key testimony") about the degree to which OCEO was involved in discussions with other jurisdictions about pandemic election planning, and the inferences to be drawn about the Chief Electoral Officer's preparedness. This affidavit was not before the Citizens' Representative, does not form part of the factual constraints binding him, and does not suggest that his finding is unreasonable. However, it is relevant when considering whether to rely on the Citizens' Representative's findings, and I agree with counsel for the Chief Electoral Officer that it has the potential of undermining the view that the Citizens' Representative took about the seriousness of the planning gaps he identified.

Whilst it may be said that there were gaps in planning, it cannot be said that the Chief Electoral Officer did nothing to anticipate and deal with pandemic election issues. The Report does not provide any logical analysis as to why these efforts by the Chief Electoral Officer – which at the least show that he had not totally abdicated his responsibilities – could be reconciled with a conclusion that there was, nevertheless, *gross* mismanagement.

The key question, however, was not whether he could have done more with respect to general pandemic election planning. He certainly could have done more. Rather, the key question is whether he could realistically have done anything that would have had a meaningful effect on the election in the circumstances that presented themselves: a complete Alert Level 5 lockdown on the eve of the election that effectively prohibited in-person voting, the position of the Chief Medical Officer of Health that she had no legal power to postpone the election (a position not

shared by the Chief Electoral Officer), and the mass resignation of election workers at the last minute because of COVID-19 infection fears once the lockdown was imposed. The Citizens' Representative's Report does not address this. Perhaps there is evidence that supports the notion that the Chief Electoral Officer could have done more to anticipate these things and that such anticipation and acting on it would have made a difference. But the report does not identify it. And the unavailability to me of the record of the evidence means that I cannot review it to see if there is an evidentiary justification for the Citizens' Representative's conclusions that is not reflected in the Report.

If an institutional failure had been established, the next step would be to establish the Chief Electoral Officer's individual contribution to that failure. Far from analyzing this point, the Citizens' Representative's Report suggests that other OCEO staff took the lead in the planning process. The June 20, 2020 recommendation to the Chief Electoral Officer did not advise him to pursue legislative reform or any other action that would have significantly changed the outcome. It is unclear from the reasoning in the Report how the Chief Electoral Officer's personal action or inaction contributed to what occurred.

In the end, the reasoning supporting the conclusion in the Report is based on (1) the assumed self-evident conclusion that the failures in pandemic election planning *must* amount to gross mismanagement, (2) the fact that other jurisdictions had seemingly engaged in more structured and organized pandemic election planning , which the Citizens' Representative felt the Chief Electoral Officer should have emulated, and (3) the Chief Electoral Officer's failure to seek legislative changes earlier that would have given him greater flexibility.[188] The reality, however, is that no other jurisdiction had to administer an Alert Level 5 lockdown imposed on the eve of an election together with mass resignations of staff. There is therefore no real comparator as to whether additional or different election planning would have made a difference. If it would not have made a difference, how can the Chief Electoral Officer be held personally responsible for the result? None of these conclusions address the key question identified above.

By focusing on general planning deficiencies and not relating them to whether, had the planning been done better, it would have made a difference with respect to

[188] Report, Volume 1, pp. 96, 103–104, available in the Supporting Materials, Item 2.1.

being able to deal with the actual events that occurred, the Report gives the impression that it was applying a very high standard governing general planning management, judged on what others had done, without considering what standard could be expected to address the problems that were ultimately faced. In Part I of this report, I cautioned against falling into the trap of judging actions against a standard of perfection by turning a high aspirational standard (in this case, to strive for "efficiency") into a standard calling for censurable conduct by simply finding the converse of the aspirational standard (actions were "*in*efficiently" performed). Something more is required than this. I wrote: "There is no absolute standard of conduct that will always result in a perfect state of efficiency or effectiveness. If applied to specific actions, one might always be able to point to something that, if done differently might have led to a more efficient or effective outcome."[189]

In this case, holding the Chief Electoral Officer to a type and methodology of pandemic preparation and planning that was engaged in by other jurisdictions (but which did not, as matters turned out, address the specific issues facing the NL election) and noting his failures in that regard, and not addressing whether, if those general failures had not occurred, it would have made a difference, effectively imposed a standard of perfection unrelated to the problems at hand. It is not enough to reason backwards from an acknowledged problem and, without some evident causal connection, conclude that just because some failures preceded the problem, they were necessarily connected. This is the *post hoc ergo propter hoc* logical fallacy that often undermines proper reasoning.

Finally, it is important to emphasize the complexity of the election planning allegation. Assessing OCEO's election preparedness requires an understanding of how various public health scenarios would affect such things as OCEO's logistics, finances, human resources, etc. It also requires a legal, political, and practical evaluation of alternatives' feasibility. Assessing how the Chief Electoral Officer's personal action or inaction contributed to OCEO's level of preparedness requires an understanding of his role within institutional culture as well as the details of how planning unfolded. And all of these assessments had to be made with as little hindsight bias as possible, relying extensively on evidence from witnesses, many of whom had recently experienced a unique and stressful election, who described

[189] P.II, above.

themselves as having low morale, and who had understandable reasons to deflect blame from themselves and place it on the Chief Electoral Officer.

The factual and evidential complexity of this allegation made it especially critical for the Chief Electoral Officer to have a full understanding of the information the Citizens' Representative was relying on in order to be able to reply to it. I have drawn attention to many questions that cannot be answered from the Citizens' Representative's reasons or from the additional information provided in his initial and expanded notice of allegations or the Chief Electoral Officer's interview. The Citizens' Representative may, after his extensive investigation and many interviews, have had answers to these questions that are not apparent from the Report. However, the Chief Electoral Officer did not have a proper opportunity to review or respond to these factual claims. This raises practical questions about their reliability: the Chief Electoral Officer may well have been able to refute or contextualize this evidence. It also highlights the unfairness of deciding the Chief Electoral Officer's fate based on information he was never shown.

Accordingly, I have concluded that there is no chain of reasoning that leads from the evidence to the conclusion reached or explains why the Chief Electoral Officer's explanation of what he did must necessarily be discounted so as to conclude that gross mismanagement occurred. Further, there are procedural fairness concerns that affect the reliability of the record. Before one could with confidence say that the actions or inaction of the Chief Electoral Officer amounted to gross management there would have to be a full examination of the events surrounding the lead-up to and planning for the election, including all of the uncertainties about its timing and the specific issues that arose. While the Citizens' Representative examined, in total, 22 witnesses, it is not clear how many of them spoke to the issues relating to Allegation D15. Furthermore, it is not known how many, if any, additional persons had relevant evidence to give on the overall issue and could give a broader or different perspective on what was obviously a complex and difficult scenario to untangle. Frankly, an inquiry as to what went wrong and who, if anyone, was individually responsible, could well be the subject of a full-blown public inquiry. That airing has not been given.

I am therefore of the opinion that

The finding of gross mismanagement and the conclusions drawn from the evidence with respect to Allegation D15 should not be relied upon by the House of Assembly or the Lieutenant-Governor in Council as a basis for further action against the Chief Electoral Officer.

ALLEGATION D16: LINES OF COMMUNICATION WITH THE CHIEF MEDICAL OFFICER OF HEALTH

This allegation states that "Lines of communication between OCEO and the Chief Medical Officer of Health were never solidly established to ensure what would be required of OCEO for each Alert Level of the pandemic, which would be understood and communicated to staff."

The Citizens' Representative's Reasoning and Finding

After investigating the communications between OCEO and the Chief Medical Officer of Health , the Citizens' Representative concluded that most contact between the OCEO and Chief Medical Officer of Health was conducted by one senior OCEO official (the "Prime Contact") rather than the Chief Electoral Officer.

The Prime Contact initiated contact in June 2020 by emailing COVID19info@gov.nl.ca. He asked to discuss "ongoing planning by Elections NL for conducting an election event while in COVID Alert levels" with the Chief Medical Officer of Health. In July the Prime Contact met with officials in the Chief Medical Officer of Health 's office in July 2020 to discuss the necessary public health measures. In August they communicated again about whether election workers would need face shields.

In September 2020, with the Humber–Gros Morne byelection pending, the Prime Contact sent the Chief Medical Officer of Health draft plans about (1) how political parties could campaign during a pandemic election and (2) voting in Personal Care Homes and Hospitals. Both plans were eventually released with feedback from the Chief Medical Officer of Health.

Reviewing the draft plan for political party activities, the Chief Medical Officer of Health asked if her staff had seen the "robust pandemic election plan" the

OCEO describes. The question was apt: the Citizens' Representative concluded that the OCEO's 2020 election planning documents were never sent to the Chief Medical Officer of Health "due to an oversight". The Citizens' Representative described this as "a highly unfortunate mistake," noting that it happened at a time when other organizations like school boards and sports organizations were having their plans reviewed and receiving feedback from public health officials on how best to implement their mandates during the pandemic.

The Chief Medical Officer of Health also expressed doubts about the OCEO's plans when reviewing an Elections Canada document in November ("Perhaps we should engage provincial elections as well if we haven't already done so. They need to be thinking the same way") and later in her interactions with the Citizens' Representative (comparing the OCEO's plans to the courts' or schools' was "apples to oranges"). The Citizens' Representative does not suggest these concerns were conveyed to the Chief Electoral Officer or anyone else at OCEO.

Despite seeking and receiving all communications between Public Health and OCEO, the Citizens' Representative found very few emails or letters passing between the Chief Medical Officer of Health and OCEO near or during the 2021 Election. On two occasions, the Chief Electoral Officer directed public health questions to the Deputy Minister of Health and Community Services. Once, Public Health officials appeared to be confused about who within OCEO was the point of contact on elections issues. The Citizens' Representative concluded from this that: "this suggests that OCEO did not provide Public Health official with an established, consistent contact at OCEO for the purposes of facilitating effective communications about best practices on conducting an election during the pandemic."

On February 10, 2021, two days before lockdown, the Chief Electoral Officer advised OCEO staff and the Deputy Minister that after "considerable discussions with the Chief Medical Officer of Health and the Department of Health", a drive-thru voting option would be introduced for persons in isolation. The following day, on February 11, the Chief Electoral Officer wrote the political party leaders indicating the CMOH should use emergency powers to postpone the election.

Overall, the Citizens' Representative compared the OCEO's communications with the Chief Medical Officer of Health unfavourably to communications in other provinces and at the federal level, referring to "fairly comprehensive consultations,

including regular meetings" and assigning a public health specialist to electoral offices. He referred to a report of the House of Commons Parliamentary Committee on Elections which contained information on pandemic election readiness experience from other jurisdictions. In his correspondence sent to the Chief Electoral Officer containing his expanded allegations,[190] the Citizens' Representative had asserted:

> The evidence so far suggests that you ignored, or were wilfully blind, or otherwise disregarded this information which undermined your office's ability to conduct an election which would respect the franchise of all voters.

In his written response, the Chief Electoral Officer indicated that he did have telephone conversations during the election with the Chief Medical Officer of Health and the Deputy Minister. He also said that at one point he had to "go over the head" of the CMOH to the Deputy Minister in order "to get things moving" when the Prime Contact was not having success and achieving things with the Chief Medical Officer of Health. He further indicated that the Chief Medical Officer of Health put him in an "untenable position" by implementing lockdown measures that made it "near impossible" to conduct an election, while at the same time interpreting the Chief Medical Officer of Health's emergency powers as too limited to allow an election postponement. He did acknowledge, however, that "[i]n retrospect, the lines of communication between the Chief Medical Officer of Health, the Department of Health, and Elections NL should have been more clearly established and documented."

In his interview, the Chief Electoral Officer indicated that he had understood the Prime Contact had discussed the OCEO's operational plans with Chief Medical Officer of Health.

The Citizens' Representative concluded that the evidence suggested that the Chief Electoral Officer "did not engage in direct, regular, documented communications with Public Health and the [CMOH] in particular, in contrast to what was happening in other Canadian jurisdictions".

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[190] Report, Volume 2, Appendix 2, pp. 37–38, available in the Supporting Materials, Item 2.2.

On this basis, he made the finding that the Chief Electoral Officer grossly mismanaged his obligations under Section 2 of the *Code of Conduct* when he "inefficiently" performed his duties and that lines of communication OCEO and CMOH "were never solidly established" to ensure what would be required of OCEO for each Alert Level of the pandemic.

Section 2 of the *Code* provided in pertinent part, as noted earlier, as follows:

> We will perform our duties honestly, faithfully, ethically, impartially and *efficiently*, respecting the rights of the public and our colleagues. …

Analysis of Reasoning and Findings

It is difficult to understand why Allegation D16 was framed as a separate allegation. The Chief Electoral Officer does not have a duty to communicate with the Chief Medical Officer of Health, let alone to engage in "direct", "regular", or "documented" communications. Rather, the Chief Electoral Officer has a duty, implicit in s. 5(1)(a) of the *Elections Act, 1991,* to direct and supervise election planning. Plans for a pandemic election might include communications with the Chief Medical Officer of Health, but the Chief Electoral Officer might also for any number of reasons prefer a plan that does not depend primarily on these communications and was developed on the basis of information acquired elsewhere (such as from other jurisdictions) or obtained from the Chief Medical Officer of Health by other means. Poor communications with the Chief Medical Officer of Health might support a finding the Chief Electoral Officer grossly mismanaged election preparations, but only as part of an overall analysis of the Chief Electoral Officer's election preparations (Allegation D15).

In this case, the Citizens' Representative suggested to the Chief Electoral Officer that "you ignored, or were wilfully blind, or otherwise disregarded" relevant pandemic election planning information which undermined OCEO's ability to conduct the election. If the Citizens' Representative had found as a fact that the Chief Electoral Officer ignored, disregarded or was wilfully blind in this regard, that would certainly have been a basis for concluding, either on the test that I have suggested, or in application of the Citizens' Representative's list of applicable factors, that he had grossly mismanaged his office.

But the Citizens' Representative did not make that finding. Indeed, his reasoning does not appear to be directed to deciding this question at all. Instead, his summary of the case is simply the factual one that "the evidence suggests" that, unlike what was happening elsewhere, the Chief Electoral Officer did not engage in direct, regular and documented communications with Public Health and the Chief Medical Officer of Health. This begs the question as to why this occurred. Was it because of wilful blindness or incompetence? Or because he delegated the work to another official and it did not get done? Or because his office had difficulty in contacting and dealing with the Chief Medical Officer of Health? Or because so much was going on at the time with respect to election preparation in an office with a small number of permanent staff that it was not reasonable to adopt a paradigm of slow and deliberate documented organization and planning? The report does not answer any of these questions.

The Citizens' Representative's approach appears to have been to focus on the fact that the OCEO did not measure up to the standards evident in the planning efforts adopted in some other jurisdictions ("in contrast to what was happening in other jurisdictions"). On this basis he made the finding that the Chief Electoral Officer "inefficiently" performed (not ignored or disregarded or was wilfully blind to) his duties. In doing so, he did not explain why the level of inefficiency should have attracted the characterization of gross mismanagement, as opposed to just mismanagement or poor management. Nor is there anything on the evidence from which one could conclude that "by any reasonable standard, the actions or failures under consideration fall so short of what could be reasonably expected in the circumstances that no reasonable person considering the matter objectively and fairly could come to any other rational conclusion."[191] Nor is there any finding in the Report that could be said to support a conclusion of institutional failure for which individual managerial actions or inaction on the part of the Chief Electoral Officer could be said to have caused or significantly contributed to institutional dysfunction.[192]

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191 See p. 130 above.

192 See p. 55above: "presiding over a poorly managed entity that fails to be functioning would not be enough to constitute gross mismanagement, but a complete disregard of responsibilities or derogation from or abandonment of duties (e.g. Nero fiddling while Rome burns) could be, because it is individual behavior that brings about the institutional dysfunction."

In this case, the Chief Electoral Officer understood that another elections official was reviewing the OCEO's plans with the Chief Medical Officer of Health. This review did not happen due to "an oversight". An oversight alone cannot establish gross mismanagement, but even if it could, the Citizens' Representative does not even suggest the Chief Electoral Officer made the oversight personally or that he ought to have detected or corrected it. Nor could it be gross mismanagement for the Chief Electoral Officer to entrust communications with the Chief Medical Officer of Health to another elections official: the Chief Electoral Officer's duty is to "exercise general direction and supervision" over election preparations (*Elections Act, 1991*, s. 5(1)(a)), not to micromanage or to do everything personally.

It is difficult to blame the Chief Electoral Officer for failing to respond to the Chief Medical Officer of Health's concerns about election planning, as there is no evidence these concerns were ever shared with him. This raises an additional concern. Gross mismanagement is about the Chief Electoral Officer's personal actions or inactions, not the institutional failure of the OCEO—*let alone* a failure that involves both OCEO and another institution. Good communication is a two-way street, and the imperfect communications between OCEO and the Chief Medical Officer of Health cannot simply be assumed to be all OCEO's fault.

Finally, the Citizens' Representative's decision not to share witness transcripts or summaries with the Chief Electoral Officer is especially concerning here. Though the Citizens' Representative relies on evidence from Public Health officials, he does not consider whether these officials might have personal or institutional reasons to place all the blame for communications failures on OCEO. Nor does he consider whether their perceptions of the Chief Electoral Officer might have been influenced by his mid-election letter suggesting the Chief Medical Officer of Health was responsible to postpone the election. I stress that there is nothing in the existing available record to indicate either of these things as possibilities. However, these are two matters (of many possibilities) that would no doubt be explored either in cross-examination or otherwise by requiring further elaboration with a view to putting the unchallenged information from the Chief Medical Officer of Health and other Public Health witnesses into perspective. The Chief Electoral Officer was denied this opportunity, which had the potential of providing a more nuanced or balanced description of what occurred between the two offices.

Procedural fairness concerns are particularly important in the context of this allegation, as they are with Allegation D15. Given the importance of Public Health officials' evidence and the need to ensure that a proper and balanced picture of the communications relationship between OCEO and the Chief Medical Officer of Health is presented, as well as the fact that the concern about protecting witnesses against reprisals is minimal in this context (because Public Health officials have no ongoing employment relationship with OCEO, unlike witnesses from OCEO), the inability of the Chief Electoral Officer to access this evidence raises serious concerns about the reliability of the Citizens' Representative's finding of gross mismanagement.

Accordingly, I am of the view that

> The finding of gross mismanagement and the conclusions drawn from the evidence with respect to Allegation D16 should not be relied upon by the House of Assembly or the Lieutenant-Governor in Council as a basis for further action against the Chief Electoral Officer.

ALLEGATION E26: PERSONAL DELIVERY OF BALLOTS

This allegation states that the CEO "delivered voting kits to at least two candidates and at least one local 'celebrity' which does not appear to be contemplated by the *Elections Act, 1991* but had the effect of disadvantaging and discouraging voters in rural Newfoundland, Labrador, and all of those voters without public profiles".

The Citizens' Representative's Reasoning and Finding

During the election, the Chief Electoral Officer confirmed to the CBC that he delivered special ballots to a couple of candidates, and that in some cases he had to process candidates' ballots himself. He only delivered ballots in his own neighbourhood, explaining "I wasn't driving to Gander". In his interview with the Citizens' Representative, he confirmed he made personal deliveries to two other candidates and that he had directed staff to make other personal deliveries.

The Citizens' Representative obtained two internal OCEO lists identifying some candidates, their addresses, and the names of individuals sharing their address. One of these lists was marked "Sensitive".

Witnesses told the Citizens' Representative they had not heard of the Chief Electoral Officer personally processing or delivering ballots in previous elections. Witnesses and media stories expressed concern that his personal involvement created a perception of unequal treatment, as his personal efforts appeared to be confined to candidates in the Northeast Avalon region.

The Chief Electoral Officer responded that, while in hindsight personal delivery was an error of judgment, he was entitled to deliver ballots personally as an "election official" under s. 86.4(5) of the *Elections Act, 1991* and had not favoured any political party or candidate. As for his personal processing of candidates' ballots, candidates who live outside the electoral district they are running in require special processing, as the district they can vote in does not match their address. OCEO's software described this special treatment as "sensitive". This was not a description that the Chief Electoral Officer put in the system.

The Citizens' Representative focused on four matters in his reasoning:

- Section 5 of the *Elections Act, 1991*, which provided that one of the duties of the Chief Electoral Officer was "to exercise general direction and supervision over the administrative conduct of elections and to enforce on the part of election officers fairness, impartiality and compliance with this Act."
- His opinion that "by delivering voter kits to residents of the Northeast Avalon, without offering this service to other citizens of the province, the CEO acted unfairly to those citizens as contemplated by Section 5."
- His conclusion that delivering election materials gave rise to perceptions that the Chief Electoral Officer was favouring some electors over others, which was detrimental to the image of OCEO.
- The deliveries meant that electors in St. John's stood a better chance of receiving election materials and therefore had a better chance of participating in the election than others.

The Citizens' Representative concluded the Chief Electoral Officer grossly mismanaged his obligations under Section 2 of the *Code of Conduct* by singling out some citizens for personal home delivery, which had the effect of "disadvantaging and discouraging" voters without public profiles or voters in Labrador or rural Newfoundland.

For ease of reference, I will set out Section 2 of the *Code of Conduct* again:

> We will perform our duties honestly, faithfully, ethically, impartially and efficiently, respecting the rights of the public and our colleagues.

Although the Citizens' Representative does not explicitly say so, I infer from his previous analysis that the part of Section 2 of the *Code* he was relying on his finding was the word "impartially."

Analysis of Reasoning and Finding

The Citizens' Representative's Report omits one significant part of the Chief Electoral Officer's interview. He explained that the processing of out-of-district candidates in OCEO's software required administrative privileges. Only three election workers had these privileges, and the Chief Electoral Officer personally processed all out-of-district candidates throughout the Province.

This explanation responds to and gives explanation for the evidence of the Chief Electoral Officer personally processing ballots and the "sensitive" voter list. However, the focus of this allegation is not the Chief Electoral Officer's processing ballots behind the scenes, but his personal and public delivery of ballots.

The personal delivery allegation focuses on the Chief Electoral Officer's individual actions rather than an institutional failure. Further, the Chief Electoral Officer acknowledged that in retrospect he regretted his decision to personally deliver ballots to electors, including politicians. The key issue, however, is whether his conduct was blameworthy enough to establish gross mismanagement.

It is difficult to follow the logic of the Citizens' Representative's reasoning or to accept his factual claim the Chief Electoral Officer's personal home delivery disadvantaged and discouraged voters without public profiles or voters in Labrador or rural Newfoundland. There is no evidence or analysis of how the Chief Electoral Officer's personal delivery disadvantaged any other voter. There is no evidence

that any voter's ballot was delayed or lost or miscounted because he dropped off a few ballots or that any other voter was discouraged from voting. One cannot draw an inference from this circumstance that other voters were "discouraged."

One voter is not disadvantaged because another received a ballot. The OCEO must provide robust and equal access to the franchise throughout the Province, but in a pandemic, it must provide access to as many voters as it can. Equality in this context means adequate access for all, not equally inadequate access. As the Citizens' Representative noted in response to another allegation,

> Intuitively, and having regard to the challenges with conducting an election during a pandemic, it is not surprising that residents of the Northeast Avalon had an advantage to facilitate their vote by virtue of the fact that the OCEO is located on the Northeast Avalon.

While there is no basis in the Citizens' Representative's reasons for concluding that voters were actually disadvantaged by the Chief Electoral Officer delivering ballots to candidates, these deliveries did create the appearance of special treatment to politically connected individuals. The Chief Electoral Officer was responsible to foster fairness and impartiality in the OCEO,[193] not to create the appearance of special treatment. He ought to have known better and effectively acknowledged that the deliveries were an error in judgment.

Apart from the Citizens' Representative's mistaken emphasis on disadvantage and discouragement, the Citizens' Representative failed to acknowledge two significant factors that mitigated the blameworthiness of the Chief Electoral Officer's error.

First, the Chief Electoral Officer explained in his interview that he processed out-of-district candidates' applications because they needed special treatment in the OCEO's software, which in turn required administrative privileges. He personally delivered ballots because he had personally processed them and was already driving near the addresses. He was legislatively permitted, as an election official, to distribute special ballot kits to electors.[194] This explanation, which the Citizens' Representative provided no reason to doubt, appears to refute the concern that the

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193 *Elections Act, 1991,* s. 5(1)(a).

194 S. 86.4(5).

Chief Electoral Officer intended to provide preferential treatment to influential or high-profile individuals.

Secondly, the Chief Electoral Officer's error occurred during the turbulent weeks immediately following the lockdown and election postponement. Elsewhere, the Citizen's Representative acknowledged that the Chief Electoral Officer was under extreme personal stress and subject to abuse, threats, and ridicule. This context helps explain how an error in judgment might occur.

In a judicial review, I would conclude that the Citizens' Representative's finding is unreasonable for two reasons. First, the evidence he relates cannot support the conclusion that voters were disadvantaged and discouraged. This conclusion was "central or significant" to the Citizens' Representative's reasoning process;[195] without it, the Citizens' Representative's reasons cannot justify his finding,[196] and it would not be appropriate for me to substitute my own analysis of the circumstances.[197]

Second, the Citizens' Representative's reasons do not allow me to understand how he dealt with the Chief Electoral Officer's explanation of his behaviour or with the mitigating effects of his personal stress. The failure to account for this relevant evidence creates a "fundamental gap" in the Citizens' Representative's chain of analysis, so that his finding is unreasonable.[198]

While these flaws might be the end of the story in a judicial review, the facts relating to this allegation do not appear to be seriously in dispute, and I think it is appropriate for me to give my own opinion about what these facts imply. In all the circumstances, it is my considered view that the Chief Electoral Officer's actions, which may have led to uninformed opinions in some quarters that he was not being impartial, were not serious enough to rise to the level of gross mismanagement because the actions were, viewed in context, not serious enough and there was no intent on the part of the Chief Electoral Officer to favour certain voters or disadvantage others.

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195 *Vavilov*, para. 100.

196 *Vavilov*, para. 86.

197 *Vavilov*, para. 96.

198 *Vavilov*, paras. 96, 126.

That said, however, this is one circumstance where my opinion depends on a normative judgment about the seriousness of the Chief Electoral Officer's actions and about the extent to which the extraordinarily stressful circumstances mitigate his departure from reasonable standards. Others might reasonably take a more severe view, holding that the Chief Electoral Officer's first duty is to avoid any appearance of political involvement, however indirect, so that the failure to consider how personal deliveries could affect public perceptions of fairness and impartiality is in itself a marked departure from reasonable standards. If so, reasonable persons might conclude that these personal deliveries cross the line into gross mismanagement, even if the mitigating effect of stress should be considered at the sanction phase.

I conclude, therefore, that

> The finding of gross mismanagement and the conclusions drawn from the evidence with respect to Allegation E26 should not be relied upon by the House of Assembly or the Lieutenant-Governor in Council as a basis for further action against the Chief Electoral Officer.

However, I would draw attention to the normative conclusion underpinning my recommendation. The case can probably be described as a "borderline" one, and the ultimate decision about how to proceed lies with the House of Assembly and Lieutenant-Governor in Council.

ALLEGATION E29: OATHS OF CONFIDENTIALITY

This allegation states that "[n]ot all temporary employees were required to swear oaths of confidentiality even though they may be privy to sensitive election activities".

The Citizens' Representative's Reasoning and Finding

The Citizens' Representative discussed three kinds of oaths or solemn statements:

1. Election workers must swear or affirm an oath when they start work. Asked to provide copies of these oaths, the Chief Electoral Officer provided 37 signed oaths, leaving 5 workers unaccounted for.

2. Special ballot officers must swear or affirm that (among other things) they will keep election results secret. The Chief Electoral Officer's disclosure contained 51 oaths sworn on March 6, 2021, after the expansion of special ballot operations and 51 days into the election. In addition, 19 oaths contained irregularities: one was not signed by the Chief Electoral Officer; 16 were not dated by the Chief Electoral Officer; and two were not signed by the incumbent or dated by the Chief Electoral Officer.

3. The House of Assembly requires employees to swear or affirm a Code of Conduct annually. The Chief Electoral Officer provided 43 signed codes of conduct, which according to the Citizens' Representative is "at or near full compliance".

The Citizens' Representative also noted that the Chief Electoral Officer was not sure in his interview of which election official was responsible to ensure that oaths were signed.

The Chief Electoral Officer responded that the evidence demonstrated oaths were administered and that administrative errors were not gross mismanagement.

Noting that the making of oaths of allegiance and signing codes of conduct "are not bureaucratic, pedantic exercises" and "not simply an administrative exercise that can be dismissed," the Citizens' Representative indicated that he was "troubled" by the irregularities in the oaths (highlighting the fact that five House of Assembly oaths could not be located) and that the Chief Electoral Officer was not sure who was responsible for administering oaths. He found the Chief Electoral Officer grossly mismanaged his obligations under Sections 2 and 7 of the *Code of Conduct* through inefficiency in performance of his duties and through failure to exercise due care and control of records assigned to him according to applicable policy and legislation.

The applicable sections of the *Code of Conduct* provided:

> 2. We will perform our duties honestly, faithfully, ethically, impartially and efficiently, respecting the rights of the public and our colleagues. We will refrain

> from conduct that might impair our effectiveness or that would impair out integrity. According to applicable policy and legislation
>
> 7. We will exercise due care and control of records created or collected in the exercise of our responsibilities, ensuring that they are organized, secured and managed according to applicable policy and legislation.

Analysis of Reasoning and Findings

The Citizens' Representative's Report demonstrates irregularities in administering a minority of oaths or in retaining records of oaths. However, it does not identify any evidence that the Chief Electoral Officer was personally responsible for serious irregularities:

- There was some evidence the Chief Electoral Officer filled out some forms improperly, such as failing to date his signature. These errors could not, without more, approach the level of gross mismanagement.
- The Citizens' Representative did not suggest that it was improper for the Chief Electoral Officer to delegate responsibility for administering oaths or that he had any reason to doubt that oaths were being administered properly.
- The Citizens' Representative did not consider whether some irregularities might have been explained by the special circumstances of the 2021 election.

The most serious irregularities were the absence of House of Assembly oaths of allegiance in five instances, the failure of the Chief Electoral Officer to sign one of the special ballot oaths and the absence of the incumbent's signature is two instances. Even accepting the Citizens' Representative's view that the oath-making exercise is not merely "a bureaucratic, pedantic exercise," there is nothing in the Report's reasoning to explain how or why the failures in this instance were to be regarded as gross mismanagement as opposed to administrative error.

The obligation to act "efficiently" in section 2 of the *Code* does not require perfection. Although persons subject to the Code should, of course, aspire to perfection, conduct that attracts censure under s. 35(2) of the *Act* should be subject to a lower bar than that. As I observed in Part I of this report, "one must be careful not

to fall into the trap – perhaps even inadvertently – of judging the actions against a standard of perfection."[199]

Specifically in respect of section 2 of the *Code* dealing with the goal of efficiency, care must be taken to turn a high aspirational standard (to strive for efficiency) into a minimum standard for censurable conduct (any inefficiency). I further suggested that sanctioning for failure to comply with an aspirational goal should involve a conclusion that "by any reasonable standard, the actions or failures under consideration fall so short of what could reasonably be expected in the circumstances that no reasonable person considering the matter objectively and fairly could come to any other rational conclusion." Much the same could be said about the requirement in section 7 of the *Code* respecting exercising *due* care and control (not absolute care and control) over records. There is nothing in the reasoning in the Report that would explain how the evidence could have met that standard.

Even if the Chief Electoral Officer were personally responsible for significant irregularities, gross mismanagement would require some evidence that his failings were blameworthy in the sense of being intentional or reckless or a marked departure from reasonable standards. It was not even clear on the evidence whether the Chief Electoral Officer had personal responsibility for ensuring the oaths were obtained and properly filled out or for their storage, except in the more general managerial sense of line responsibility as the senior manager. No such evidence is evident. Surely, it is not enough to hold someone responsible for gross mismanagement simply because they are "troubled" by the existence of irregularities and by the fact that the Chief Electoral Officer was "not sure" about who was responsible for administering the oaths. To hold him responsible on the basis of gross mismanagement without evidence of personal failure to complete a task for which he was directly responsible or without evidence of a fundamental abdication of general managerial responsibilities, would be to extend the concept of gross mismanagement to cover mere administrative inefficiencies.

Accordingly, I am satisfied that the Report does not disclose a "rational chain of analysis that is justified in relation to the fact and law that constrain the decision

[199] See p. 12 above.

maker."[200] In my respectful view, the omissions in the reasoning cause me, in the words of *Vavilov*, "to lose confidence in the outcome."[201] As a result, I conclude

> The finding of gross mismanagement and the conclusions drawn from the evidence with respect to Allegation E29 should not be relied upon by the House of Assembly or the Lieutenant-Governor in Council as a basis for further action against the Chief Electoral Officer.

ALLEGATION F34: THE INDIGENOUS FRANCHISE

This allegation states that "OCEO affected the Indigenous franchise as it pertains to northern Labrador by not having election materials available for electors whose first language is not English."

The Citizens' Representative's Reasons and Finding

The Office of the Chief Electoral Officer only communicates in English. By contrast, the Citizens' Representative noted that election authorities in Ontario, Saskatchewan, Alberta, Nunavut, and at the federal level offer election materials in some Indigenous languages. The Citizens' Representative concluded that the lack of Indigenous language materials affected Indigenous turnout, citing

- witnesses' opinions,
- CBC reports of the opinions of some candidates and a former Innu Nation Grand Chief,
- declining turnout in the Torngat Mountains district and the community of Natuashish,
- the majority of Nain residents self-identifying as Inuk, and
- census data showing that 8.55% of Natuashish residents speak neither French nor English.

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200 *Vavilov,* para. 85.

201 Para. 122.

He acknowledged, however, that lower voter turnout ratios could not be attributed solely to the fact that voting materials were not available in Indigenous languages. He cited other possible causes: weather delays, great travel distances to Torngat Mountains by air for the postal system, and lack of access to telephone and reliable internet services on the north Labrador coast. He nevertheless concluded that lack of printed material for Indigenous persons "did not help."

The Chief Electoral Officer responded that Newfoundland and Labrador had never issued Indigenous language election materials before. Neither the district returning officer nor anyone else ever raised the issue with him until the middle of Election 2021. Nor had the issue ever cropped up in previous elections. At that point, he did not think it appropriate to accept politicians' offer to translate the ballots, but otherwise he "exhausted the opportunities we could" in the time available and other circumstances existing to produce Indigenous language ballots. In the end, no elector apart from the politicians speaking to the media requested an Indigenous language ballot. While he acknowledged that one might be able to say that not finding a way to do this was "poor planning and maybe even mismanagement," he nevertheless maintained that "given the context of the matter, characterizing the Chief Electoral Officer in retrospect as gross mismanagement would be unfair given the unprecedented nature of this issue."

In his analysis, the Citizens' Representative referred to the fact that, as he put it, "The CEO admits this was poor planning and possibly mismanagement," but he did not acknowledge the Chief Electoral Officer's qualification that given the "context" (presumably meaning the background and how this matter arose) and "the unprecedented nature of the issue," this could not be said to be gross mismanagement.

In reaching his conclusion, the Citizens' Representative simply stated that:

> The lack of materials in other languages, including indigenous languages, does not meet the generally accepted standard for availability to all peoples as set by other jurisdictions. This issue did not arise in the context of a pandemic. Indigenous people have populated Labrador for centuries and have reasonable expectations that generally available election materials be provided to them.

He added that the Office of the Chief Electoral Officer "partially affected" the Indigenous franchise.

On this basis, he concluded that the Chief Electoral Officer "grossly mismanaged his obligations" under Section 4 of the *Code of Conduct* "when he did not offer the appropriate measure of respect to the Indigenous populations of northern Labrador when he failed to direct his Office to provide election materials in languages other than English".

Section 4 of the *Code* provided:

> We will treat colleagues, Members and the public with courtesy and respect.

Analysis of the Reasoning and Findings

It is unclear whether the Citizens' Representative's finding focused on the CEO's mid-election response to candidates' requests for Indigenous language ballots or to his pre-election planning. His assertion that the issue "did not arise in the context of a pandemic" suggests that he might have been focusing on pre-election planning.

If the finding related to the Chief Election Officer's mid-election response, the Citizens' Representative did not reject the Chief Electoral Officer's statement that he tried to produce Indigenous language ballots. He does not find that the Chief Electoral Officer ought to have allowed political candidates to translate election materials. He does not cite evidence or analysis of the feasibility of translating election materials into Indigenous languages in mid-February 2021 when the issue first arose. He does not point to any actions the Chief Electoral Officer could have taken but did not to ensure ballots were translated. He does not even specify the languages (although from context, he likely meant dialects of Inuttitut and Innu-Aimun). Instead, he appears to be simply of the view that because other jurisdictions had been providing translated election documents, that was the standard for which the Chief Electoral Officer was responsible. In other words, failure to meet a standard that had never been applied before in the province constituted "wrongdoing."

The Citizens' Representative provides no basis for finding that the Chief Electoral Officer could, in mid-election, have done more to produce Indigenous language ballots. Even if he had, a finding of gross mismanagement would also require grounds showing the Chief Electoral Officer's failure to take these (unidentified) actions was personally blameworthy and not just an institutional failure for

which, as head of the organization, he was statutorily responsible. A finding of gross mismanagement cannot be supported based on the CEO's mid-election response.

Nor can the Chief Electoral Officer's pre-election planning support a finding of gross mismanagement. To reach this conclusion, I do not need to consider the interesting question of when government institutions should or must, either as a matter of law or general fairness, provide services in Indigenous languages or any other non-English language. There is no evidence suggesting that the Chief Electoral Officer's failures (if that was what they were) were personally blameworthy or that another individual would have done better.

The Citizens' Representative did not cite any evidence that anyone in the Province ever suggested providing elections materials in Indigenous languages before February 2021. Though the Citizens' Representative interviewed many election officials, his report does not suggest any of them ever considered the issue. Though he cites several news stories on Indigenous language election materials, none precedes February 2021.

The Province's electoral system is not a cloistered realm known only unto the Chief Electoral Officer. Many election workers, Indigenous leaders, government officials, politicians, party members, journalists, and members of the public could have called for election materials to be provided in Indigenous languages. There is no evidence any of them did prior to February 2021. In the circumstances, it is impossible to find that the Chief Electoral Officer was personally blameworthy in failing to identify this issue.

Counsel for the Citizens' Representative submitted to me that the Chief Electoral Officer, through his interactions with his elections counterparts in other jurisdictions, would surely have been aware of the "evolving" nature of this issue of Indigenous translation and suggested he could therefore be held responsible for not having acted in the same way in the Newfoundland and Labrador context. He asserted: "The CEO was responsible for his office, and under section 5 of the *Elections Act, 1991* had an obligation to provide a fair election." This comes close to saying that the head of an office or organization that fails to meet acceptable standards must, simply by virtue of holding the office, be necessarily guilty of "wrongdoing" (gross mismanagement) for everything of a serious nature that goes wrong

within the office. That would attribute a meaning to gross mismanagement that extends far beyond the core characteristics that I have previously discussed and, likewise extends beyond many of the ideas in the list of factors identified by the Citizens' Representative as being the touchstone for his analysis.

At what point in an "evolving" situation is failure to "get on board" (even if one is not the last to do so) to be considered "wrongdoing" as opposed to some other form of criticisable behaviour? It must be remembered that within the Newfoundland and Labrador context, most government websites and documents exist only in English. Provincial statutes exist only in English. The Supreme Court of Newfoundland and Labrador's website and rules of court and forms exist only in English, as does the website and forms of the office of the Citizens' Representative and other statutory offices.

That is not to say that doing nothing to improve the situation is therefore justified. But it raises the question whether it is appropriate to single out one person and characterize his failure to do so as "wrongdoing." True, there is something special about ensuring that every citizen is able to exercise their franchise. It is vitally important. Yet, that does not mean that the head of an institution, by virtue of being the head, should be criticized for "wrongdoing" (as opposed to some other type of administrative criticism or censure) because the province has not yet caught up with some (but not all) other jurisdictions. Certainly, the Citizens' Representative did not explain why.

Further, Section 4 of the *Code of Conduct* which requires treatment of the public with "courtesy and respect" appears to be speaking of persons showing respect for one another in their individual dealings and interactions. The Citizens' Representative was obviously of the view, however, that the responsibility of the Chief Electoral Officer as head of an office which did not provide translated election materials was sufficient to engage the application of section 4, even though there was no indication that the Chief Electoral Officer had personally, by his language or actions or the way he managed the office, ever shown any disrespect towards Indigenous persons. Instead, the fact that he was not more pro-active in addressing the Indigenous translation issue appears to be enough to amount to not "showing the appropriate measure of respect" to Indigenous populations. In my view, this is a questionable application of section 4 of the *Code*. In any event, even if it could be interpreted in that way, the reasoning of the Report does not give any indication as to

why not taking steps well before the election when the issue was not specifically raised could amount to showing disrespect.

In these circumstances, I have to conclude that

> The finding of gross mismanagement and the conclusions drawn from the evidence with respect to Allegation F34 should not be relied upon by the House of Assembly or the Lieutenant-Governor in Council as a basis for further action against the Chief Electoral Officer.

ALLEGATION G35: PRIVACY SAFEGUARDS

This allegation states that "an alleged environment [was] created by OCEO where the personal information of private citizens (ie) list of electors information, left OCEO and went into the homes of temporary employees with no written or oral safeguards or warnings issued to employees about how to handle this information, giving rise to potential privacy breach."

The Citizens' Representative's Reasoning and Finding

Witnesses told the Citizens' Representative that temporary employees took personal information, in the form of lists of electors, into their homes to process ballot applications. The personal information included names, addresses, and phone numbers.

The Chief Electoral Officer responded that some election workers were permitted to process only mail-out ballots from home. The purpose was to facilitate the processing and sending out of the extraordinarily large number of mail-in ballots that were necessitated by the fact that the election was being conducted during the Covid-19 pandemic. Employees were required to take confidentiality oaths and were expected to safeguard information as they would in the office. They were permitted to access only a limited amount of information, most of which was also shared with political parties and candidates. They were not permitted to perform other functions at home, such as processing election worker payments as that

would have required access to more sensitive information like social insurance numbers. Furthermore, there was no evidence of any privacy breach.

The Citizens' Representative concluded that the Chief Electoral Officer "has not been able to satisfactorily establish that training employees on privacy, safeguards and security of personal information and the consequences of non-compliance, in addition to incorporating file check-out procedures for records containing personal information actually took place". He found, on the basis of this conclusion, that the Chief Electoral Officer grossly mismanaged his obligations under section 7 of the *Code of Conduct*, which provided:

> We will exercise due care and control of records created or collected in the exercise of our responsibilities, ensuring that they are organized, secured and managed according to applicable policy and legislation.

Analysis of Reasoning and Finding

The criticism of the Chief Electoral Officer by the Citizens' Representative in the circumstances of this allegation is essentially a general criticism of the administrative and management practices (in this case relating to privacy protection) existing in the Office of the Chief Electoral Officer, for which he, as Chief, had overall responsibility. It raises again similar basic questions discussed earlier regarding Allegation D15 and 16) as to the circumstances of when poor management or even mismanagement can be raised to the level of gross mismanagement for the purposes of attracting the appellation of "wrongdoing."

The Citizens' Representative did not reject the Chief Electoral Officer's assertions that, with respect to protection of personal information held by his office, the following things were done: (i) employees were reminded that they had to treat the information in the same way in which they were expected to treat it in the office; (ii) employees had been required to take oaths of confidentiality; (iii) the information taken out of the office was limited to names, addresses and phone numbers of persons on voting lists and did not include other sensitive information like social insurance numbers; (iv) there was no evidence of a resulting privacy breach. For the Citizens' Representative, this was not a sufficient standard of care to have exhibited. There should, additionally, have been "privacy training" and "instructions implemented on how to protect that information."

In my respectful view, the Citizens' Representative's reasoning and finding on Allegation G35 suffers from a number of fatal problems.

First, the Chief Electoral Officer, as head of his office, was responsible to take steps that are "reasonable in the circumstances" to protect personal information against theft, loss, unauthorized collection, access, use or disclosure and against unauthorized copying or modification.[202] The Citizens' Representative provides no real explanation or analysis of why this responsibility specifically required detailed employee training and file check-out procedures. Whilst such steps may well be regarded as best practices according to government policies (although the Citizens' Representative did not identify them as such), the failure of the Chief Electoral Officer to implement such practices (if that was what it was) does not mean that he abandoned his responsibilities altogether or knowingly turned a blind eye to what was happening. He was obviously cognizant of the need to protect privacy of personal information. The employees were reminded to treat the information taken the same way as it would be treated in the office, the type of information allowed to be taken was limited and the type of work to be done off-site (mailing out mail-in ballots) was deliberately chosen so it did not involve other work, such as payroll, which would involve more highly sensitive information. The criticism of the Chief Electoral Officer, therefore was that he did not ensure that "enough" was done. But the reasoning does not attempt to explain why, assuming that more was in fact needed, why any failures amounted to gross mismanagement as opposed to some other level of failure.

Secondly, the special circumstances of the 2021 election, which led the Chief Electoral Officer to cancel in-person voting and to postpone election day for six weeks, was also a consideration as to whether that would have justified a departure from information privacy management best practices. The Office's information management policies could not be condemned without analyzing how additional employee training or check-in procedures (while possibly reducing risk but not necessarily resulting in a reduction of privacy breaches, which did not occur in any event) in the context of all that was happening in the fluid pandemic circumstances, might have delayed ballot processing further, consumed scarce staff time, and otherwise might have affected the ability of the Office to conduct the election.

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[202] *Access to Information and Protection of Privacy Act, 2015,* SNL 2015, c. A-1.2, s. 64(1) (hereinafter sometimes referred to as *ATIPPA*).

The decision to engage in training or engage in delivering further instructions would have to be evaluated, in terms of its significance, against the other impacts it might have had on the operation of the Office. The Report does not address this matter in the current context at all.

Thirdly, the allegation and the Citizens' Representative's finding essentially describe an institutional failure or at the most a general managerial failure. There is no analysis of what the Chief Electoral Officer did or ought to have done (and why) nor of the blameworthiness of his individual conduct. The Chief Electoral Officer is personally responsible under s. 64(1) of *ATIPPA* to take steps to ensure that personal information is protected, but to establish that he failed to discharge this responsibility, it is necessary to analyze the steps he personally took and conclude that he ought personally to have acted differently. To establish gross mismanagement, it would also be necessary to find that the CEO's failure to do what he ought to have done reflected individual culpability, or even if it could be characterized as institutional failure, that his inaction was so great as to imperil the institution.

Fourthly, there was no attempt by the Citizens' Representative to relate the circumstances to the concept of gross mismanagement having the core characteristics that I have described or as set out in the multi-factor list described in his Report. For example, in respect of the Citizens' Representative's non-exclusive list, was he relying on "the deliberate nature of the wrongdoing" or the "systemic nature of the wrongdoing" or that they were "serious errors that are not debatable among reasonable people," to name just three? Was one factor enough or was there a confluence of factors here that justified calling the events gross mismanagement?

The Citizens' Representative does not appear to have considered these questions. From a reading of his reasoning, it is not possible to determine why the alleged failures to comply with best privacy protection practices amounted to gross mismanagement, as opposed to some other managerial or institutional failure. I agree with counsel for the Chief Electoral Officer when he submitted that the logic of the decision of the Citizens' Representative on the evidence here, without more, dilutes the concept of gross mismanagement to something significantly less that serious, deliberate or reckless conduct. If that was the intent, there should have been some analysis explaining why the concept of gross mismanagement was more ex-

pansive. On the other hand, if the Citizens' Representative intended to apply a narrower view of gross mismanagement, an explanation of why the evidence met that standard would be expected. Alternatively, an explanation might have been supplied by a review of the evidentiary record which might have contained other information not referred to in the Report's reasons; however, that avenue was not available to me because, as I have mentioned on a number of occasions, I was not able to review that record.

Because there is no "rational chain of analysis" and the reasons "do not make it possible to understand the decision maker's reasoning on a critical point"[203] so that the reader of the reasons can understand how the decision maker moves from the known facts to the conclusion reached, I have to conclude that

> The finding of gross mismanagement and the conclusions drawn from the evidence with respect to Allegation G35 should not be relied upon by the House of Assembly or the Lieutenant-Governor in Council as a basis for further action against the Chief Electoral Officer.

CONCLUSION ON REVIEW OF CITIZENS' REPRESENTATIVE'S REPORT

The Terms of Reference require "an analysis of the Report, including any procedural, human resources or legal issues." Part II of my review has been directed to that matter.

I have concluded, for the reasons given earlier in Part II,[204] that there are, in fact, procedural, human resources and legal issues that raise concerns about the degree to which the Report can be used as a basis for other action against the Chief Electoral Officer. As well, as discussed earlier,[205] the structure of and analysis undertaken in the Report's discussion of the individual allegations also raises questions as to whether the Report can be used as a basis for further action.

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203 *Vavilov,* para. 103

204 "Wrongdoing – Gross Mismanagement;" "Threshold for Investigation;" and "Procedural Fairness Issues."

205 "General Observations on the Reasons," as well as the analysis of the individual findings.

The Terms of Reference also require an opinion as to whether "based on the analysis of the Report", action under s. 5.3 of the *Elections Act, 1991* may be considered appropriate. Because, based on my analysis of the Report, I have concerns as to its reliability as a basis for further action I have concluded that

> The House of Assembly and the Lieutenant-Governor in Council should not rely on the findings in the Citizens' Representative's Report as a basis for further action against the Chief Electoral Officer under s. 5.3 of the *Elections Act, 1991*.

That, however, does not end the matter. Action under s. 5.3 can be undertaken without the existence of the Citizens' Representative's Report. Without the Report to rely on, however, this presents a number of difficulties. How that can be dealt with is the matter to which I now turn in Part III of my report.

PART III: POTENTIAL ACTION UNDER S. 5.3 OF THE *ELECTIONS ACT, 1991*

THE RELEVANCE OF S. 5.3 OF THE ELECTIONS ACT, 1991 TO THE REVIEW

The Terms of Reference require me to provide a recommendation whether "in the opinion of the Reviewer based on the analysis of the Report" action contemplated under s. 5.3 of the *Elections Act, 1991* "may be considered appropriate."

There are two qualifications in that directive. First, my opinion must be based on my analysis of the Report, not on the basis of other evidence not forming part of the record of the original investigation. It is the reliability of the Report as a platform for further action that must be my focus.

Secondly, whatever I recommend, it is an opinion only, not a final adjudication. I am only tasked with determining whether there is a *basis* for the application of s. 5.3 to be found in the Citizens' Representative's Report. The ultimate decision whether to apply and act under s. 5.3 must be made by the House of Assembly and the Lieutenant-Governor in Council.

Given my conclusions in Part II that there is cause for concern about the reliability of the Report as a basis for further action, my conclusion must be that

> Action contemplated under s. 5.3 of the *Elections Act, 1991* using the Report as the decision-making platform for that action should not be considered appropriate.

As I have stated previously, however, action under s. 5.3 does not depend on use of a report by the Citizens' Representative. The terms of s. 5.3 are clear that the House of Assembly and Lieutenant-Governor in Council may take action independently of the existence of the Report, on the basis of their separate determination that there was "incapacity to act" or "misconduct, cause or neglect of duty" on the part of the Chief Electoral Officer. That determination should, of course, be based on information acquired from other credible sources that enables the House

and Cabinet to conclude that the legal standard for suspension or dismissal has been met.

The Terms of Reference also seek my opinion as to whether any further investigations, proceedings or analyses are "appropriate or desirable," either "to determine any other appropriate remedy"[206] or generally, "in the circumstances."[207]

Even if, as I have concluded, the Report should not be used as a basis for decision making under s. 5.3, it is nevertheless within my mandate, therefore, to recommend other mechanisms that could be employed to enable the House and the Lieutenant-Governor in Council to acquire an appropriate information base to enable them to decide whether or how s. 5.3 should be applied.

In Part III of this report, I will focus on two broad themes. First, I will present an analysis of the legal framework that would apply to sanction the Chief Electoral Officer, if the House and the Lieutenant-Governor in Council in their wisdom were to decide to proceed under s. 5.3. Secondly, I will make some suggestions as to possible procedural mechanisms that could be used, consistently with the duty to act fairly, to provide the evidence necessary to make an appropriate decision in the absence of reliance on the Citizens' Representative's Report.

LEGAL FRAMEWORK: THE MECHANICS OF SUSPENSION OR REMOVAL

The Chief Electoral Officer can only be suspended or removed under s. 5.3 of the *Elections Act, 1991*:

> The Lieutenant-Governor in Council, on resolution of the House of Assembly passed by a majority vote of the members of the House of Assembly actually voting, may suspend or remove the Chief Electoral Officer from office because of an incapacity to act or for misconduct, cause or neglect of duty.

Before addressing the interesting substantive and procedural questions posed by this brief section, it is worth describing in some detail the steps required to sanction the Chief Electoral Officer under it:

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206 Terms of Reference, 6(c).

207 6(a).

- Any member of the House may, in principle, move to suspend or remove the Chief Electoral Officer. In fact, an opposition MHA introduced a motion to suspend him under s. 5.3 as recently as April 2021.
- Removing or suspending the Chief Electoral Officer requires Cabinet support:
    - Legally, a resolution of the House does not suspend or remove the Chief Electoral Officer under s. 5.3. It merely allows suspension or removal by the Lieutenant-Governor-in-Council (in effect, the Cabinet).
    - Practically, a government must have the confidence of the legislature to exist, so it is unusual for the legislature to pass significant motions without government support. The April 2021 motion was defeated (17 ayes and 21 nays).[208]
- Cabinet would usually decide to suspend or remove the Chief Electoral Officer before introducing a motion for suspension or removal. A written Cabinet submission would normally provide the necessary context. The decision would usually be expressed through a Minute in Council, after which a motion would be introduced either by the Government House Leader or an appropriate minister.
- The House can decide how to debate the motion. In the past, resolutions to dismiss statutory officers have proceeded under the normal standing orders, with no special modifications to allow the officer to make submissions or challenge evidence:[209]
    - Members have been the only ones to speak. Members speak once for up to 20 minutes, except the Premier, the Leader of the Opposition, and the

[208] Newfoundland and Labrador, *House of Assembly Proceedings*, 50th General Assembly, 1st session, Vol. L, No. 5 (April 21, 2021).

[209] The main recent precedents are the 2005 resolution to remove the Citizens' Representative (the March Debate) and the 2009 resolution to remove the Child and Youth Advocate (the Neville Debate). The March Debate is related to the decision in *March v. Hodder*, 2007 NLTD 93 and the Neville Debate to *Newfoundland and Labrador (Child Advocate) v. Newfoundland and Labrador (House of Assembly),* 2009 NLTD 189. Because the April 2021 motion to remove the Chief Electoral Officer was defeated with little discussion of procedure, it is more difficult to infer whether the House felt different procedures would have been necessary to proceed with removal.

Government House Leader or minister introducing the motion, who get 60 minutes.[210]

- Evidence has been tabled: before a debate on removing the Citizens' Representative in December 2005, the Speaker tabled a Commission of Internal Economy report, and the Minister of Finance and President of the Treasury Board tabled a chronology and collection of documents before a debate on removing the Child and Youth Advocate in December 2009.[211]
- The House has considered other methods of proceeding. In the 2005 debate, an opposition MHA moved that the Citizens' Representative be heard. This motion was defeated (11 ayes, 24 nays). In the 2009 debate, an opposition MHA moved that the Child and Youth Advocate be given "a hearing contemplated by the principles of procedural fairness and natural justice, including a meaningful opportunity to respond to the allegations". This motion was also defeated (5 ayes, 36 nays).[212]
- The House has wide powers to investigate.[213] For example, it could refer the question to a House committee, which could hold a hearing with counsel, subpoenas, and witnesses.

- The motion would need the support of a majority of the House to pass, even if some members were absent. The current Standing Orders require all members present to vote.[214] However, in the 2005 debate the Opposition House Leader recused himself based on a conflict of interest, and the Speaker (after consulting the House) did not require him to vote.[215]
- Once passed by the House, the resolution would be certified and communicated to Cabinet.

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210 *House of Assembly Standing Orders*, SO 46, s. 46(1) and (2).

211 See the March Debate and the Neville Debate. The Speaker of the House of Assembly provided me with these documents, which may be found in the Supporting Materials.

212 See the March Debate and the Neville Debate.

213 See for example *House of Assembly Act*, RSNL 1990, c. H-10, sections 6–11 and 19.

214 *House of Assembly Standing Orders*, SO 16, s. 16(6).

215 See the March Debate.

- Notwithstanding the House resolution and any earlier Cabinet decision, Cabinet could still theoretically decide not to suspend or remove the Chief Electoral Officer. In ordinary circumstances, however, Cabinet would, soon after the resolution, advise the Lieutenant-Governor to suspend or remove the Chief Electoral Officer. The Lieutenant-Governor would then (by constitutional convention) make an Order-in-Council suspending or removing them.

As discussed earlier, the language of s. 5.3 suggests that Cabinet's substantive deliberation about whether to remove the Chief Electoral Officer would occur after the House resolution. In practice, it is far more likely that Cabinet would decide to proceed with removal before a resolution was introduced. That is when the substantive analysis and decision would normally occur. The last steps leading to the Order-in-Council would normally be a formality.

Given the reality of Cabinet operations, it would be artificial and impractical to expect Cabinet to consider the question of removal twice based on the same facts, issues, and law. However, this practice must be reconciled with Cabinet's duty under s. 5.3 to decide removal is appropriate *after* the House resolution not *before* it. Cabinet must apply its judgment to the circumstances that exist when it advises removal.

As a result, Cabinet's decision to advise removal, however cursory, must be interpreted as a decision to reaffirm its earlier analysis on the basis that there has been no material change. If a material change does arise, Cabinet may be obliged to reconsider.

LEGAL FRAMEWORK: PARLIAMENTARY PRIVILEGE

The House has, as part of parliamentary privilege, an inherent and exclusive power to control its own proceedings. This privilege to exercise all the powers necessary for its proper functioning was recognized early in the House's history in

Kielley v. Carson.[216] It has since been recognized as a Canadian constitutional principle.[217]

When a privileged decision is challenged in court, the courts' jurisdiction is limited to confirming that the decision falls within parliamentary privilege.[218] In *Kielley v. Carson*, for example, the Privy Council concluded that the House had exceeded its privilege by attempting to punish a lay person for remarks made outside the assembly. If a decision does fall within parliamentary privilege, the court has no jurisdiction to second-guess or review the legislature's decision.

Parliamentary privilege means that the House can decide for itself whether a resolution under s. 5.3 is lawful and procedurally fair:

- In *March v. Hodder*, the former Citizens' Representative applied for judicial review of the House resolution calling for his removal, citing a breach of procedural fairness. Orsborn J. concluded he had no jurisdiction to hear the application because of parliamentary privilege.
- In *Newfoundland and Labrador (Child and Youth Advocate) v. Newfoundland and Labrador (House of Assembly)*, the Child and Youth Advocate applied for a declaration stating that, if a resolution to remove her were introduced, she would have the right to be heard by the House as a matter of procedural fairness. She argued that a nonbinding declaration, unlike judicial review, would not interfere with parliamentary privilege. This application was also dismissed for a lack of jurisdiction based on parliamentary privilege.

It is important to emphasize that parliamentary privilege does not mean that the House is entitled to proceed illegally or unfairly. Privilege is not an exception to the rule of law.[219] Instead, it is part of the constitutional architecture that gives meaning to the rule of law, defining a sphere in which the House is "the sole judge

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216 (1842), 4 Moore 63, 13 ER 225, 2 Nfld LR x (Privy Council).

217 See e.g. *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly),* [1993] 1 SCR 319; *Canada (House of Commons) v. Vaid,* 2005 SCC 30.

218 *Vaid*.

219 *Duffy v. Canada (Senate)*, 2020 ONCA 536 at para. 90; *Vaid* at para 29(d).

of the lawfulness of its proceedings".[220] Within this sphere of privilege, the responsibility to uphold the law falls on the House rather than the superior courts, who cannot correct the House if it errs.

APPROACH TO INTERPRETATION OF S. 5.3

Having been asked to provide an opinion on whether action under s. 5.3 is appropriate, I will now analyze the meaning of "misconduct, cause, or neglect of duty" and the requirements of procedural fairness. Because I am providing an opinion and not analyzing an existing report or decision, I will provide my own analysis of the question rather than any kind of reasonableness analysis.

I hope my analysis can assist the Members in carrying out their constitutional responsibilities. But the responsibility to interpret and apply the law belongs to the Members, not to me, and my opinion cannot relieve them of the duty to form their own independent judgment of what the law requires while addressing whether a resolution calling for the Chief Electoral Officer's suspension or removal should be adopted.

Finally, I should note that the decision to sanction the Chief Electoral Officer cannot be made by the House alone. It is the Lieutenant-Governor in Council, following a House resolution calling for sanction. who must ultimately decide whether to sanction the Chief Electoral Officer. My remarks about parliamentary privilege should not be taken to detract from Cabinet's independent responsibility to uphold the law or to imply any opinion about whether the final Order-in-Council (made by the Lieutenant-Governor in Council, not the House) may be subject to judicial review outside of the protective shield of parliamentary privilege.

As with the House, I can hope that my opinion will be of value during the Cabinet deliberative process, but Cabinet has the duty to decide for itself how to exercise its legal powers.

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[220] *New Brunswick Broadcasting*, citing Erskine May, *Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 21st ed. (London: Butterworths, 1989), at p. 90.

MISCONDUCT, CAUSE OR NEGLECT OF DUTY

It is important to remember that the test for suspension or removal is found in s. 5.3's language of "misconduct, cause or neglect of duty" not in a finding of "gross mismanagement" by the Citizens' Representative under Part VI of the *House of Assembly Accountability, Integrity and Administration Act.* This is so regardless of whether the Citizens' Representative's Report is being relied on for decision making under s. 5.3.

While there may be overlap with respect to the types of activity captured by the two terms, "gross mismanagement" is not the equivalent of "misconduct, cause or neglect of duty." Each term must be given its own meaning by application of proper principles of statutory interpretation.[221]

I will now present my view of the content to be given to the phrase "misconduct, cause or neglect of duty" within s. 5.3 by examining, in accordance with the approach mandated by the Newfoundland and Labrador Court of Appeal in *Archean Resources*, the legislative history, the language of the text, the statutory context and the purpose of the provision.

LEGISLATIVE HISTORY

Section 5.3 protects the Chief Electoral Officer's security of tenure and should be understood in light of the significant role security of tenure has played in Canada's constitutional development.

Security of tenure has mediaeval origins. English monarchs sometimes granted offices "at pleasure" (meaning the grant could be revoked at any time) and sometimes "during good behaviour" (meaning the monarch could only revoke the grant for cause). Naturally, officers who could be dismissed at pleasure were easier to influence than officers who could only be dismissed for cause.[222]

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221 For the interpretation of the term "gross mismanagement" in the context of Part VI, see "Wrongdoing – Gross Mismanagement," above, starting at p. 47.

222 Simon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (Cambridge, U.K.: Cambridge University Press, 2013), at 21–46; W.R. Lederman, "The Independence of the Judiciary" (1956) 34(7) Can. Bar. Rev 769, at 779–784.

To reduce royal influence over judges, the *Act of Settlement, 1700*,[223] provided that "Judges Commission be made *quamdiu se bene gesserint* [during good behaviour], and their Salaries be ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them." Thereafter, English judges could be dismissed by the monarch for cause (which could be established through conviction, impeachment, or a writ of *scire facias*[224]) or by Parliament without cause.[225]

The *Constitution Act, 1867* also guarantees judges' security of tenure: "the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons." [226] At first glance, this provision might also seem to allow two separate options for removing a judge: removal without cause by the Governor-General following a Parliamentary address or removal for cause, established in the ordinary courts by conviction, *scire facias*, etc. But removal without cause would undermine modern conceptions of judicial independence, especially as post-1700 constitutional developments make it more likely that the government of the day will have effective control over Parliament. Today, s. 99(1) is understood to require *both* cause *and* a Parliamentary address before a judge can be removed.[227]

Until 2016, the Chief Electoral Officer held office "during good behaviour", language evoking the *Act of Settlement* and s. 99(1) of the *Constitution Act, 1867*. The Chief Electoral Officer could be removed only for cause and by resolution of the House of Assembly.[228] But, unlike the *Act of Settlement* and s. 99(1) of the *Constitution Act, 1867*, the executive had no role in removing him: a resolution of the House could remove him without any involvement from Cabinet.

The current s. 5.3 brings the Chief Electoral Officer's security of tenure even closer to judges' security of tenure, allowing removal only for cause and by the

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223 12 and 13 Will. III, c. 2

224 *Scire facias* was a writ, now abolished, requiring a person against whom it was brought to show cause why a record (in this case, the Royal Letters Patent appointing the judge) should not be annulled.

225 Shetreet and Turenne, at 300–317; Lederman, at 785–788; *Gratton v. Canadian Judicial Council,* 1994 CanLII 3495 (FC).

226 *Constitution Act, 1867,* s. 99(1).

227 *Gratton.*

228 *Elections Act, 1991*, *s. 4* (before May 23, 2016).

joint action of the legislative and executive branches. Along with this change, "during good behaviour" was replaced by "for incapacity or for misconduct, cause or neglect of duty" by the *Statutory Offices of the House of Assembly Amendment Act*,[229] which standardized security of tenure for the Auditor General, Child and Youth Advocate, and Citizens' Representative.

One significant difference between the Chief Electoral Officer's security of tenure and a judge's is that the Chief Electoral Officer is appointed for only a six-year term. Judicial independence, in its modern form, is intended to ensure that judges are independent, not only of the current government, but also of society and the market, so that the judge will not "be inclined to favour a side that may be important in the judge's future."[230] The Chief Electoral Officer's six-year term is long enough to ensure some independence from the appointing government, which must face the polls once before his term is up, but not long enough to ensure this higher degree of independence.

A more minor difference is also worth noting. Under s. 99(1) of the *Constitution Act, 1867*, a judge is removed by the Governor General, acting by convention on the advice of the Prime Minister. Under s. 5.3 of the *Elections Act, 1991*, the Chief Electoral Officer is removed by the Lieutenant-Governor in Council, acting by convention on the advice of Cabinet. This distinction reflects appointment provisions: judges are appointed by the Governor-General,[231] while the Chief Electoral Officer is appointed by the Lieutenant-Governor in Council on resolution of the House.[232]

In short, the structure of s. 5.3 of the *Elections Act* strongly resembles the constitutional guarantees underpinning and protecting judicial independence. This resemblance suggests that s. 5.3 should be interpreted to protect the Chief Electoral Officer's independence, but also that the relatively mature jurisprudence and commentary on judicial independence can be used to clarify the meaning of "misconduct, cause, or neglect of duty".

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229 SNL 2015, c. 6

230 Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 66.

231 *Constitution Act, 1867,* s. 96(1).

232 *Elections Act, 1991,* s. 4(2).

THE OBJECT OR MISCHIEF OF THE SECTION

A central part of legislative interpretation is recognizing "what, broadly speaking, the object or objects of the legislative act must have been".[233]

Democracy is "a principle by which our Constitution is to be understood and interpreted", embracing citizens' right to participate in the electoral process.[234] Fair elections are also "an essential component of our democratic society".[235]

The Chief Electoral Officer is entrusted with ensuring that elections are held fairly and that citizens can effectively participate in them. Because the government is subject to the electoral process, this mandate requires some independence from the government and protection from government influence. However, the Chief Electoral Officer's mandate also requires capacity and probity, which in turn require accountability.

Independence and accountability are inherently in tension, as has often been recognized in the context of judicial accountability.[236] Security of tenure provisions like s. 5.3 aim to reconcile this tension by ensuring that the Chief Electoral Officer can only be sanctioned for cause established through a public process involving both the legislative and executive branch. Where possible, s. 5.3 should be interpreted to ensure that the Chief Electoral Officer can be held to account effectively for conduct that would jeopardize public confidence in the elections system, but also to minimize the possibility that the government could use the removal process to exert influence over the Chief Electoral Officer.

"MISCONDUCT", "CAUSE", OR "NEGLECT OF DUTY"

"Misconduct", "cause", and "neglect of duty" are familiar words. "Misconduct" is wrongful action. "Neglect of duty" is wrongful inaction. And "cause", in this context, is conduct that justifies removal. Together, these words encompass any conduct justifying suspension or removal.

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233 *Archean Resources*, at para. 22.

234 *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, at paras. 76–77.

235 *Harper v. Canada (Attorney General)*, 2004 SCC 33, at para. 62.

236 *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, at para. 44, citing Friedland at pp. 84–87.

"Misconduct", "cause", and "neglect of duty" are all commonly used to describe behaviour justifying the termination of an office or position. In considering when an employer had "just cause" to dismiss an employee in *Regina v. Arthurs*, Schroeder J.A. cited "serious misconduct" or "habitual neglect of duty".[237] In considering when a provincial court judge could be dismissed for breach of good behaviour in *Valente v. The Queen*, Le Dain J. paraphrased the test as "misconduct"[238] and "cause".[239]

The courts do not rely on adjectives to explain what kind of "misconduct", "cause", or "neglect of duty" justifies dismissing an employee. Instead, the question is whether the conduct is incompatible with the fundamental terms of the employment relationship.[240] Proportionality is an underlying concern.[241] The conduct must be considered in the context of factors including the employee's role and responsibilities, the type of business or activity, the employee's position within the organization, and the degree of trust placed in the employee.[242]

In the dismissal of judges, the conduct is also judged against the fundamental aspects of the judicial office. The question is whether the conduct is "so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office".[243]

"Misconduct" and "neglect of duty" relate to the Chief Electoral Officer's individual blameworthy conduct. In the judicial or employment context, "cause" also refers to individual blameworthy conduct. Whatever "misconduct, cause, or neglect of duty" means, it contemplates some individual blameworthy conduct by the Chief Electoral Officer that justifies his removal.

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237 (1967), 1967 CanLII 30 (ON CA), at para.11.

238 [1985] 2 SCR 673, at para. 35, quoting Lord Denning.

239 *Valente*, at paras. 29 and 37.

240 *McKinley v. BC Tel*, 2001 SCC 38, at para. 48.

241 *McKinley*, at para. 53.

242 *Dowling v. Ontario (Workplace Safety and Insurance Board)*, 2004 CanLII 43692 (ON CA), at para. 50.

243 *Moreau-Bérubé*, at para. 12.

The fundamental aspects of the Chief Electoral Officer's role can be inferred from s. 5(1) of the *Elections Act, 1991*:

> It is the duty of the Chief Electoral Officer
>
> (a) to exercise general direction and supervision over the administrative conduct of elections and to enforce on the part of election officers fairness, impartiality and compliance with this Act;
>
> (b) to issue to election officers those instructions that he or she considers necessary to ensure effective execution of this Act; and
>
> (c) to perform all other duties that are imposed on him or her by or under this Act.

Section 12(2) also sheds light on the office's fundamental aspects:

> The Chief Electoral Officer shall remove from office a returning officer who
>
> (a) ceases to be ordinarily resident in the electoral district for which he or she is appointed;
>
> (b) is incapable, by reason of illness, physical or mental infirmity or otherwise, of satisfactorily performing his or her duties under this Part;
>
> (c) has failed to discharge competently his or her duties under this Part; or
>
> (d) has, after his or her appointment, conducted himself or herself in a politically partisan manner, whether or not in the course of the performance of his or her duties under this Part.

The Chief Electoral Officer is responsible to foster fairness, impartiality, and compliance with the *Elections Act, 1991*.[244] Partisanship is antithetical to the role.[245]

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244 *Elections Act, 1991*, s. 5(1)(a).

245 *Elections Act, 1991*, s. 5(1)(a), 12(2)(d).

Further, the CEO has a managerial role which demands a basic level of competence.[246]

CAN INCOMPETENCE ESTABLISH MISCONDUCT, CAUSE, OR NEGLECT OF DUTY?

Many of the allegations against the Chief Electoral Officer, such as the allegation of poor planning (D15), raise questions of incompetence rather than of misconduct or neglect of duty. As noted above, competence is a core attribute of the Chief Electoral Officer's office. When can incompetence establish "misconduct, cause, or neglect of duty" justifying removal?

To begin with, incompetence could be framed either as "incapacity to act" or as "misconduct, cause, or neglect of duty" under s. 5.3. Evidence that the Chief Electoral Officer could not act competently going forward would raise a question of "incapacity to act". While past incompetence could support an inference of future incompetence, in this case I do not believe the allegations raise a question about the Chief Electoral Officer's capacity to act. The instances of past incompetence could only justify removal if they can be framed as "misconduct, cause, or neglect of duty".

Gross or serious incompetence can form cause for dismissal in an employment context.[247] Some authorities suggest this incompetence must rise "to the point where it merges with other factors of greater severity".[248] This statement has been called "confusing" and interpreted to mean simply that the incompetence must be "gross" (that is, very serious).[249] However, accepting responsibilities one is entirely unable to discharge could be seen as dishonest or reckless—"factors of greater severity".

In the judicial context, it remains unsettled whether gross incompetence can constitute a breach of good behaviour.[250] The Canadian Judicial Council's *Ethical*

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246 *Elections Act, 1991*, s. 5(1)(a) and (b), s. 12(2)(c).

247 *McHugh v. City Motors (Nfld.) Ltd*., 1988 CanLII 5507 (NL SC), at para. 26.

248 *Erlund v. Quality Communication Products Limited et al*. 1972 CanLII 1196 (MB QB).

249 *Babcock v. C. & R. Weickert Enterprises Ltd*., 1993 NSCA 163.

250 *Report of the Canadian Judicial Council to the Minister of Justice in the matter of the Inquiry Committee to review the conduct of the Honourable Paul Cosgrove of the Ontario Superior Court of Justice* (Ottawa: Canadian Judicial Council, 2009), at paras. 58–62.

Principles for Judges frames "Diligence and Competence" as an ethical duty requiring judges to devote themselves to their duties and to maintaining the knowledge and wellness their duties require.[251] A possible interpretation is that incompetence alone would not be a breach of good behaviour, but could be evidence of a breach of the ethical duty to maintain competence.

Here, the word "cause" is set between "misconduct" and "neglect of duty", both of which require wrongful behaviour and not mere inability. As words take colour from their surroundings, this supports interpreting "cause" so that incompetence must rise to the level of personal fault to justify removal. This interpretation also aligns with the unsettled jurisprudence and commentary on incompetence in judicial removal cases.

A narrow view of when incompetence can establish "misconduct, cause, or neglect of duty" helps achieve the object of s. 5.3 and to achieve fair and practical results.[252] A Chief Electoral Officer who is demonstrably and generally incompetent can be removed for incapacity. Removal for specific instances of poor judgment, as distinct from general incompetence, would create a real risk of undue influence: the Chief Electoral Officer would be aware that any difficult decision could be judged in hindsight by the government and used as a pretext for removal.

SUMMARY

In my view, "misconduct, cause, or neglect of duty" means individual conduct by the Chief Electoral Officer that is blameworthy and incompatible with the Chief Electoral Officer's duty to manage elections fairly, impartially, and in compliance with the *Elections Act, 1991*. An institutional failure or bad outcome is not individual conduct, though in some cases it may support an inference about the Chief Electoral Officer's individual conduct. Incompetence can establish "misconduct, cause or neglect of duty" only if it is very serious and demonstrates individual fault, as for example if the Chief Electoral Officer wrongly accepted responsibilities knowing they were unable to discharge them.

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251 *Ethical Principles for Judges*, pages 27–32.

252 *Archean Resources*, at para. 26.

PROCEDURAL FAIRNESS

As discussed above, I believe the House has a duty of procedural fairness even when acting under the protection of parliamentary privilege. Further, Cabinet has a duty of fairness which has in some circumstances been enforced by the courts.[253]As a result, I will review the content of the duty of procedural fairness in these circumstances using the *Baker* factors.[254] I hope this analysis of the principles of procedural fairness as developed by the courts may help members of the House and of Cabinet to decide how to proceed.

THE NATURE OF THE DECISION

Unlike the Citizens' Representative, the House and Cabinet are not investigators. They are the highest governmental institutions in the Province, with a mixture of legislative, policy-making, and judicial functions.[255]

This last point deserves elaboration. In *Kielley v. Carson*, the Privy Council concluded that the House could not punish for past contempt because it "is no Court of Record, nor has it any judicial functions whatever".[256] The Privy Council meant that the House does not hear civil or criminal trials or appeals, unlike the Westminster Parliament, which has a long history acting as a court of law and equity. Only the power to hear trials and appeals would have implied the power of contempt claimed in *Kielley v. Carson*.

Taking the word "judicial" in a more natural sense, the House does have judicial functions, such as the power to discipline its members[257] or resolve human-

253 See e.g. *Pelletier v. Canada (Attorney General)*, 2005 FC 1545; *Shoan v. Canada (Attorney General)*, 2020 FCA 174.

254 As discussed in Part II, this refers to the factors developed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

255 See generally *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

256 *Kielley v. Carson*, p. 234.

257 *Duffy v. Canada (Senate)*, 2020 ONCA 536, at 41–43.

rights disputes involving its employees.[258] Similarly, the Lieutenant-Governor in Council is often called upon to make administrative and even judicial decisions.[259]

While Cabinet and the House can act judicially, their primary roles are legislative and policymaking, and both bodies often rely on assistance from the civil service and statutory officers. The Citizens' Representative is one part of the vast machinery that supports Cabinet and the House in discharging their responsibilities. The special nature of these bodies must be taken into account in assessing the requirements of procedural fairness, as is described below.

THE NATURE OF THE STATUTORY SCHEME

Unlike the Citizens' Representative, the House and Cabinet do not produce an advisory report. Their decision is final and leaves the Chief Electoral Officer little if any recourse. This suggests a high degree of procedural fairness.

THE IMPORTANCE OF THE DECISION

Like the Citizens' Representative's report, a decision by the House or Cabinet under s. 5.3 is very important to the Chief Electoral Officer personally, and this factor calls for a high degree of procedural fairness.

In addition, the public importance of the Chief Electoral Officer's independence also suggests that the House and Cabinet should err on the side of providing more ample participation rights.

LEGITIMATE EXPECTATIONS

Little in recent history would give the Chief Electoral Officer the legitimate expectation of extensive participation.

THE HOUSE AND CABINET'S PROCEDURAL CHOICES

As I am providing an opinion on what ought to be done in the future, not reviewing a past decision, there are no choices to review.

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258 *Canada (House of Commons) v. Vaid*, 2005 SCC 30.

259 *Wilson v. Esquimalt and Nanaimo Railway Company*, 1921 CanLII 424 (UK JCPC).

The last two *Baker* factors have little significance in this case. However, the other the *Baker* factors suggest that the Chief Electoral Officer is entitled to a high degree of procedural fairness before removal. He ought to be aware of every material particular of the case to meet and ought to have an adequate opportunity to raise any legitimate response.

Procedural fairness is not a box-ticking exercise, and procedures required will vary depending on the allegations and evidence. For example, if an allegation turns entirely on a witness's questionable credibility, cross-examination may be required; but for most allegations, it would suffice if material concerns were sufficiently explored.

The unique nature of Cabinet and the House calls for a relaxation of the principle that whoever hears must decide. Cabinet and the House are entitled to rely on delegates and reports.[260] They have an independent responsibility to satisfy themselves that the test for removal is met and that procedural fairness was provided. They cannot adopt an investigation report uncritically, but nor do they have a free-standing obligation to rehear evidence or submissions.

While the unique nature of Cabinet and the House means that they are more entitled than other bodies to delegate their responsibilities, their ability to draw on the whole resources of the state ensures that they are able to provide full notice and an opportunity to respond, even if they entrust this responsibility to others. While some decisions from other jurisdictions suggest that a statutory officer with security of tenure can be dismissed with limited notice of the case to meet and a limited ability to respond to it,[261] these decisions do not involve officers with central constitutional roles who report to the House and can only be removed after a resolution of the House. Even if these authorities are correct, I would not recommend reliance on them or offering the Chief Electoral Officer anything less than a full opportunity to know and respond to the case to meet.

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[260] See e.g. *Inuit Tapirisat* at p. 753: "The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council. The executive branch cannot be deprived of the right to resort to its staff, to departmental personnel concerned with the subject matter, and above all to the comments and advice of ministerial members of the Council".

[261] See e.g. *Shoan v. Canada (Attorney General)*, 2020 FCA 174.

The procedures that fairness will require depend on the nature of the record before the House and Cabinet. If the Chief Electoral Officer was convicted of a serious offence at trial, the fact of conviction will establish the grounds alone, and allowing the Chief Electoral Officer to dispute the conviction might be inappropriate. But if the House raises a new allegation on its own initiative, fairness might require an investigation and hearing (though not necessarily before the House).

The House has already considered similar questions in the context of harassment complaints against members and formulated a *Harassment-free Workplace Policy Applicable to Complaints Against Members*. The policy requires the Citizens' Representative to investigate allegations fairly and submit an investigative report to the Standing Committee on Privileges and Elections.[262] The Standing Committee then hears from the complainant and respondent[263] and prepares a final report and recommendation for the whole House.

Assuming the Citizens' Representative's investigation is thorough and fair, the *Policy* provides a workable method for implementing the House's independent duty of procedural fairness. The whole House receives the Standing Committee's report, not the Citizens' Representative's and not the identities of complainants or witnesses.[264] But if the Standing Committee thoroughly reviews the Citizens' Representative's report and concludes that it is fair and reliable, that may well be sufficient to satisfy the House that the allegations are true and the process fair.

The *Policy* depends on the Citizens' Representative's investigating the allegations thoroughly and providing the respondent with a full opportunity to be heard. It does not provide any method of curing deficiencies in the initial investigation. It cannot be compared with a Human Rights Commission process, in which the respondent can be provided with a lower level of procedural fairness because adverse findings will proceed to a full hearing. The Citizens' Representative hears the evidence and finds the facts, and so it is before the Citizens' Representative that the respondent is entitled to be heard. The Standing Committee's role is to confirm that the findings are thorough and fair.

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262 *Harassment-free Workplace Policy Applicable to Complaints Against Members*, s. 5.6.

263 *Harassment-free Workplace Policy Applicable to Complaints Against Members*, s. 5.7.

264 *Harassment-free Workplace Policy Applicable to Complaints Against Members*, s. 10.

RECOMMENDATIONS AND NEXT STEPS

Having analyzed the Citizens' Representative's findings and the framework for suspending or removing the Chief Electoral Officer under s. 5.3 of the *Elections Act, 1991*, I must now provide my opinion and recommendation about (1) whether action under s. 5.3 based on the Report may be appropriate or (2) whether further investigations, proceedings, are appropriate or desirable.

The first question is, in light of my earlier conclusions, straightforward. As discussed, I did not find that any of the Citizens' Representative's findings of gross mismanagement could be relied on by Cabinet or the House, nor could the recitation of evidence in the Report, in the absence of clear findings of fact reached after a proper process was adopted to allow the Chief Electoral Officer to respond fully to it. The procedural and substantive requirements for suspending or removing the Chief Electoral Officer are, if anything, even more demanding than for a finding of gross mismanagement. The conclusions cannot, in my opinion, form a reliable basis for action under s. 5.3 for the procedural and substantive reasons I identified earlier.

As I observed previously, however, the House and the Lieutenant-Governor in Council are not precluded from considering the application of s. 5.3 in the absence of a Report by the Citizens' Representative. To do so, however, they would need access to information from other credible sources that would provide the evidentiary platform upon which to base conclusions as to whether the legal standard for suspension or removal has been met. That engages the next question as to whether, if the House and Lieutenant-Governor in Council were to decide to proceed to consider the application of s. 5.3, without relying on the Citizens' Representative's Report, what, if any, further investigations, analyses or proceedings may be appropriate or desirable.

This second question goes beyond the analysis of fact and law and asks me what is practical or useful in the circumstances. Wherever the Citizens' Representative's Report has allowed me to form an opinion about appropriate next steps, I have provided it. I will comment on this question in the context of the individual allegations.

ALLEGATION A1: HARASSMENT

Harassment of an employee is inappropriate and unacceptable behaviour, which is why the House of Assembly has adopted a *Harassment Free Workplace Policy* for addressing it. Although I understand the Citizens' Representative's reasons for investigating this matter through the whistleblower process rather than referring it directly under the policy, having reviewed the Citizens' Representative's conclusions, I believe the policy provides a more flexible and appropriate framework for addressing this concern than s. 5.3 of the *Elections Act, 1991*.

The *Harassment Free Workplace Policy* requires a complaint either by the individual harassed or by a bystander. As neither name has been disclosed, all the witnesses interviewed by the Citizens' Representative should be informed that bystanders or harassed individuals are welcome to bring their complaints forward under the *Policy*. To ensure that witnesses are comfortable coming forward, an independent human resources professional should be engaged to administer the *Policy*.

If no individuals are willing to identify themselves, there is little prospect of justifying action under s. 5.3 in any case, and I could not recommend action.

ALLEGATION A4: SCREAMING AND YELLING

Screaming and yelling in the workplace is inappropriate and unacceptable behaviour. As with Allegation A1, I believe the *Harassment Free Workplace Policy* provides a more flexible and appropriate framework for addressing this allegation than s. 5.3 of the *Elections Act, 1991.* As with Allegation A1, all the witnesses interviewed by the Citizens' Representative should be informed that bystanders or harassed individuals are welcome to bring their complaints forward under the *Policy* and that an independent human resources professional should be engaged to administer the *Policy*.

ALLEGATION B8: NEPOTISM

The Citizens' Representative's findings in relation to Allegation B8 raise two significant concerns.

First, institutionally, the Citizens' Representative's Report suggests that OCEO continues to hire children of public servants and OCEO workers as temporary employees. Superficially plausible reasons have been given for this practice, but the Citizens' Representative does not appear to have confirmed their validity, and neither can I.

Either these reasons are valid, in which case the practice should be formalized and approved, or they are not, in which case it should cease. An internal, forward-looking investigation should be conducted to draw clear recommendations for future policy.

Second, individually, the Citizens' Representative's Report does provide reasons for suspecting that either an actual conflict of interest or an apparent conflict of interest existed in this case. While I will not make any recommendation about whether this issue should be pursued under s. 5.3 of the *Elections Act, 1991*, I discuss below how the flaws in the Citizens' Representative's Report could be rectified.

ALLEGATION C14: OCCUPATIONAL HEALTH AND SAFETY

In analyzing this allegation, I indicated that the Occupational Health and Safety Division appears well placed to analyze both the OCEO's institutional culture of safety and the Chief Electoral Officer's personal responsibility, if any, for lapses in training. Given that the Chief Electoral Officer acknowledges that there were oversights in training, both the individual and institutional aspects of this allegation should be referred to the Occupational Health and Safety Division. Once referred to the appropriate institution, I would see little benefit in addressing this issue under s. 5.3 of the *Elections Act, 1991* and would not recommend it.

ALLEGATION D15: PRE-ELECTION PLANNING

Although the Citizens' Representative's Report did not establish personal fault by the Chief Electoral Officer or even an institutional failure, that cannot on its own allay the concern that elections officials recognized many of the challenges associated with Alert Level 5 in the Summer of 2020 and informed the Chief Electoral Officer of them, and that no plan was formed to deal with a lockdown that interfered with in-person voting. If Cabinet or members of the House of Assembly

feel that further investigation into the personal responsibility of the Chief Electoral Officer is desirable and in the public interest, they should proceed with a further investigation or hearing as discussed below. I would caution, however, that the process should not be used for scapegoating or for assigning individual blame based on hindsight.

Regardless of whether the Chief Electoral Officer's personal actions require further investigation, it would be appropriate to conduct a thorough review of OCEO's planning methods for the future.

ALLEGATION D16: COMMUNICATIONS WITH THE CHIEF MEDICAL OFFICER OF HEALTH

As I noted before, Allegation D16 seems not to allege an independent concern, but instead one aspect of poor election planning. I recommend that the nature of communications with the Chief Medical Officer of Health should be considered as part of any further investigation into Allegation D15, and not otherwise.

ALLEGATION E26: PERSONAL DELIVERY OF BALLOTS

I concluded above that, based on my own normative judgment about the seriousness of the Chief Electoral Officer's actions, they were not serious enough to rise to the level of gross mismanagement. If Cabinet and the House of Assembly share my normative assessment, then this allegation does not raise a question about misconduct, cause or neglect of duty under s. 5.3 and nothing further should be done with it.

If Cabinet or members of the House of Assembly disagree with my normative assessment of the Chief Electoral Officer's error, they should ask themselves whether his error was blameworthy and incompatible with the Chief Electoral Officer's duty to manage elections fairly, impartially, and in compliance with the *Elections Act, 1991*. If so and if they believe action under s. 5.3 is desirable and in the public interest, they should proceed with a further hearing as discussed below.

ALLEGATION E29: OATHS OF CONFIDENTIALITY

My analysis of the Citizens' Representative's reasoning did not reveal any evidence that the Chief Electoral Officer was personally responsible for a failure to

administer oaths, let alone that his conduct was blameworthy enough to establish gross mismanagement. Similarly, the evidence and reasons cannot support action under s. 5.3, and I do not see any reason to believe that further investigation might uncover evidence that would justify such action. I recommend no further steps.

ALLEGATION F34: THE INDIGENOUS FRANCHISE

The Citizens' Representative's Report provided no reason to believe the Chief Electoral Officer was personally blameworthy in dealing with the question of translating election materials into Indigenous languages. I do not believe that any further evidence is likely to emerge establishing personal blame, and cannot recommend any further investigation into the Chief Electoral Officer's personal fault.

At the same time, how to provide adequate public services without discrimination to individuals who speak Indigenous languages and languages other than English is a significant issue. It is an issue of policy not blame, and it is not limited to the electoral system.

A proper analysis of Indigenous and minority language issues would require an analysis of the populations that have difficulty accessing public services in English, the particular public services for which language is a barrier, different models for providing service, the costs and benefits of different approaches, the views and preferences of affected populations, and the principles of substantive equality and reconciliation. This work could be done through the Province's representative political institutions, through the civil service, or through an independent process. I would recommend it.

ALLEGATION G35: PRIVACY SAFEGUARDS

The Citizens' Representative's reasons do not disclose, in my opinion, a reason to apprehend that the Chief Electoral Officer's handling of privacy safeguards was blameworthy enough to deserve suspension or removal under s. 5.3 of the *Elections Act, 1991*. Nor did it disclose an ongoing institutional failure that requires correction. I recommend no action be taken in connection with this allegation.

HOW TO PROCEED UNDER S. 5.3

If the House of Assembly or Lieutenant-Governor in Council choose to move forward under s. 5.3 of the *Elections Act, 1991* with any of allegations B8, D15 and D16, or E26, it would be necessary to rehear and re-examine the evidence in a fair process in which the Chief Electoral Officer would have a full opportunity to be heard. For example:

- The House of Assembly could refer allegations for a full hearing before, for example, the Privileges and Elections Committee or a select committee. To ensure fair and efficient proceedings, the committee should appoint counsel to present the case against the Chief Electoral Officer and allow the Chief Electoral Officer to retain counsel to present his case. To ensure confidentiality, the hearing could be conducted in private.
- The Lieutenant-Governor in Council could also establish a commission of inquiry under the *Public Inquiries Act, 2006*[265] with a short time limit to investigate and make specific findings about the allegations. In practice, the necessity of considering personal and confidential information on a short timeframe would likely require hearings in private, and this necessity could be anticipated in the Terms of Reference and implemented by the commissioner under s. 6(2) of the *Public Inquiries Act, 2006*. However, given the track record of past public inquiries relative to the speed with which they are able to do their work, this may not be a practical option.

FINAL OBSERVATIONS

The essence of my conclusions and recommendations can be summed up as follows:

1. The Citizens' Representative's Report should not be used by the House of Assembly or the Lieutenant-Governor in Council as a platform for proceeding with the possible application of s. 5.3 of the *Elections Act, 1991.* The con-

[265] SNL 2006, c. P-38.1.

cerns I have expressed about the reasoning process employed and the problems with procedural fairness undermine the reliability of the Report for the purpose of application of s. 5.3.

2. The House and the Cabinet are nevertheless not precluded from proceeding to consider the possibility of suspension or removal of the Chief Electoral Officer under s. 5.3 but in doing so they will have to develop another mechanism, other than reliance on the Citizens' Representative's Report, for investigating the circumstances so that a fairly obtained informational base can be acquired upon which proper decisions can be made.

3. In my opinion, there would be little utility in the House and the Cabinet moving forward under s. 5.3 using the events referred to in Allegations A1, A2, C14, E29, F34 and G25. If anything is to be done in respect of those matters, other policy, program or institutional steps should be employed.

4. With respect to the events referred to in Allegations B8, D15, D16 and E26, before any decision should be made under s. 5.3, it would be necessary to rehear and re-examine the evidence in a fair process in which the Chief Electoral Officer would have the full opportunity to be heard and to respond to the evidence against him.

5. In considering whether a resolution should be adopted calling for the suspension or removal of the Chief Electoral Officer under s. 5.3, each Member of the House must bring their independent judgment to bear on the issues, applying the legal test of "misconduct, cause or neglect of duty" (and not the finding of "gross mismanagement" by the Citizens' Representative) to the facts as ascertained and satisfying themselves that the demands of procedural fairness have been met..

6. If consideration is given to moving forward under s. 5.3, the choice of mechanism to facilitate the information-gathering process should be assessed in practical terms, including the time that may be involved in doing so before a final decision could be made.

I also wish to make the following general observations. The concerns I have expressed about the Citizens' Representative's findings must be viewed in context. He conducted a lengthy and detailed investigation which he took very seriously

and wrote a fulsome report that shows no evidence of bias or intended unfairness. He dismissed the majority of the allegations.

Where I identified concerns as to the nature and completeness of the reasoning process he employed, those concerns may well have been answered, at least in part, by evidence from the extensive investigation. It is common for reasons to raise questions whose answers can be inferred from the record. What is unusual here is that, because the full record is unavailable, those questions are unanswerable.

While I believe the Citizens' Representative's decision not to allow me to review the record was mistaken, it was principled and reflected, I believe, a sincere commitment to a high degree of confidentiality and whistleblower protection. This decision came at a cost to the Citizens' Representative's own interests, as it made it difficult for him possibly to explain or defend his findings.

Whistleblower regimes like Part VI of the *Act* are a powerful tool for unearthing wrongdoing and maintaining confidence in public institutions. However, the confidentiality they need to function also creates special investigative challenges. This case exemplifies how, even with the best of intentions, whistleblower investigations can create unfair and unreliable results.

When I conclude that the findings against the Chief Electoral Officer are not reliable, I do not mean that they are not reliable in a technical or legalistic sense. They are not reliable for any purpose. No one should assume, even casually, that the findings are true or probably true.

At the same time, the difficulty of resolving questions about confidentiality and procedural fairness is not the fault of the Citizens' Representative. This tension is inherent in whistleblower regimes and continues to create problems and confusion across Canada. 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.

I have the honour to submit herewith my report. In accordance with Term 8 of my Terms of Reference, I remain available for consultation with the House of Assembly Management Commission for three months from the date of submission of this report.

APPENDIX A

TERMS OF REFERENCE – INDEPENDENT REVIEW OF THE FINDINGS AND REPORT OF THE CITIZENS' REPRESENTATIVE:

The Management Commission directs that the Honourable J. Derek Green, former Chief Justice of Newfoundland and Labrador ("the Reviewer"), be engaged to review the report of the Citizens' Representative entitled "A Report on Public Interest Disclosures Regarding the Chief Electoral Officer for Newfoundland and Labrador", March 2022, as follows:

1. The Reviewer shall analyze the Report based on the evidence and findings contained in it and shall not perform a reinvestigation of the said Report;
2. The Reviewer may make inquiries of or invite submissions from the Citizens' Representative and the Chief Electoral Officer, or their counsel, on the findings contained in the report;
3. The Reviewer may make inquiries of or invite submissions from such other persons the Reviewer determines necessary to fulfil the Reviewer's responsibilities under this referral;
4. The Reviewer may consult with the House of Assembly Service regarding matters of parliamentary procedure, parliamentary privilege and the administrative governance framework of the Legislature;
5. The Secretary to the Management Commission shall provide the Reviewer with those human resources or other supports necessary to complete the review;
6. The Reviewer shall provide to the Management Commission the following:
   a) an analysis of the Report, including any procedural, human resources or legal issues identified and whether any further investigations, proceedings or analyses are appropriate or desirable in the circumstances;
   b) a recommendation whether, in the opinion of the Reviewer based on the analysis of the Report, action contemplated under section 5.3 of the *Elections Act, 1991* may be considered appropriate, including whether a further

term of suspension should be imposed or whether the Chief Electoral Officer should be removed from office for misconduct, cause or neglect of duty as contemplated by that section; and
c) a recommendation whether, in the opinion of the Reviewer, any further investigations, proceedings or analyses are appropriate or desirable to determine any other appropriate remedy;

7. The Reviewer shall complete the work contemplated in this referral and shall report on the analysis completed and make the required recommendation by September 15, 2022;

8. The Reviewer shall be available for consultation with the Management Commission for three months after delivering the review of the above-noted report.

APPENDIX B

PROCEDURAL GUIDELINES

This document contains procedural guidelines for the Independent Review. These guidelines are subject to interpretation or revision the Reviewer thinks appropriate, and counsel are invited to make comments on them at any time.

PARTICIPATION

1. The Chief Electoral Officer is invited to comment on any issue he perceives to relate to the Review or its Terms of Reference.
2. The Citizens' Representative is invited to comment on any issue he perceives to relate to the Review or its Terms of Reference, subject to direction from the Review about the appropriate scope of its participation.
3. The Reviewer will, from time to time, identify potential issues. Neither the identification of an issue, nor any comment or question elaborating upon it, implies any views on whether an issue will or ought to be addressed or about how any issue ought to be framed or decided. The final report may pass over issues that were identified and may address issues that were not identified. Counsel are expected to make any submissions they wish considered on any issue relating to Review or the Terms of Reference, irrespective of whether the issue is identified by the Reviewer.
4. The Chief Electoral Officer and the Citizens' Representative must accept communications through email to their counsel. Unless otherwise notified, the Chief Electoral Officer may be contacted by email to [redacted] and the Citizens' Representative may be contacted by email to [redacted].
5. The Reviewer may be contacted by email to both [redacted] and [redacted]. Absent special circumstances, the Chief Electoral Officer and the Citizens' Representative are each encouraged to copy the other on correspondence.
6. The Reviewer may also receive comments from the Chief Electoral Officer or the Citizens' Representative orally or by phone. These comments may lead to

further issues being identified or to new exhibits, in which case the Chief Electoral Officer or Citizens' Representative will be informed of the new issue or exhibit and given a fair opportunity to comment.

7. The Citizens' Representative and Chief Electoral Officer are encouraged to provide comments freely, informally, and frequently.

8. To encourage free and open discussion, the Chief Electoral Officer and the Citizens' Representative are free to withdraw or revise any comments they make until August 15, 2022. After August 15, 2022, the Review's record and the comments of the Chief Electoral Officer and Citizens' Representative will be considered final, subject to direction by the Reviewer.

9. The Reviewer aims to provide the Chief Electoral Officer and Citizens' Representative with as much time as is reasonably possible to provide comments. If urgent issues arise, the Reviewer may request comment within 24 hours or another limited time as the circumstances allow.

10. All communications between the Reviewer, the Chief Electoral Officer, and Citizens' Representative are confidential.

RECORD

11. The record for the review will consist of the Citizens' Representative's report and any additional documentary exhibits numbered by the Reviewer. The list of documentary exhibits will be distributed from time to time by email, and electronic or paper copies provided as appropriate.

12. The distribution of an exhibit signifies only that the information contained in the document may be considered by the Reviewer. It does not imply any conclusion about whether the document or information relates to the Terms of Reference, whether it is reliable, or what implications if any it has.

13. The Review will proceed informally and not according to the law of evidence.

14. The relevance, reliability, weight, and appropriateness of any factual information are substantive issues that the Chief Electoral Officer and the Citizens' Representative may address in their comments and that the Reviewer will address in the final report.

15. The Reviewer will rely solely on factual information (1) in the record or (2) so notorious or generally accepted or so capable of immediate and accurate demonstration as not to be subject to reasonable dispute for the purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the issue in question.

16. If the Reviewer becomes aware, orally or otherwise, of factual information that could reasonably be argued to be relevant to the Review or the Terms of Reference, he will describe this information in the form of an exhibit. This exhibit will be shared with the Chief Electoral Officer and the Citizens' Representative. It, rather than the original communication, will form part of the record for the Review.

17. The Chief Electoral Officer and Citizens' Representative may suggest potential exhibits to the Reviewer by email. These exhibits will be marked as exhibits and included in the record if there is some reasonably arguable basis for concluding that they may be relevant to the Review or the Terms of Reference.

INFORMATION AND COMMENTS FROM OTHER INDIVIDUALS

18. The Reviewer may request information or comments from other individuals or institutions as it sees fit orally, by email, or otherwise.

19. Where reasonably possible, the Chief Electoral Officer and the Citizens' Representative will be given notice of the general nature of the information or comment the Reviewer intends to seek (without limiting the nature of the information or comment that may emerge).

20. If a new issue or new exhibit emerges, the Chief Electoral Officer and Citizens' Representative will be notified of it.

21. The Chief Electoral Officer and Citizens' Representative may suggest individuals or institutions from whom the Reviewer might request information or comment. The Reviewer may seek comments on the suggestion before deciding whether to seek information or comment. Barring unusual circumstances, new suggestions for individuals or institutions to contact will not be entertained after August 1, 2022.