



HOUSE OF ASSEMBLY
NEWFOUNDLAND AND LABRADOR
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**Submission to the Review of the Structure of the
Statutory Offices of the House of Assembly**

On behalf of the Official Opposition Caucus of the House of Assembly, I make this submission to the Review of the Structure of the Statutory Offices of the House of Assembly.

Sincerely,

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Summary of Our Recommendations

This section summarizes the recommendations in the main submission that follows.

The Scope of the Terms of Reference

The “full terms of reference” contain nine bullets; however, the nine bullets are **not** the full extent of the Terms of Reference. As the introductory sentence states, the Consultant’s mandate is a general mandate to “review the structure of the Statutory Offices of the House of Assembly, with the exception of the Office of the Auditor General”. While the report must “include” recommendations on all nine bulleted terms listed, the mandate does not say the review, report and recommendations must “only include” those nine terms. No such limitation is imposed because the term “include” is not defined in the Terms of Reference in a way that is exclusionary. Therefore, the Consultant’s review, report and recommendations may cover anything regarding the structure of the Statutory Offices other than the Auditor General’s Office, without limitation, as long as the report also “includes” recommendations on those nine terms.

The Separation of Powers

The impetus and objectives of the review must be to strengthen accountability. It would be indefensible if the impetus and objectives of the review were to undermine accountability. It is the rightful duty of the House of Assembly and its Statutory Offices to hold the executive branch to account. The executive branch must not undermine that role, whether directly or through indirect means dressed up in a cloak of legitimacy.

The Green Report of 2006-07

In his report, Green gave considerable attention to the issue of the separation of powers. While Green concluded that legislative autonomy should not be invoked to shield the House and its Members from accountability, Green also affirmed that legislative autonomy plays a crucial role in shielding the House and its Members from overreach by the executive branch, so Members can function “free from external impediment, especially from the executive” and “resist domination by an aggressive government”. Green stated: “When it [legislative autonomy] is invoked properly, it will find a justification in the idea that there is a necessity to exclude outside interference to enable the legislature and its Members to function effectively and properly.” Green stated: “my mandate requires that any recommendations I make not *undermine* legislative autonomy”; and further: “I am also authorized, in making my recommendations, to take into account opportunities to enhance *accountability* and *transparency* of MHA expenditures, but without undermining the *autonomy* of the legislature.” Green was painstakingly careful to ensure his review, commissioned by the government, did not in any way undermine accountability and transparency, or subject the House, its offices and its Members to aggressive overreach by the executive branch. In fact, one of Green’s recommended changes was the establishment of the House of Assembly Management Commission – a body whose duties and responsibilities he defined in draft legislation to include subject matters of this review.

House of Assembly Management Commission

Arguably, some of the items listed in the Terms of Reference fall within the purview of the House of Assembly Management Commission, which was established to empower the House of Assembly to oversee and bring greater accountability to the Statutory Offices of the House. The proper bodies to commission reviews of the Statutory Offices of the House and to propose changes to their structures ought to be the House of Assembly by way of Resolution, or the House of Assembly Management Commission. If there is doubt about whether the Commission has this authority and mandate, then it ought to be defined clearly in legislation. It ought to be the legislative branch, not the executive

branch, commissioning reviews and recommending appropriate revisions of Statutory Offices of the legislative branch. The argument for this is laid out in greater detail below.

Impetus #1 for the Current Review

The first impetus for the current review is the situation that occurred in 2021-22 when the Citizens' Representative reviewed and reported on allegations regarding the Chief Electoral Officer and, subsequently, when that report became the subject of further review, discussion and public controversy. Arguably, as many of us stated at the time, some change is required in the way things are done to prevent a recurrence of this chaos. The part of the Terms of Reference that most closely relates to this situation is bullet #5, which regards: "How to manage conflicts which arise between Statutory Offices, who should investigate alleged misconduct of a statutory officer, and how that investigation should be conducted (internally, externally, independent ADR etc.)." We believe there are many ways to address the deficiencies that precipitated the election chaos and the investigative chaos that followed. Further below, this submission will make suggestions under headings that correspond to the individual bulleted items listed in the Terms of Reference.

Impetus #2 for the Current Review

We are concerned there may be a second impetus for the current review that is not directly related to the chaos of the election and the investigative processes that followed. The Terms of Reference are not limited to managing conflicts among Statutory Officers. They wander into other areas that, for the Opposition, raise significant concerns. Some of the bullets raise the spectre of downsizing the Statutory Offices in one way or another. Other bullets regard the oversight and control of Statutory Offices. If any aspect of the current review is a veiled attempt by the executive branch to erode Statutory Offices whose work has proven to be politically troublesome and embarrassing for the government, all such aggressive overreach by the government must be exposed and resisted. Any action of the executive branch or recommendation of a review commissioned by the executive branch to weaken the Statutory Offices would be utterly inappropriate. It is concerning enough that the Terms of Reference threaten to intimidate these offices with their words of downsizing and externally imposed oversight. Our Statutory Offices were created to hold the government to account, and any intention or action of the government to weaken them must be opposed.

Bullet #1: Minimum Required Competencies

Bullet #1 regards: "The minimum required competencies for each statutory officer".

The competencies of the Statutory Office principals should remain at the discretion of the House of Assembly and not be dictated by law or by the executive branch. Who is to say a candidate lacking a certain competency defined in a well-intentioned list would not be the ideal candidate for a host of other reasons, expertise and experience? It should be for the Members to exercise their own judgment based on the candidates available.

The selection committee process defined for the IPC could be replicated for all Statutory Offices. This would be a reasonable way to present the House with a roster of qualified candidates without specifying requisite competencies. It would remove the possibility of the executive branch hand-picking candidates who might go easy on them.

Bullet #2: The Number of Statutory Offices

Bullet #2 regards: "The number of statutory offices and whether a statutory officer could fulfil the obligations of more than one statutory role; which offices/statutory officers could be combined based on common objectives, functions, qualifications, clients etc."

Child and Youth Advocate

Considering scope, depth and quantity of the reports of the Child and Youth Advocate since the inception of this Statutory Office and the wide range of continuing challenges faced by children and youth in Newfoundland and Labrador, it is clear that a full-time Child and Youth Advocate is required along with the requisite research and support staff, and the Advocate should not be tasked with the additional responsibilities of another Statutory Office that would divert the attention of the Office from the challenges of children and youth, a unique and sizeable demographic. Any move to erode the Child and Youth Advocate Office would be a giant step backward and would be met by fierce opposition from the public and Members of the House of Assembly.

The Statutory Office of the Child and Youth Advocate must remain a stand-alone Statutory Office with a full-time principal who is not shouldered with the responsibilities of another Statutory Office.

Seniors' Advocate

Seniors need a dedicated Advocate who is empowered to consider the challenges they face, both broadly as a demographic group and individually. While the Seniors' Advocate is empowered to consider issues of general application, the Office is not properly equipped to examine individual challenges and is therefore advised to refer such matters to the Citizens' Representative for investigation. When the legislation was brought before the House for debate in 2016, the Opposition raised concerns that the office was not sufficiently empowered. "With thousands and thousands of our seniors in the care of government, the Seniors' Advocate, we truly believe, ought to have been created using the Child and Youth Advocate model and actually have some teeth in their ability to advocate to government." Also: "The Seniors' Advocate has been given no role or authority to see that the *Adult Protection Act* is actually enforced." The Opposition recommended "that this legislation be strengthened to give the Advocate the actual authority they need to make the decisions that are in the best interest of the seniors of Newfoundland and Labrador".

The Statutory Office of the Seniors' Advocate must remain a stand-alone Statutory Office with a full-time principal who is not shouldered with the responsibilities of another Statutory Office. Further, the duties, powers and resources of the Seniors' Advocate should be significantly increased to enable the Advocate to address the individual concerns of seniors, and to be directly informed of and empowered to investigate any circumstances where seniors appear to have been abused.

Citizens' Representative

In 2001, the House passed "*An Act Respecting the Appointment of a Citizens' Representative for the Province Who Shall Have the Powers Traditionally Conferred on an Ombudsman*." The Act defines certain duties and considerable powers of the Citizens' Representative. The 2014 *Public Interest Disclosure and Whistleblower Protection Act* also spells out a relatively new role for the Citizens' Representative. Effective April 1, 2020, the Citizens' Representative also plays an important role in the Harassment-Free Workplace Policy Applicable to Complaints Against Members of the House of Assembly. This Office processes and reports on between 600 and 800 matters per year in connection with the variety of functions it performs. It is clear from the broad scope of the work and purview of this Statutory Office that there is no office in the province of comparable power and authority. It is also clear from the quantity and depth of its work that the office is required full-time and its principal would not have the time to shoulder the responsibilities of other offices.

If there are concerns that the work of the Citizens' Representative may overlap with the work of the Child and Youth Advocate and the Seniors' Advocate, consider the argument that it is better to have more checks and balances on the operations of the government than too few. It is imperative that children and youth be the focus of the work of a dedicated Child and Youth Advocate and that seniors be the focus of the work of a dedicated Seniors' Advocate, but it is no less important that citizens generally, whistleblowers and subjects of alleged harassment be afforded the services of a dedicated

Citizens' Representative. There may also be times when the Statutory Offices can work together to investigate and report on matters of overlapping concern.

The Statutory Office of the Citizens' Representative must remain a stand-alone Statutory Office with a full-time principal who is not shouldered with the responsibilities of another Statutory Office.

Information and Privacy Commissioner

The Statutory Office of the Information and Privacy Commissioner was created by legislation passed in 2002 and proclaimed in 2004-05. ATIPPA was replaced in 2015 with the *Access to Information and Protection of Privacy Act, 2015* (ATIPPA, 2015).

The Information and Privacy Commissioner also has a significant role under the *Personal Health Information Act*.

The Information and Privacy Commissioner requested an independent oversight role as part of the government's Bill 22 of 2022-23, *An Act to Amend the Management of Information Act*, which is currently before the House of Assembly.

It is clear from the duties of this Statutory Office and the volume of its publications that it is among the busiest of all Statutory Offices. It is inconceivable that the far-reaching functions of ATIPPA could function without a dedicated, stand-alone Office of the Information and Privacy Commissioner with a dedicated, full-time Statutory Officer. It is also inconceivable that the province could roll back the clock to a time when ATIPPA did not exist. People rely on the access provisions and privacy protections this Statutory Office ensures. If anything, the importance of privacy protections is growing, given the importance of information in the modern age and the vulnerability of personal data to negligent or bad actors.

The Statutory Office of the Information and Privacy Commissioner must remain a stand-alone Statutory Office with a full-time principal who is not shouldered with the responsibilities of another Statutory Office. Further, as it is a natural extension of the work of this Statutory Office, the OIPC should be given an independent oversight role with respect to the 'duty to document' provisions of the *Management of Information Act*.

Chief Electoral Officer

The Statutory Office of the Chief Electoral Office is established under the *Elections Act, 1991*.

Duties of Chief Electoral Officer

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.
- (2) The Chief Electoral Officer shall report on his or her activities to the House of Assembly through the Speaker.

Under section 4 of the Charter of Rights and Freedoms, a provincial general election must be held at least once every five years except in grave circumstances. Under section 3 of the *House of Assembly Act* (which is non-binding), a general election should be held every four years. Under section 3.1 of that Act (which is also non-binding), an election should be called within a year of the governing party electing a new leader and Premier. In practice in Newfoundland and Labrador, a general election could be called at any time. The 1999 general election was held on February 9, 1999, less than three years after the prior general election of February 22, 1996. The 1972 general election was held on March 24, 1972, less than a year after the general election of October 28, 1971. Even in the era of fixed-date elections, the 2019 general election was held on May 16, 2019, not on the second Tuesday of October 2019 as mandated. The 2015 general election was held on November 20, 2015, not on the

second Tuesday of October as mandated. The 2015 election date was established by an amendment of the *House of Assembly Act*, but in 2019, the government simply ignored this provision of the Act altogether.

Under section 54 of the *House of Assembly Act*, a by-election should be called within 60 days of a seat becoming vacant, unless a general election is imminent. Resignations of Members, while not frequent, can happen at any time for a multitude of reasons. In both 2007 and 2014, by-elections were held in five districts, and in 2001, there were by-elections in four districts.

The Office of the Chief Electoral Office would also be responsible for conducting a plebiscite, such as those that were conducted regarding denominational education on September 5, 1995 and September 2, 1997. Plebiscites are even more infrequent than by-elections, but could be called at any time.

The Chief Electoral Office would normally be most busy during elections, after elections and for a considerable period of time in the lead-up to anticipated general elections. During the COVID-19 pandemic, the Office would have been exceptionally busy because of the particular challenges of running a general election that was expected because of a pending change in Premier.

While many of the people who work with the Office during elections are hired only temporarily, it is necessary to have a principal and core staff who maintain a constant state of preparedness so an election can be conducted if required. This is particularly true when the governing party is a minority in the House (as was the case from 2019 to 2021), because a confidence vote or other circumstances can quickly trigger an election.

The chaos of the election of 2021 demonstrates how important it is to have a Chief Electoral Officer ready to oversee and be accountable for the operations of the Office. It is difficult to imagine having a principal who takes a leave of absence between elections but who is ready to step up at a moment's notice any time an election is called.

In recent years, the Chief Electoral Officer has served simultaneously as the Commissioner for Legislative Standards. While it may be possible to hold both offices simultaneously, recent events show that forcing the principal to step down from one role pending an investigation inevitably causes a vacancy to occur in the other role as well.

Considering the fact that the House of Assembly is currently considering an overhaul of the legislation and processes governing elections in light of problems in 2021, this may be a time when the dedicated services of a full-time Chief Electoral Officer will be needed for a considerable period of time of adjustment. Given how important it is to ensure the integrity of elections to safeguard the fundamental rights and freedoms of citizens, it would be imprudent to take any actions that would compromise the full functioning of the Chief Electoral Office at this time, in particular.

Another consideration is the fact that challenges of 2021 elections in some of the electoral districts are currently before the courts in a protracted process, and the Chief Electoral Office might be expected to be involved in those proceedings. The Chief Electoral Officer would certainly be impacted if the courts were to overturn one or more of those elections and trigger new elections.

The next general election is just two years away, according to the fixed-date election law, but could happen sooner under various circumstances. Because the practice of holding a fixed-date election on the second Tuesday of October every four years has been followed only twice (2007, 2011) in the five general elections that have happened since it was established (2007, 2011, 2015, 2019, 2021), and also because the provision establishing that practice is not binding, therefore people do not have any good reason to be confident that the next general election will happen on the second Tuesday of October 2025. As the discussion following the 2023 Budget made clear, people fully expect the government to revert to the practice of calling general elections without notice, whenever the political climate is favourable to them. In that context, the Chief Electoral Office and its principal must always be prepared for a snap election call.

The Statutory Office of the Chief Electoral Officer should remain a stand-alone Statutory Office with a full-time principal who is not shouldered with the responsibilities of another Statutory Office, particularly in anticipation of pending election law changes and in recognition of the fact that the person currently serving in the role is relatively new to the post at a particularly busy time.

Commissioner for Legislative Standards / Ethics Commissioner

Prior to the Green Report of 2006-07, there was a Commission for Members' Interests, constituted under the *House of Assembly Act*. It was Green who suggested expanding the role and renaming the officer the Commissioner for Legislative Standards.

Other functions as well as comparable functions of the Commissioner are defined in the *House of Assembly Accountability, Integrity and Administration Act* with respect to the Codes of Conduct and other matters.

In recent years, the Commissioner for Legislative Standards has been tasked with producing a flurry of investigative reports, dated September 14, 2022, April 12, 2022, November 3, 2020, September 24, 2020, November 13, 2019, June 25, 2019, October 19, 2018, October 18, 2018, October 3, 2018, August 24, 2018, August 24, 2018, May 2017, April 2014 and August 2013. The Commissioner has even been called before the Bar of the House of Assembly to answer questions about the work of the office.

The Commissioner must be available as needed to provide advice to Members about compliance with the disclosure rules and to handle allegations of harassment, as well as other matters.

Considering the scandal that precipitated the Green Report of 2006-07, it would be not just imprudent, but foolish and outrageous to erode the Office of the Commissioner for Legislative Standards that was strengthened to prevent a recurrence of such a scandal. Such an erosion would be all the more imprudent now that the importance of properly handling harassment allegations has been acknowledged and the Commissioner's duties have been expanded accordingly.

NEWFOUNDLAND AND LABRADOR NEEDS AN ETHICS COMMISSIONER

The Official Opposition is proposing that the Commissioner for Legislative Standards should be given expanded powers and responsibilities and a new title parallel to those of the federal Conflict of Interest and Ethics Commissioner. The Office of the federal Conflict of Interest and Ethics Commissioner explains the federal Commissioner's role and mandate. This role is much broader than the role defined for our province's Commissioner for Legislative Standards. There is currently no Statutory Office or other office in Newfoundland and Labrador capable of investigating serious ethical breaches comparable those the federal Commissioner is empowered to investigate. A mature democracy must have such checks and balances on those who hold positions of authority.

During the chaos following the 2021 election and in circumstances since that time, it became apparent that Newfoundland and Labrador is lacking important functionalities that exist federally in Canada and to some extent in other jurisdictions. One such instance occurred when the Premier allegedly accepted a gift – a fishing trip at the private lodge of the proponent of a massive wind power project that was not going to be allowed to proceed without a significant change in provincial government policy, a change that was indeed made not long after that fishing trip occurred and for which the Premier has never produced receipts to support a claim that he financed the trip. In the public domain, this has been described as a serious ethical breach. There is no Statutory Office in this province empowered to investigate such a breach; but an Ethics Commissioner with powers parallel to those of the federal Commissioner could conduct such a probe, deliver findings and recommendations, and raise the bar on ethics among public office holders in Newfoundland and Labrador. This is the opportunity for such a recommendation to make Newfoundland and Labrador a leader in ethical standards and practices. We urge you to bring this recommendation forward.

The Statutory Office of the Commissioner for Legislative Standards and Ethics Commissioner should remain a stand-alone Statutory Office with a full-time principal who is not shouldered with the responsibilities of another Statutory Office. The role and mandate of the Commissioner should be expanded to parallel that of the federal Conflict of Interest and Ethics Commissioner, and the title of the Office and Officer should be changed accordingly. To the extent that this revised role duplicates the work of other offices overseeing conflicts of interest, changes should be made to ensure the responsibility rests with the new provincial Conflict of Interest and Ethics Commissioner.

Bullet #3: Full- or Part-Time Statutory Officers

Bullet #3 regards: "Whether each Statutory Office requires the dedication of a full-time statutory officer or whether it could be part-time or on an as-needed basis."

Our recommendations regarding this bullet were provided in our response to Bullet #2. There are strong reasons for having full-time Statutory Officers in all six of the offices under the current review. All six have hefty workloads and significant obligations that require their early attention and dedication throughout the year and throughout their terms of office. To take a Statutory Officer away from their role for part of the year or part of their term would be to erode the proper functioning of the office, to deprive the people of the province of their dedicated services when they are required, to risk undermining the integrity of these offices of the people's House, and to relieve the government of the scrutiny and accountability that these Statutory Officers were established to enforce. The government should not be relieved of the pressure that these Statutory Offices and their principals impose on the government's activities. To do so would be to erode transparency, accountability and people's confidence in their governing institutions. This is not a time to take a step back from accountability. It should be made clear that the current review must not be misused to excuse any efforts by the government to escape the proper scrutiny of Statutory Offices. In summary, each of the six Statutory Offices under the current review requires the dedication of a full-time Statutory Officer.

Bullet #4: From Recruitment to Removal

Bullet #4 regards: "How each statutory officer should be recruited, appointed, re-appointed, compensated, disciplined, and removed from office."

Regarding recruitment and appointment,

currently, for five of the six Statutory Offices under the current review (excepting the Information and Privacy Commissioner), the respective pieces of legislation do not define the recruitment and appointment processes other than to say: "On resolution of the House of Assembly, the Lieutenant-Governor in Council shall appoint" the Statutory Officer.

The processes for recruiting and appointing all six of the Statutory Offices under the current review should parallel the process currently in place for the Information and Privacy Commissioner, as defined in section 85 of the *Access to Information and Protection of Privacy Act, 2015*, which states:

85. (1) The office of the **Information and Privacy Commissioner** is continued.

(2) The office shall be filled by the Lieutenant-Governor in Council on a resolution of the House of Assembly.

(3) Before an appointment is made, the Speaker shall establish a selection committee comprising

(a) the Clerk of the Executive Council or his or her deputy;

(b) the Clerk of the House of Assembly or, where the Clerk is unavailable, the Clerk Assistant of the House of Assembly;

(c) the Chief Judge of the Provincial Court or another judge of that court designated by the Chief Judge; and

(d) the President of Memorial University or a vice-president of Memorial University designated by the President.

(4) The selection committee shall develop a roster of qualified candidates and in doing so may publicly invite expressions of interest for the position of commissioner.

- (5) The selection committee shall submit the roster to the Speaker of the House of Assembly.
- (6) The Speaker shall
 - (a) consult with the Premier, the Leader of the Official Opposition and the leader or member of a registered political party that is represented on the House of Assembly Management Commission; and
 - (b) cause to be placed before the House of Assembly a resolution to appoint as commissioner one of the individuals named on the roster.

Statutory Office holders should hold their offices for a period that is longer than the longest General Assembly (i.e., more than five years), so they have the security of tenure required for them to engage in the challenging work of holding the government to account without being unduly vulnerable to the aggressive overreach of a vindictive administration. Currently, the term of appointment for each of the six Statutory Officers is 6 years. A term of 6 years seems reasonable for each Statutory Officer.

Regarding reappointment,

the House should have the discretion to re-appoint a Statutory Officer who Members believe is doing a good job in that role.

Currently – for the Commissioner for Legislative Standards, the Chief Electoral Officer, the Child and Youth Advocate, the Citizens’ Representative, and the Seniors’ Advocate – the Statutory Officer may be reappointed for a second term of 6 years, but shall not hold office for more than 2 terms. However, in the case of the Information and Privacy Commissioner, under subsection 87(2) of the *Access to Information and Protection of Privacy Act, 2015*: “The Lieutenant-Governor in Council may, with the approval of a majority of the members on the government side of the House of Assembly and separate approval of a majority of the members on the opposition side of the House of Assembly, re-appoint the [Information and Privacy] commissioner for one further term of 6 years.”

The requirement established for the reappointment of the Information and Privacy Commission – that there must be majority votes of both the government side and the opposition side of the House – should be replicated for all Statutory Officers. Specifically, each law should be amended to state: “The Lieutenant-Governor in Council may, with the approval of a majority of the members on the government side of the House of Assembly and separate approval of a majority of the members on the opposition side of the House of Assembly, re-appoint the [Statutory Officer] for one further term of 6 years.”

Regarding compensation,

the processes should remain as they currently are, although the legislation pertaining to the Seniors’ Advocate should be updated to refer to the *Public Service Pensions Act, 2019*.

Regarding discipline or removal from office,

we strongly urge caution in this regard. The executive branch must not be unduly empowered to silence a Statutory Officer whose legitimate work is irritating for the government in office. It must not be provided with defences or excuses that would allow it to improperly muzzle a Statutory Officer of the House in the guise of taking disciplinary action.

Currently, provisions for the disciplining (suspension) and removal from office of a Statutory Officer require the matter to be brought before the House of Assembly (eventually) for an open debate and a vote of Members. Although a majority government would still have the power to enforce its will, the transparency of an open debate in the House would serve as a check on forceful overreach. People would see what is going on.

To quote Mr. Justice Green, a Statutory Officer is “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 processes for suspending or removing Statutory Offices are essentially the same for all six Statutory Officers under the current review.

There are no provisions for “disciplining” a Statutory Officer other than “suspending” a Statutory Officer, nor should there be. The appropriate responses to neglect of duty or misconduct should be suspension or removal.

In his 2022 review of the report of the Citizens’ Representative on the Chief Electoral Officer, Green provided a thought-provoking analysis of the significance of section 5.3 of the *Elections Act, 1991*, with respect to the removal of one of the Statutory Officers under the current review. He wrote: “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. 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.” The importance of the final phrase should not be diminished. Opportunities for the government to use the threat of removal from office as a means of exerting influence over any Statutory Officer must be minimized if not eliminated. It may be in the government’s interest to silence its critics, but it is in the people’s best interest that the security of tenure of these critics of the government – these Statutory Officers of the people’s House – should be made as secure as possible.

Therefore, we propose two changes to the processes for suspending or removing Statutory Officers, and would apply these changes to all six officers.

First, to ensure the executive branch does not unfairly remove a Statutory Officer whose work proves politically troublesome for the government in office, we propose a change that is similar to the provisions currently in place for reappointing the Information and Privacy Commissioner, as defined in subsection 87(2) of the *Access to Information and Protection of Privacy Act, 2015*, which states: “The Lieutenant-Governor in Council may, with the approval of a majority of the members on the government side of the House of Assembly and separate approval of a majority of the members on the opposition side of the House of Assembly, re-appoint the [Information and Privacy] commissioner for one further term of 6 years.” We propose that any decision by the House to remove or suspend a Statutory Officer must have a double majority – a majority of the members on the government side and a separate majority of the members on the opposition side. **The amended provisions regarding each Statutory Officer should read essentially as follows: “The Lieutenant-Governor in Council shall [rather than “may”], on a resolution of the House of Assembly passed with the approval of a majority of the members on the government side of the House of Assembly and separate approval of a majority of the members on the opposition side of the House of Assembly, remove the [Statutory Officer] from office or suspend the [Statutory Officer] because of an incapacity to act, or for neglect of duty or for misconduct.”**

Second, all six pieces of legislation currently have a provision that: “When the House of Assembly is not in session, the Lieutenant-Governor in Council may suspend the [Statutory Officer] because of an incapacity to act, or for neglect of duty or for misconduct, but the suspension shall not continue in force beyond the end of the next sitting of the House of Assembly.” It is understandable that it would be onerous to require the entire House to reconvene to make such a decision. Nevertheless, the

decision to suspend a Statutory Officer is a rare and important one that cannot be taken lightly. As the Statutory Officer is an officer of the legislative branch whose status and work should be protected from overreach by the executive branch, we propose that the House of Assembly Management Commission should be the body making the decision on the suspension of a Statutory Officer. This would place the decision in the hands of the rightful branch of government and serve to protect the independence of our Statutory Officers. **The amended provisions regarding each Statutory Officer should read essentially as follows: "When the House of Assembly is not in session, the Lieutenant-Governor in Council shall [rather than "may"], on the recommendation of a majority vote of the House of Assembly Management Commission, suspend the [Statutory Officer] because of an incapacity to act, or for neglect of duty or for misconduct, but the suspension shall not continue in force beyond the end of the next sitting of the House of Assembly."**

Bullet #5: Managing Conflicts

Bullet #5 regards: "How to manage conflicts which arise between Statutory Offices, who should investigate alleged misconduct of a statutory officer, and how that investigation should be conducted (internally, externally, independent ADR etc.)."

There will not often be conflicts between Statutory Offices. Four circumstances that could give rise to conflicts are these:

- Statutory Officers interpret similar powers and duties differently;
- Two Statutory Officers are investigating the same matter independently of one another;
- One Statutory Officer intends to refer a matter to another Statutory Officer;
- One Statutory Officer is commissioned to investigate another Statutory Officer because of a whistleblower disclosure, a harassment complaint or another reason.

It is not clear whether there is (or should be) a forum in which the first three of these matters could be discussed and resolved.

One Officer Investigating Another

This would arise when a person makes a whistleblower disclosure about a Statutory Officer under the *Public Interest Disclosure and Whistleblower Protection Act*, and the Citizens' Representative, the Auditor General or the Commissioner for Legislative Standards is tasked with conducting an investigation under sections 14 or 15 of the Act. Green described "the difficulty of resolving questions about confidentiality and procedural fairness" as a "tension" that "is inherent in whistleblower regimes and continues to create problems and confusion across Canada." Green offered recommendations for a particular way of handling such investigations, which favours procedural fairness. The *Public Interest Disclosure and Whistleblower Protection Act* makes clear in subsection 14(3): "The citizens' representative shall ensure that the right to procedural fairness and natural justice of all persons involved in an investigation is respected, including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings." Procedural fairness means the accused should have a full and fair opportunity to mount a defence to the accusations. Whistleblower protections may compromise that opportunity.

Green wrote: "A high level of procedural fairness would ordinarily be required to suspend or dismiss a statutory officer with security of tenure." For the investigative report to be reliable, it must "distinguish evidence, fact, normative conclusions, and law" so the reasons do not resist "independent analysis, creating a risk that the conclusions would be adopted blindly." Green wrote: "I recommend that future reports draw a clearer distinction between evidence, fact, norm, and law." A report to be placed before the House to help reach a disciplinary decision "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."

Allegations must be testable. In some cases, there are “real concerns about witnesses’ perception, memory, sincerity, and narration”, about motivations of ill will, about co-workers unconsciously influencing others’ perceptions, about the possibility of collusion, about confident opinions being based on media coverage of events rather than personal knowledge, and about blaming another to exculpate oneself. The accused cannot mount a proper defence without knowing who said what and having the opportunity to test their credibility and respond. An accused may be “able to formulate more persuasive answers with better knowledge of the case to meet”.

For allegations involving harassment, Green noted that his attention had been drawn to the fact that “had this matter been referred for resolution to the executive’s Harassment Free Workplace Policy, it would have afforded the [accused] greater procedural rights, including the right to be presented with the complaint, to know his accuser and to respond to the specifics.”

In an investigation, there are not only whistleblowers, but also witnesses who are not whistleblowers. Ideally, the testimony of a whistleblower should be corroborated by multiple witnesses. Green wrote: “Witnesses’ confidentiality, unlike whistleblowers’, is not protected under Part VI.” However, “reprisals are forbidden by the legislation and proceedings can be instituted if reprisals did occur following disclosure”.

The investigator should strive to provide the House with a report it can rely on to make its own decision fairly. While the House of Assembly may be informed by an investigative report and recommendations of one Statutory Officer about another, the House is not bound by those recommendations and can make a decision even if the report is flawed. The House is master of its domain and its decisions will not be overruled by the courts. Nonetheless, as Green states: “Although the House operates under the protective veil of parliamentary privilege which shields its deliberations from judicial scrutiny in many respects, the House nevertheless has a duty to proceed fairly and lawfully.” Members need to ask themselves whether they can have confidence in the reliability of the investigative report they have received “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 accused. Since there is little opportunity for the accused to appeal the decision of the House, “this suggests that relatively generous participation rights should be provided.”

However, the final decision, following a resolution of the House, rests with Cabinet. The language of the Act uses the permissive “may”. Cabinet is not a rubber stamp; it makes its own choice. Unlike the House, the Cabinet is not protected by parliamentary privilege. All the more reason to ensure the investigative process respects the right of the accused to procedural fairness.

Since whistleblowers are protected from reprisals, should their testimony be available to the accused? Should the accused have the right to know who they are and to question their credibility? Should witnesses also be protected from reprisals? How do we draw the line between exposing wrongdoing through whistleblower protections and protecting Statutory Officers from unfair attacks?

We recommend ensuring the Statutory Officers who conduct such investigations should have the resources and obligation to hire lawyers well versed in such matters, so their investigative reports are as reliable as possible and procedural fairness is assured.

We recommend that whistleblowers and witnesses be protected from reprisals, but their testimony must be substantially disclosed, tested and open to challenge, as procedural fairness demands.

We recommend the advice of Green be followed to the greatest extent possible. Terms such as poor management, mismanagement and gross mismanagement should be well defined and the process for establishing them should be rigorous. Pages 144-157 and 167-168 of Green’s report ought to be studied in particular detail.

We recommend isolating allegations of harassment and dealing with them under the Harassment Free Workplace Policy.

We recommend that Codes of Conduct be defined more directly and thoroughly, with less aspirational language that is wide open to interpretation.

Bullet #6: Quality Assurance and Performance

Bullet #6 regards: "Whether and how quality assurance and performance of each statutory officer/Statutory Office should be measured and overseen."

The executive branch of government has no business measuring and overseeing the performance and quality of the work of the Statutory Officers and their offices.

If there are allegations about the neglect of duty or misconduct of a Statutory Officer, they can be dealt with under the legislative provisions in place for these purposes, as highlighted above. But it is the responsibility of Members to appoint Statutory Officers who are capable of running these offices, and these Officers should be trusted to do their work. All offices should be permitted to do their work and lay out the evidence for the cases they make, and the people of the province and their elected Members can then make their own judgments based on what they see. Or the courts can judge, if a matter comes before them. Generally, the matters of the legislative branch do not come before the courts because of parliamentary privilege. It is therefore incumbent on the legislative branch to ensure the quality of its own work. But this does not mean divesting its responsibility to the executive branch. That is something the legislative branch cannot and should not attempt to do.

Statutory Offices should be provided with sufficient resources to hire and engage the services of professionals with expertise in matters relevant to their work, including lawyers, forensic accountants and so forth. If the Statutory Officers believe they lack the resources to do their work properly, they have opportunities to make this known to the Speaker and the House of Assembly Management Commission.

If the House of Assembly Management Commission has reason to believe a Statutory Office is not performing at a level that is appropriate, it can address these issues with the Statutory Officers. The Management Commission has considerable powers and responsibilities in this regard under section 20 of the *House of Assembly Accountability, Integrity and Administration Act*. If the Management Commission is advised that its oversight powers are insufficient, then the legislation ought to be amended to clarify its responsibility for ensuring the proper operation of the Statutory Offices.

If any Member believes a Statutory Office or Officer is performing poorly or producing work of an inferior quality, the Member or the Member's Caucus may bring a resolution to the House of Assembly to debate. The House of Assembly by resolution or the Management Commission by decision should be empowered to review a report of a Statutory Officer on a case-by-case basis if Members deem this to be appropriate.

In these ways, Statutory Offices are properly overseen by the elected Members of the House of Assembly.

We find no justification in the Green review to impose external mechanisms to ensure the quality of the work and performance of Statutory Officers. The House of Assembly and the Management Commission have the capacity to order work reviews on a case-by-case basis. This is a necessary and sufficient mechanism to provide oversight for the work of the Statutory Offices. It is for the legislative branch to provide oversight for the legislative branch, and no other branch of government should have that role.

Bullet #7: Administrative Oversight

Bullet #7 regards: "What is an appropriate administrative oversight model for the Statutory Offices, inclusive of financial management, human resources management, information management, procurement, and any other "back office" functions; structure."

We have no issue with the way the Statutory Offices are currently overseen from an administrative perspective.

We also have no issue with the Speaker's Office, the Clerk, House services and the six (or seven, or fewer) Statutory Offices collaboratively developing an administrative oversight model for the Statutory Offices, inclusive of financial management, human resources management, information management, procurement, and any other "back office" functions and structure – if that is something they believe is warranted, and driven by their own initiative for their own reasons.

However, we strongly believe the executive branch of government must not have a role in the oversight of Statutory Offices, as this would compromise the independence of the legislative branch and threaten the proper work of the Statutory Offices to provide scrutiny of the executive branch.

The legislative branch answers to the House and the Management Commission, not to the executive branch. While there is some overlap between the two branches (i.e., Cabinet Ministers operate in both spheres), the branches are not the same and should not be treated as such. The Statutory Offices are not agencies of the executive branch, subject to executive administration or daily monitoring in ways that would compromise the independence of their work.

As stated in the *House of Assembly Accountability, Integrity and Administration Act*, it is in the office of the Clerk of the House that administrative oversight of the Statutory Offices properly belongs.

Bullet #8: Sharing Space and Administration

Bullet #8 regards: "Whether physical space and administrative functions could be shared among Statutory Offices."

We urge caution in this regard. As we have recently seen, sometimes one Statutory Office is charged with investigating another. Also, there are strong privacy and confidentiality considerations in the work of the various Statutory Offices that obligate these Offices to restrict the flow and exposure of information. The mandates of the Statutory Offices often require them to work independently, not just of the executive branch, but of one another.

The sharing of physical space and administrative functions could compromise the privacy and confidentiality of a Statutory Office vis-à-vis other Statutory Offices, unless the shared physical space includes robust physical subdivisions and security barriers, enforced by effective (and no doubt costly) internal security measures and personnel. This could create needlessly uncomfortable working environments.

Shared administrative functions could, similarly, expose confidential files and information to those not eligible to access them, unless such materials are at all times securely quarantined to restrict access. In a common office environment with shared administrative functions, systems and personnel, this may be impractical to achieve. Privacy and confidentiality might be compromised.

Any decision to share physical space and administration functions among Statutory Offices must be made independently of the executive branch, and must be driven collaboratively by the offices of the legislative branch, with a full view and understanding of the implications in terms of security, privacy, confidentiality and workability.

Perhaps legislative amendments would be required to address privacy and confidentiality concerns, and that would raise other considerations. Currently, the legislation that binds and protects the personnel of a Statutory Office is exclusive to that Statutory Office for the purposes of the Acts it operates under.

Bullet #9: Reporting to Whom

Bullet #9 regards: "Where reports from each Statutory Office should be directed, such as whether any of the reports of the Statutory Offices should go to a standing or select committee of the House of Assembly for review and analysis."

Note the following general protocol, as stated in the *House of Assembly Act*:

Reports to the House of Assembly

19.1 (1) Notwithstanding another Act, where a report or other document that an officer of the House of Assembly is required to submit to the House of Assembly is submitted to the Speaker or the Clerk of the House of Assembly when the assembly is not in session, the speaker or the clerk shall provide a copy to each member and make it available for inspection by the public immediately after the report or other document is submitted.

(2) A report or other document is considered to have been tabled before the House of Assembly when it is submitted to the speaker or clerk under subsection (1).

The various Statutory Offices have a host of reporting protocols. The general protocol defined above has worked well for the vast majority of reports from Statutory Offices.

Reports that could be handled differently are ones that require further decisions and actions by the House of a disciplinary nature – reports on alleged wrongdoing. Some of these may be submitted to the House of Assembly Management Commission.

It is important to ensure a report by one Statutory Officer on another Statutory Officer in light of a whistleblower disclosure is properly directed and properly acted upon, in one way or another, expeditiously. Perhaps such reports should be directed to the House of Assembly Management Commission, which may then be empowered to direct the report for a review by a standing or select committee or by an external reviewer, as was eventually done in the circumstances in question.

The Management Commission and the House itself ought to be free to decide where a report will be directed on a case-by-case basis if something about the report requires special consideration. Such decisions are made following debates of Members, where the options are weighed for the particular cases at hand. This approach may be preferable to a formulaic approach that orders reviews of reports when they may not be warranted.

The Reporting Process for the Current Review

The Terms of Reference are silent on the body to which the Consultant is to report at the conclusion of this review. One might expect the report to be submitted to the body that commissioned it. However, it would be more appropriate for a report on the structure of the Statutory Offices of the House – the legislative branch – to be submitted directly to the legislative branch – to the Speaker of the House and the House of Assembly Management Commission, for tabling directly in the House of Assembly. A courtesy copy could also be provided to the Minister who announced its commissioning.

MAIN SUBMISSION

The Call for the Statutory Review

On December 5, 2022, the Minister of Justice and Public Safety and Attorney General announced the Provincial Government's decision to commission a Review of the Statutory Offices of the House of Assembly, issuing the following news release:

<https://www.gov.nl.ca/releases/2022/jps/1205n02/>

Public Advisory: Review of Statutory Offices to be Conducted; Minister Hogan Available to Media

Justice and Public Safety

December 5, 2022

The Provincial Government has appointed Retired Supreme Court Justice Robert Fowler to conduct a review of the statutory offices that report to the House of Assembly. Justice Fowler will review the structure, reporting and accountability of the statutory offices of the House of Assembly and prepare a report that includes recommendations.

The Honourable John Hogan, KC, Minister of Justice and Public Safety and Attorney General, will be available to media at 1:00 p.m. today (Monday, December 5) outside of the House of Assembly to discuss this review.

Statutory offices operate independent of government. They are also not directed by Cabinet or ministers. Given the need to operate independently from the Provincial Government, the offices report directly to the House of Assembly. The statutory offices being reviewed include:

- Commissioner for Legislative Standards
- Office of the Chief Electoral Officer
- Office of the Child and Youth Advocate
- Office of the Citizens' Representative
- Office of the Information and Privacy Commissioner
- Office of the Seniors' Advocate

The Auditor General is excluded from this review, as the Auditor General Act was updated in 2021 to improve accountability for public bodies in the province. The Auditor General is subject to robust performance oversight by Auditors General across Canada and reports to the Public Accounts Committee.

The full terms of reference for this review can be found in the backgrounder below. The review is anticipated to take approximately six months.

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BACKGROUNDER

Terms of Reference

The Consultant shall review the structure of the Statutory Offices of the House of Assembly, with the exception of the Office of the Auditor General, and prepare a report that includes recommendations for the following:

- The minimum required competencies for each statutory officer;
- The number of statutory offices and whether a statutory officer could fulfil the obligations of more than one statutory role; which offices/statutory officers could be combined based on common objectives, functions, qualifications, clients etc.;
- Whether each Statutory Office requires the dedication of a full-time statutory officer or whether it could be part-time or on an as-needed basis;
- How each statutory officer should be recruited, appointed, re-appointed, compensated, disciplined, and removed from office;
- How to manage conflicts which arise between Statutory Offices, who should investigate alleged misconduct of a statutory officer, and how that investigation should be conducted (internally, externally, independent ADR etc.);
- Whether and how quality assurance and performance of each statutory officer/Statutory Office should be measured and overseen;
- What is an appropriate administrative oversight model for the Statutory Offices, inclusive of financial management, human resources management, information management, procurement, and any other "back office" functions; structure;
- Whether physical space and administrative functions could be shared among Statutory Offices; and
- Where reports from each Statutory Office should be directed, such as whether any of the reports of the Statutory Offices should go to a standing or select committee of the House of Assembly for review and analysis.

The Consultant may seek input from current and former statutory officers, the Clerk of the House of Assembly, the Clerk of the Executive Council, the Management Commission of the House of Assembly and any others that may be necessary to inform the Terms of Reference.

The Scope of the Terms of Reference

According to the news release, the following Terms of Reference, defined in the backgrounder, compose "the full terms of reference." The nine bullets below are numbered, for easy reference in this brief.

Arguably, the nine bullets are **not** the full extent of the Terms of Reference. As the introductory sentence states, the Consultant's mandate is a general mandate to "review the structure of the Statutory Offices of the House of Assembly, with the exception of the Office of the Auditor General". While the report must "include" recommendations on all nine bulleted terms listed, the mandate does not say the review, report and recommendations must "only include" those nine terms. No such limitation is imposed because the term "include" is not defined in the Terms of Reference in a way that is exclusionary. Therefore, the Consultant's review, report and recommendations may cover anything regarding the structure of the Statutory Offices other than the Auditor General's Office, without limitation, as long as the report also "includes" recommendations on those nine terms. If the review or this submission stray from the nine terms in any way, that is permissible under the Terms of Reference as defined, as long as the matter being discussed is the structure of the Statutory Offices of the House of Assembly other than the Auditor General's Office.

Here are the Terms of Reference with the bullets numbered for reference purposes.

Terms of Reference

The Consultant shall review the structure of the Statutory Offices of the House of Assembly, with the exception of the Office of the Auditor General, and prepare a report that includes recommendations for the following:

1. The minimum required competencies for each statutory officer;
2. The number of statutory offices and whether a statutory officer could fulfil the obligations of more than one statutory role; which offices/statutory officers could be combined based on common objectives, functions, qualifications, clients etc.;
3. Whether each Statutory Office requires the dedication of a full-time statutory officer or whether it could be part-time or on an as-needed basis;
4. How each statutory officer should be recruited, appointed, re-appointed, compensated, disciplined, and removed from office;
5. How to manage conflicts which arise between Statutory Offices, who should investigate alleged misconduct of a statutory officer, and how that investigation should be conducted (internally, externally, independent ADR etc.).
6. Whether and how quality assurance and performance of each statutory officer/Statutory Office should be measured and overseen;
7. What is an appropriate administrative oversight model for the Statutory Offices, inclusive of financial management, human resources management, information management, procurement, and any other "back office" functions; structure;
8. Whether physical space and administrative functions could be shared among Statutory Offices; and
9. Where reports from each Statutory Office should be directed, such as whether any of the reports of the Statutory Offices should go to a standing or select committee of the House of Assembly for review and analysis.

The Consultant may seek input from current and former statutory officers, the Clerk of the House of Assembly, the Clerk of the Executive Council, the Management Commission of the House of Assembly and any others that may be necessary to inform the Terms of Reference.

The Separation of Powers

The Statutory Offices of the House of Assembly are offices of the legislative branch of government, not of the executive branch or the judicial branch. The Statutory Offices do not operate under the direction of the Premier, the Executive Council or any Ministers of the Provincial Cabinet or their departments. They were not established by the executive branch; do not answer to the executive branch; and cannot be altered by the executive branch. They are offices of the people's House, established by the House, that answer to the House and can only be altered by the House.

Minister Hogan acknowledged this in his news release, which stated:

- "Statutory offices operate independent of government";
- "They are also not directed by Cabinet or ministers";
- they "need to operate independently from the Provincial Government"; and
- "the offices report directly to the House of Assembly".

Notwithstanding this admission, it is the Provincial Government – the executive branch, not the legislative branch – that has commissioned this review of the structure of the Statutory Offices of the House. This review was not commissioned by way of a resolution of the House of Assembly, duly passed by Members in Legislative Session convened. It was ordered by the executive branch and announced by the Minister of Justice and Public Safety and Attorney General.

Essentially, the executive branch has commissioned a member of the judicial branch (now retired) to review, report on and make recommendations for altering Statutory Offices of the legislative branch.

That approach may be well and good, if the impetus and objectives of the review are to strengthen accountability. It would, however, be indefensible if the impetus and objectives of the review were to undermine accountability. It is the rightful duty of the House of Assembly and its Statutory Offices to hold the executive branch to account. The executive branch must not undermine that role, whether directly or through indirect means dressed up in a cloak of legitimacy.

The Green Report of 2006-07

For comparison's sake, one might refer to the Green report of 2006-07. That report was not commissioned by way of a Resolution of the House either, but was commissioned by the Premier and submitted to the Premier, who then released it publicly.¹ The circumstances and nature of that review, however, were quite different from the present review. That review was spurred by an investigation of the Auditor General, who contacted the Premier's Office to trigger the appropriate actions regarding serious allegations of impropriety – allegations that took shape during the course of a review, by a Statutory Officer of the House of Assembly, of the spending practices of Members of the House of Assembly.² What began as a review³ soon became a public inquiry, affording the commissioner additional powers.⁴

As Premier Williams' news release stated when that review was commissioned: "it is critical that this be undertaken by a completely impartial individual and I have requested that Chief Justice Derek Green of the Supreme Court of Newfoundland and Labrador undertake this review. I have also asked the Chief Justice for an opinion as to the appropriate manner in which to preserve the democratic requirement to have an autonomous legislature, while also guaranteeing public accountability."⁵

In his report, Green gave considerable attention to the issue of the separation of powers.⁶ While Green concluded that legislative autonomy should not be invoked to shield the House and its Members from accountability, Green also affirmed that legislative autonomy plays a crucial role in shielding the House and its Members from overreach by the executive branch, so Members can function "free from external impediment, especially from the executive" and "resist domination by an aggressive government".⁷ Green stated: "When it [legislative autonomy] is invoked properly, it will find a justification in the idea that there is a necessity to exclude outside interference to enable the legislature and its Members to function effectively and properly."⁸ Green stated: "my mandate requires that any recommendations I make not *undermine* legislative autonomy"; and further: "I am also authorized, in making my recommendations, to take into account opportunities to enhance *accountability* and *transparency* of MHA expenditures, but without undermining the *autonomy* of the legislature."⁹

Although Green's review was profound in its impact, it was rather narrow and focused in its scope, which was confined to matters regarding the compensation and expenditures of Members of the House of Assembly, and how they are monitored and controlled¹⁰. That review was quite different from the current review in terms of its impetus, scope and intended consequences.

Green was painstakingly careful to ensure his review, commissioned by the government, did not in any way undermine accountability and transparency, or subject the House, its offices and its Members to aggressive overreach by the executive branch. In fact, one of Green's recommended changes was the establishment of the House of Assembly Management Commission – a body whose duties and responsibilities he defined in draft legislation to include subject matters of this review.

¹ "Premier to Release Chief Justice Green's Report" (June 6, 2007).

<https://www.releases.gov.nl.ca/releases/2007/exec/0606n09.htm>; and "Premier Says Green Report Will Usher in a New Era of Accountability and Restore Public Confidence" (June 7, 2007). <https://www.releases.gov.nl.ca/releases/2007/exec/0607n05.htm>

² Page 1.4 of "Rebuilding Confidence: Report of the Review Commission on Constituency Allowances and Related Matters" (May 2007). <https://www.gov.nl.ca/publicat/greenreport/mainreport/mainreport.pdf>

³ Order in Council OC2006-296 (July 20, 2006). <https://www.exec-oic.gov.nl.ca/public/oic/details?order-id=11597>

⁴ Order in Council OC2006-297 (July 20, 2006). <https://www.exec-oic.gov.nl.ca/public/oic/details?order-id=13343>

⁵ "Premier reconfirms government's commitment to strengthen rules governing House of Assembly" (June 26, 2006). <https://www.releases.gov.nl.ca/releases/2006/exec/0626n03.htm>

⁶ Pages 1.3 through 1.16 and pages 2.1 through 2.9 of "Rebuilding Confidence" (May 2007).

⁷ Pages 2.8 to 2.9 of "Rebuilding Confidence."

⁸ Page 2.7 of "Rebuilding Confidence."

⁹ Page 1.12 of "Rebuilding Confidence."

¹⁰ "Terms of Reference for MHA compensation package released" (July 21, 2006).

<https://www.releases.gov.nl.ca/releases/2006/exec/0721n10.htm>

House of Assembly Management Commission

Green included in Schedule I of his 2007 report a draft Bill he gave the long title "An Act Respecting the Effective Administration of the House of Assembly, the Standards of Conduct of Elected Members, and their Ethical and Accountable Behaviour." Today's *House of Assembly Accountability, Integrity and Administration Act* closely mirrors Green's draft legislation. The purpose of the Act, defined in section 3, includes to "(g) establish standards of conduct for members and for those charged with responsibility for the administration of operations of the House of Assembly service and the statutory offices." The duties and responsibilities of the commission, defined in section 20, include the following (with emphasis added):

- 20. (1) The commission is responsible** for the financial stewardship of all public money, within the meaning of the *Financial Administration Act*, that may be voted by the House of Assembly for the use and operation of the House of Assembly **and statutory offices**, and for all matters of financial and administrative policy affecting the House of Assembly, its members, offices and staff and in connection with them and, in particular, the commission shall
- (a) oversee the finances of the House of Assembly including its budget, revenues, expenses, assets and liabilities;
 - (b) **review and approve the administrative, financial and human resource and management policies of the House of Assembly service and statutory offices;**
 - (c) **implement and periodically review and update financial and management policies applicable to the House of Assembly service and statutory offices;**
 - (d) **give directions with respect to matters that the commission considers necessary for the efficient and effective operation of the House of Assembly service and statutory offices;**
 - (e) make and keep current rules respecting the proper administration of allowances for members and reimbursement and payment of their expenditures in implementation of subsection 11 (2) of this Act;
 - (f) annually report, in writing, to the House of Assembly, through the speaker, with respect to its decisions and activities in accordance with section 51; and
 - (g) **exercise other powers given to the commission** and to perform other duties imposed on the commission under this or another Act.
- (2) **The commission may at any time report to the House of Assembly on matters referred to in this section or in another Act relating to the House of Assembly.**
- (3) Notwithstanding paragraph (1)(c), where a financial or management policy has not been established by the commission for the House of Assembly and statutory offices, the financial and management policies of the government shall apply.
- (4) The commission may, by directive, delegate a power or duty to the speaker or the clerk and, where that delegation is made,
- (a) **the commission shall establish outcome measurements and accountability recording of measurements that enable that proper oversight and recording be maintained;**
 - (b) the exercise of that power or the performance of that duty shall be considered to have been carried out by the commission; and
 - (c) the commission shall remain accountable for decisions as if it had made them.
- (5) In carrying out its duties under subsection (1), the commission shall
- (a) regularly, and at least quarterly, review the financial performance of the House of Assembly as well as the actual expenditures of members compared with approved allocations;
 - (b) ensure that an annual financial audit is completed of the accounts of the House of Assembly and the statutory offices in accordance with section 43 before September 1 immediately following the fiscal year to which that audit relates;
 - (c) ensure that a compliance audit is completed of the accounts of the House of Assembly and the statutory offices in accordance with section 43 at least once every General Assembly and reported on before September 1 immediately following the last fiscal year to which that audit relates;
 - (d) ensure that full and plain disclosure of the accounts and operations of the House of Assembly and statutory offices is made to the auditor appointed under section 43;
 - (e) consider and address on a timely basis recommendations of the auditor appointed under section 43; and
 - (f) report, in writing, annually to the House of Assembly, or a committee established by it, the results of an audit and the steps taken or to be taken to address matters of concern raised by an audit.
- (6) **In carrying out its duties, the commission may**
- (a) **make rules of general application respecting**
 - (i) the amounts which members may claim for reimbursement or payment for reasonable and legitimate expenses under subsection 11 (4) and the manner in which those allowances shall be calculated, claimed, substantiated and paid,
 - (ii) the engagement by a member and the amount and method of payment and other terms of engagement of constituency assistants and the reimbursement of reasonable expenses incurred by those assistants in carrying out their duties,

- (iii) subject to the requirements of the *Financial Administration Act*, the form of documentation required to make a claim under this Act,
- (iv) the financial accountability of members,
- (v) the duties and responsibilities of the clerk with respect to the financial administration of the House of Assembly and the statutory offices, and
- (vi) **those other matters that may be necessary to give effect to the purpose of this Act;**

(b) **issue directives**

- (i) interpreting, clarifying or amplifying the rules,
- (ii) **establishing policies for the guidance of members, the clerk and staff of the House of Assembly service and statutory offices,**
- (iii) in accordance with this Act and rules calling for the issuing of directives, and
- (iv) altering, on appeal, rulings of the speaker as to the application of the rules to particular cases where advance rulings have been sought under section 24; and

(c) **make decisions**

- (i) on individual cases or appeals brought to the commission for decision, and
- (ii) **on all other matters that call for action or decision of the commission in relation to the House of Assembly.**

(7) A change shall not be made to the level of amounts of allowances and resources provided to members except in accordance with a rule and, notwithstanding section 64, that rule shall not be effective unless first laid before the House of Assembly and a resolution adopting it has been passed.

- (8) A directive issued or decision made by the commission
- (a) is effective on the date specified in that directive or decision; and
 - (b) shall not be issued or made if it is inconsistent with this Act or the rules.

Arguably, some of the items listed in the Terms of Reference fall within the purview of the House of Assembly Management Commission, which was established to empower the House of Assembly to oversee and bring greater accountability to the Statutory Offices of the House.

The proper bodies to commission reviews of the Statutory Offices of the House and to propose changes to their structures ought to be the House of Assembly by way of Resolution, or the House of Assembly Management Commission. If there is doubt about whether the Commission has this authority and mandate, then it ought to be defined clearly in legislation. It ought to be the legislative branch, not the executive branch, commissioning reviews and recommending appropriate revisions of Statutory Offices of the legislative branch. The argument for this is laid out in greater detail below.

Impetus #1 for the Current Review

The first impetus for the current review is the situation that occurred in 2021-22 when the Citizens' Representative reviewed and reported on allegations regarding the Chief Electoral Officer and, subsequently, when that report became the subject of further review, discussion and public controversy. Arguably, as many of us stated at the time, some change is required in the way things are done to prevent a recurrence of this chaos. The part of the Terms of Reference that most closely relates to this situation is bullet #5, which regards: "How to manage conflicts which arise between Statutory Offices, who should investigate alleged misconduct of a statutory officer, and how that investigation should be conducted (internally, externally, independent ADR etc.)."

To find solutions to the issues that arose, it is helpful to place the entire matter in its appropriate context. The following are facts of the matter.

- The *House of Assembly Act* was amended in 2004, adding section 3.1 to direct a Premier newly elected by their party to seek a general election within a year of being sworn in as Premier. Andrew Furey was sworn in as Premier on August 19, 2020. The law directed him to ask the Lieutenant-Governor by August 19, 2021 to call a general election. However, the law also makes clear in subsection 3(1) that the Lieutenant-Governor is not bound by such provisions.
- Normal activities around the province, country and world were greatly impacted by the ongoing COVID-19 pandemic. Following pandemic elections in the provinces of British Columbia, Saskatchewan, New Brunswick and Prince Edward Island, the House of Commons Standing Committee on Procedure and House Affairs undertook a review and issued an interim report in December 2020, urging jurisdictions to enact changes to protect the integrity of elections. Those changes included measures to remove barriers to voting for certain groups, allow greater flexibility in administering electoral procedures, allow more options for voting by mail, provide for longer election periods, administer the vote for people at long-term care facilities and those under quarantine, and so forth.¹¹ The provincial government brought forward no amendments to the election legislation in light of this federal report.
- On October 7, 2020, the House of Assembly (with the dissent of the governing party, which was a minority government) debated and passed a non-binding Private Member's Resolution "that this hon. House urge the government to bring to the House an amendment to the *House of Assembly Act* for deliberation during the current fall sitting to set a fixed date for the next general election in the third week of October 2021, notwithstanding section 3.1 of the act."¹² The rationale was that, by the fall of 2021, most people would have had the opportunity to be vaccinated, and safe elections could not be assured prior to that. The government did not take the legislative action proposed.
- On January 15, 2021, Premier Furey requested that the Lieutenant-Governor issue the writs for a general election to be held on February 13, 2021. Surges of COVID-19 around February 11 and 12, 2021 resulted in decisions by the Chief Electoral Officer to delay the election and cancel in-person voting. Numerous irregularities in the administration of the election were reported around that time. Questions were raised about the powers and resources of the Chief Electoral Office to manage the election under the pandemic circumstances. The election ended with the announcement of preliminary results on March 27, 2021 and the official tally on March 30, 2021. Subsequently, the results in some districts were challenged in court. Those cases are ongoing.
- In March of 2021, two staff members of Elections Newfoundland and Labrador filed a disclosure under the *House of Assembly Accountability, Integrity and Administration Act*, containing allegations against the Chief Electoral Officer. (This we know from the November 4, 2022 report

¹¹ "Interim Report: Protecting Public Health And Democracy During A Possible Pandemic Election: Report of the Standing Committee on Procedure and House Affairs" (December 2020). http://publications.gc.ca/collections/collection_2020/parl/xcs9-1/XC59-1-1-432-7-eng.pdf

¹² Hansard of October 7, 2020. <https://assembly.nl.ca/HouseBusiness/Hansard/ga49session1/20-10-07.htm>

to the Speaker by the Acting Commissioner for Legislative Standards.”¹³) The March 2021 disclosure gave rise to a year-long investigation by the Citizens’ Representative, ending on March 15, 2022.

- On March 15, 2022, the Citizens’ Representative filed a report with the Speaker and the Clerk of the House. That report (“**A Report on Public Interest Disclosures Regarding the Chief Electoral Officer for Newfoundland and Labrador**”¹⁴) was not released publicly at that time, nor was its existence publicly announced at the time.
- On May 16, 2022 and in the days following that, this matter became the subject of discussion in the House of Assembly and the news media.¹⁵ Members asked whether the report existed and, if so, whether it would be released.
- On June 8, 2022, the Lieutenant-Governor in Council made a request of the Chair of the House of Assembly Management Commission regarding a report of the Citizens’ Representative under Public Interest Disclosure regarding the Chief Electoral Officer.¹⁶
- On June 14 and 21, 2022, the House of Assembly Management Commission held in-camera meetings regarding this matter.¹⁷
- On June 28, 2022, the provincial government announced that it had accepted the recommendation of the House of Assembly Management Commission, and suspended the Chief Electoral Officer and Commissioner for Legislative Standards. The suspension would be in effect until an independent review of the findings of the Citizens’ Representative regarding allegations raised at Elections NL is completed.¹⁸ The release stated: “The Provincial Government had referred the full, un-redacted Citizens’ Representative’s report to the House of Assembly Management Commission, which is composed of members of the three political parties out of respect for the independence of statutory offices. The House of Assembly Management Commission is responsible for overseeing the administration of the statutory offices.”
- Also on June 28, 2022, the Chair of the House of Assembly Management Commission issued a news release, “providing an update related to the request of June 8, 2022 from the Lieutenant-Governor in Council with respect to a report of the Citizens’ Representative under Public Interest Disclosure regarding the Chief Electoral Officer. The Management Commission held meetings respecting the request on June 14 and June 21, 2022, during which the Commission deliberated and issued decisions with recommendations to the Lieutenant-Governor in Council regarding: suspension of the Chief Electoral Officer and Commissioner for Legislative Standards until an independent review of the findings and report of the Citizens’ Representative regarding the Chief Electoral Officer is completed; and acting appointments for the Chief Electoral Officer and Commissioner for Legislative Standards positions in accordance with subsection 5.5(1) of the *Elections Act, 1991* and subsection 34(8) of the *House of Assembly Act*. The Management Commission is in the process of finalizing the details of the independent review of the findings and report of the Citizens’ Representative, including who will conduct the review, the terms of reference and related timelines. The Commission’s work on this matter is ongoing.”¹⁹
- On July 13, 2022, the Chair of the House of Assembly Management Commission advised that: “the Honourable J. Derek Green, former Chief Justice of Newfoundland and Labrador, has been

¹³ Link: <https://www.gov.nl.ca/exec/files/R-Citizens-Rep-Report.pdf>

¹⁴ Page 1 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

¹⁵ For example: Hansard of May 16, 2022. <https://assembly.nl.ca/HouseBusiness/Hansard/ga50session1/22-05-16.htm>; CBC News, “A secret report may reveal a toxic workplace at Elections N.L. — if the report actually exists” (May 18, 2022).

<https://www.cbc.ca/1.6458465>; CBC News, “Calls grow to make secret Elections N.L. report public, as government stays silent” (May 19, 2022). <https://www.cbc.ca/1.6459883>

¹⁶ Compare <https://www.gov.nl.ca/releases/2022/hoa/0608n03/> with <https://www.gov.nl.ca/releases/2022/hoa/0628n05-2/>

¹⁷ Links: <https://assembly.nl.ca/ManComm/Meetings/2022-23/june14-22/HoAMCMinutes-2022-06-14.pdf>;

<https://assembly.nl.ca/ManComm/Meetings/2022-23/june21-22/HoAMCMinutes-2022-06-21.pdf>

¹⁸ Link: <https://www.gov.nl.ca/releases/2022/exec/0628n01/>

¹⁹ Link: <https://www.gov.nl.ca/releases/2022/hoa/0628n05-2/>

appointed to undertake an independent 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" (the Report), dated March 2022.²⁰ That review was not a re-investigation of the report or a public inquiry, but only a review.²¹

- On September 15, 2022, Green submitted to the Speaker his report entitled "**Fairness, Reliability, and Justification: Accountability Based On Public Interest Disclosures: Review Of The Citizen's Representative's Report Respecting The Chief Electoral Officer**".²²
- On September 16, 2022, the Chair of the House of Assembly Management Commission said the Commission would review the materials and meet to discuss its next steps.²³
- On October 21, 2022, the House of Assembly Management Commission released "the Review of the Honourable J. Derek Green of the March 2022 Report of the Citizens' Representative on Public Interest Disclosures Regarding the Chief Electoral Officer for Newfoundland and Labrador."²⁴ The Management Commission requested that the suspension of the Chief Electoral Officer and Commissioner for Legislative Standards be lifted, and the Lieutenant-Governor in Council made this happen.
- On October 24, 2022, the Office of the Citizens' Representative also issued a news release on this matter.²⁵ The release stated, in part: "We agree with the former Chief Justice's comment in the Executive Summary of his Review that 'whistleblower investigators must strike a difficult balance between confidentiality and fairness.' Indeed, the utmost concern of the Office of the Citizens' Representative is to protect those who blow the whistle about disclosures of wrongdoing."
- On November 4, 2022, as noted above, the Acting Commissioner for Legislative Standards issued a report to the Speaker entitled "**A Report on the Public Interest Disclosures Regarding the Citizens' Representative**".²⁶ The report was initiated pursuant to a public interest disclosure filed with the Speaker against the Citizens' Representative respecting an allegation of gross mismanagement regarding the confidentiality and disclosure of particulars regarding the "Report on Public Interest Disclosures Regarding the Chief Electoral Officer for Newfoundland and Labrador".
- On November 9, 2022, *The Telegram* reported²⁷ on this new report, stating that "another report was received by the government on Monday, Nov. 7, this time containing allegations of gross mismanagement" by the Citizens' Representative. The news article stated: "Justice Minister John Hogan said Tuesday he hadn't yet seen the report, but his department is looking at it and wants to release it as soon as possible if they can, provided all privacy legislation can be followed. He said it first needs to be reviewed for any personal information that should remain private. 'A report on top of a report is not really getting us anywhere, and it's certainly a lot of confusion about who reports to who, who investigates who, things like that. So, it certainly might be time to look at this as a whole,' Hogan told reporters. He suggested doing a review of all of the statutory offices, which are offices that operate independently from government and report to the House of Assembly, such as the chief electoral officer, citizens' representative, seniors' advocate and so on. 'How can it be simplified? I guess maybe cabinet will look at it, maybe we need an external reviewer to look at it, someone who is an expert in this area to sort of guide us through all the main principles about why these statutory offices exist in the first place, what are their roles, and what do we hope as a government, as a province, to have these people

²⁰ Link: <https://www.gov.nl.ca/releases/2022/hoa/0713n02/>

²¹ Page 2 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

²² Link: <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

²³ Link: <https://www.gov.nl.ca/releases/2022/hoa/0916n03/>

²⁴ Link: <https://www.gov.nl.ca/releases/2022/hoa/1021n06/>

²⁵ Link: <https://www.gov.nl.ca/releases/2022/ocr/1024n06/>

²⁶ Link: <https://www.gov.nl.ca/exec/files/R-Citizens-Rep-Report.pdf>

²⁷ Link: <https://www.saltwire.com/atlantic-canada/news/independent-mha-paul-lane-says-newfoundland-citizens-representative-bradley-moss-is-being-bullied-100793253/>

accomplishing? 'They're needed. I mean, we need a privacy commissioner, we need a legislative standards commissioner, we need these things, but they need to be able to work together hand-in-hand, and not against each other. So, that's where it seems to be going, and it's taking time away from legislative debate, it's taking time away from government to do things that are productive for the province. And if we can tighten it up and make it more efficient, I don't think we have any option but to try and do that,' Hogan said."

- On November 17, 2022, the Office of the Executive Council released a redacted version of the report of the Acting Commissioner for Legislative Standards regarding the Citizens' Representative.²⁸ The Executive Council stated: "The report was initiated pursuant to a public interest disclosure filed with the Speaker of the House of Assembly against the Citizens' Representative respecting an allegation of gross mismanagement regarding the confidentiality and disclosure of information." Also: "The report, which was received by the Office of Executive Council on Monday, November 7 was reviewed to ensure compliance with the *Access to Information and Protection of Privacy Act* to protect personal and private information." Also: "This report has also been referred to the House Management Commission, which consists of members representing all parties in the House of Assembly, for consideration and recommendations, if required."
- On November 17, 2022, the Office of the Citizens' Representative also issued a news release on this matter.²⁹ The release stated, in part: "By statute, the Citizens' Representative is an Officer of the House of Assembly. Importantly, this is intended to safeguard the Citizens' Representative's ability to fulfill his responsibilities faithfully and impartially by making him independent of the government and its administration. The Office of the Citizens' Representative's priority is to protect those who come forward at great personal and professional risk to make disclosures of wrongdoing in the public interest. This is what the Office has done, and what the Office will continue to do. The Office of the Citizens' Representative is committed to strengthening accountability and the integrity of the public service in Newfoundland and Labrador."

In the end, we were left with the report of the Citizens' Representative on the Chief Electoral Officer, the Green review of the Citizens' Representatives report, and the report of the Acting Commissioner for Legislative Standards on the Citizens' Representative, all rooted in a chaotic pandemic election and its aftermath.

There is another review that is pertinent to the current review, because it involves the Chief Electoral Office. Following the 2021 election, the Opposition called for an independent review of the election, which would provide recommendations for reforming the process. Instead, the Minister of Justice and Public Safety and Attorney General convened an All-Party Committee led by Government Members to identify means to enhance accessibility of voting in Newfoundland and Labrador.³⁰ That process has not reached a conclusion.

We believe there are many ways to address the deficiencies that precipitated the election chaos and the investigative chaos that followed.

Further below, this submission will make suggestions under headings that correspond to the individual bulleted items listed in the Terms of Reference.

²⁸ Link: <https://www.gov.nl.ca/releases/2022/exec/1117n02/>

²⁹ Link: <https://www.gov.nl.ca/releases/2022/ocr/1117n04/>

³⁰ Link: <https://www.gov.nl.ca/releases/2021/jps/0421n04/>

Impetus #2 for the Current Review

We are concerned there may be a second impetus for the current review that is not directly related to the chaos of the election and the investigative processes that followed. The Terms of Reference are not limited to managing conflicts among Statutory Officers. They wander into other areas that, for the Opposition, raise significant concerns.

Some of the bullets raise the spectre of downsizing the Statutory Offices in one way or another.

- In particular, Bullet #2 asks whether Statutory Offices could be combined; Bullet #3 asks whether Statutory Officers could cease to function for certain periods; and Bullet #8 asks whether the spaces and staff of Statutory Offices should be combined.

Other bullets regard the oversight and control of Statutory Offices.

- In particular, Bullet #4 regards the discipline and removal from office of Statutory Officers; Bullet #6 regards the measurement and oversight of quality assurance and the performance of Statutory Officers; and Bullet #7 regards an administrative oversight model for Statutory Offices.

It is understandable that the Consultant does not wish to entertain a political agenda, but sometimes political agendas are disguised. If any aspect of the current review is a veiled attempt by the executive branch to erode Statutory Offices whose work has proven to be politically troublesome and embarrassing for the government, all such aggressive overreach by the government must be exposed and resisted.

The current review, commissioned in December 2022, is not limited to the three Statutory Offices whose principals were embroiled in the post-election investigations of 2021-22. It also extends to three other Statutory Offices that, in fulfilling their mandates to hold the government to account, have regularly been highly critical of the executive branch. It is important to be aware of this in resisting any measures that, under the cloak of the current review, might muzzle these Statutory Offices. Consider these examples.

On June 9, 2022, the **Information and Privacy Commissioner** issued a news release challenging a course of action announced by the Premier during his news conference with the Attorney General.³¹ The news release stated the following:

Statement of the Information and Privacy Commissioner Regarding his Office's Role with Respect to Disclosure of Documents by Public Bodies

On the afternoon of June 7, I received correspondence from Executive Council requesting that I review a report that had been prepared by the Citizen's Representative, and related correspondence. I had not been consulted prior to receiving this request. Less than a half hour later, before I had the opportunity to consider the request, Executive Council issued a press release indicating that the documents had been sent to my Office for "review and analysis to ensure personal information of complainants is protected". Also, the Premier and Attorney General held a media availability regarding this matter. While these may not have been the Premier's words, the media reported that the Premier had "instructed" me to undertake this review. He was quoted to say that I would "scrub" the documents as part of my "due diligence".

On June 8, I wrote the Clerk of the Executive Council to decline to review these documents. As an independent statutory officer of the House of Assembly, actions that I take are grounded in the Access to Information and Protection of Privacy Act, 2015. My primary role, as defined in that statute, is to provide independent review of decisions made by the government and other public bodies. While there is some scope for me to provide advice to public bodies in certain contexts, if I provide detailed advice on a decision of a public body – in this case, reviewing proposed redactions – I become part of the decision making process and thereby undermine my ability to provide independent review. If there was a complaint about this matter, my ability to review it would be compromised. As it happens, I have already received one complaint related to this matter. The suggestion that the review of documents in advance of their disclosure is my due diligence suggests that I bear responsibility for these decisions. Instead, the due diligence must be taken by the public body, and is subject to my review.

It also must be clarified that there is no authority in law for the Premier, any Minister or Cabinet to instruct my Office. The House of Assembly, as the legislative branch, provides oversight of the executive branch. If I was subject to instruction by the executive branch, then my role would not be seen as independent by the public. Trust in government is based on the existence of strong oversight, and the integrity of that oversight must be maintained.

³¹ Link: <https://www.gov.nl.ca/releases/2022/oipc/0609n04/>

I believe that the Premier's intention in asking me to review the documents was a good faith effort to protect the privacy of the complainants and witnesses to this report. The only advice that I am able to offer the government is that, if ultimately it chooses to release some or all of these documents or information within them, that it satisfies itself that it has the legal authority to do so, and it makes best use of the resources that it has available to it, in the form of experienced ATIPP coordinators and legal advice, to make appropriate redactions. My role will be to provide independent oversight of these decisions.

In November 2021, the Information and Privacy Commissioner announced his intention to investigate the cyberattack that compromised the personal information of thousands of patients and health authority employees.³² At issue was a prior report warning the government of the vulnerability of its data systems. More recently, the provincial government has gone to court in an attempt to stop the commissioner from continuing this investigation.³³

The Information and Privacy Commissioner also pressed the government to give the office an oversight role when reforming the management of information legislation, but the government refused. The commissioner faulted the government for exempting the Cabinet, denying independent oversight and making the duty to document arbitrary.³⁴

On November 1, 2022, the **Seniors' Advocate** issued a news release indicating 56% of the recommendations contained in the Office's 2019 report were still not fully implemented, with 12% having had little or no meaningful progress.³⁵ On October 20, 2022, the Seniors' Advocate wrote to the Minister of Health and Community Services, requesting immediate implementation of the 2019 recommendation of the Office to complete a significant review of the province's personal care homes and long-term care homes, describing the situation as "even more critical today".³⁶

More recently, on March 30, 2023, the Seniors' Advocate issued a report indicating that 32 per cent of seniors do not have enough income to meet their needs, and many say they are unable to afford food. The report exposed conditions of seniors going without food, dividing medicine, being unable to afford the medical supplies and devices they need, and not having adequate housing.³⁷ Directly challenging the Minister of Finance, the Seniors' Advocate on March 31, 2023 also said the seniors' benefit increase was much less than requested and not enough to make a difference.³⁸

On July 14, 2021, the **Child and Youth Advocate** reported on the handcuffing of a seven-year-old child experiencing a mental health crisis.³⁹ On November 25, 2021, the Child and Youth Advocate reported on deficiencies in the Safe and Caring Schools Policy and the Code of Conduct, saying the government is aware of the issues but not addressing them.⁴⁰ On December 10⁴¹ and December 16⁴², 2021, the Child and Youth Advocate issued three reports identified systemic issues placing children at risk. More recently, on March 13, 2023, the Child and Youth Advocate commented on a Human Rights decision that found the government at fault for not providing appropriate education for a Deaf child.⁴³

Any action of the executive branch or recommendation of a review commissioned by the executive branch to weaken the Statutory Offices would be utterly inappropriate. It is concerning enough that the Terms of Reference threaten to intimidate these offices with their words of downsizing and externally imposed oversight. Our Statutory Offices were created to hold the government to account, and any intention or action of the government to weaken them must be opposed.

³² Link: <https://www.cbc.ca/1.6243879>

³³ Link: <https://www.cbc.ca/1.6783655>

³⁴ Link: <https://www.gov.nl.ca/releases/2023/oipc/0322n03/>

³⁵ Link: <https://www.gov.nl.ca/releases/2022/osa/1101n01/>

³⁶ Link: <https://www.gov.nl.ca/releases/2022/osa/1020n09/>

³⁷ Link: <https://www.gov.nl.ca/releases/2023/osa/0330n03/>; and <https://www.cbc.ca/1.6796390>

³⁸ Link: <https://vocm.com/2023/03/31/seniors-benefit/>

³⁹ Link: <https://www.gov.nl.ca/releases/2021/cya/0714n02/>

⁴⁰ Link: <https://www.gov.nl.ca/releases/2021/cya/1125n04/>

⁴¹ Link: <https://www.gov.nl.ca/releases/2021/cya/1210n02/>

⁴² Link: <https://www.gov.nl.ca/releases/2021/cya/1216n02/>

⁴³ Link: <https://www.gov.nl.ca/releases/2023/cya/0313n06/>

Bullet #1: Minimum Required Competencies

Bullet #1 regards: "The minimum required competencies for each statutory officer".

With the exception of the law regarding the Information and Privacy Commissioner (IPC), the legislation is silent on the required competencies of the statutory officers. Even for the IPC, the legislation is about the process for selecting the candidate, not the specific competencies of the candidate.

- Subsection 34(1) of the *House of Assembly Act* states: "On resolution of the House of Assembly, the Lieutenant-Governor in Council shall appoint a **Commissioner for Legislative Standards.**"
- Subsection 4(2) of the *Elections Act, 1991* states: "On resolution of the House of Assembly, the Lieutenant-Governor in Council shall appoint a **Chief Electoral Officer.**"
- Section 4 of the *Child and Youth Advocate Act* states: "On resolution of the House of Assembly, the Lieutenant-Governor in Council shall appoint a **Child and Youth Advocate.**"
- Subsection 3(2) of the *Citizens' Representative Act* states: "On resolution of the House of Assembly, the Lieutenant-Governor in Council shall appoint a **Citizens' Representative.**"
- Section 4 of the *Seniors' Advocate Act* states: "On resolution of the House of Assembly, the Lieutenant-Governor in Council shall appoint a **Seniors' Advocate.**"
- Section 85 of the *Access to Information and Protection of Privacy Act, 2015* states:

85. (1) The office of the **Information and Privacy Commissioner** is continued.
(2) The office shall be filled by the Lieutenant-Governor in Council on a resolution of the House of Assembly.
(3) Before an appointment is made, the Speaker shall establish a selection committee comprising
(a) the Clerk of the Executive Council or his or her deputy;
(b) the Clerk of the House of Assembly or, where the Clerk is unavailable, the Clerk Assistant of the House of Assembly;
(c) the Chief Judge of the Provincial Court or another judge of that court designated by the Chief Judge; and
(d) the President of Memorial University or a vice-president of Memorial University designated by the President.
(4) The selection committee shall develop a roster of qualified candidates and in doing so may publicly invite expressions of interest for the position of commissioner.
(5) The selection committee shall submit the roster to the Speaker of the House of Assembly.
(6) The Speaker shall
(a) consult with the Premier, the Leader of the Official Opposition and the leader or member of a registered political party that is represented on the House of Assembly Management Commission; and
(b) cause to be placed before the House of Assembly a resolution to appoint as commissioner one of the individuals named on the roster.

The competencies of the Statutory Office principals should remain at the discretion of the House of Assembly and not be dictated by law or by the executive branch. Who is to say a candidate lacking a certain competency defined in a well-intentioned list would not be the ideal candidate for a host of other reasons, expertise and experience? It should be for the Members to exercise their own judgment based on the candidates available.

The selection committee process defined for the IPC could be replicated for all Statutory Offices. This would be a reasonable way to present the House with a roster of qualified candidates without specifying requisite competencies. It would remove the possibility of the executive branch hand-picking candidates who might go easy on them.

Bullet #2: The Number of Statutory Offices

Bullet #2 regards: "The number of statutory offices and whether a statutory officer could fulfil the obligations of more than one statutory role; which offices/statutory officers could be combined based on common objectives, functions, qualifications, clients etc."

In the past several years, the roles of Chief Electoral Officer (CEO) and Commissioner for Legislative Standards have been filled by one person. This may be because elections are held infrequently and a full-time CEO is not deemed to be warranted. However, as we learned in 2022, a suspension of the principal of one office would deprive the other office of its principal as well, and it would be necessary to appoint interim office holders on a temporary basis.

To best determine the appropriate number of Statutory Offices and Officers, we need to look at the roles and responsibilities of each and determine how important and time-consuming they are.

The Statutory Offices are examined one by one in the pages that follow, and recommendations are offered.

Child and Youth Advocate

The recommendation to establish the Statutory Office of the Child and Youth Advocate came from the 1996 Select Committee on Children's Interests, which included MHAs Patt Cowan, Gerald Smith, Harvey Hodder and Mary Hodder. The committee recommended that: "The advocate, like the auditor general, would be an officer of the legislature with a fixed term of office. The advocate would be responsible for both case and systems advocacy and like the secretariat could require 'Child Impact Statements' from any government department/agency. Like the secretariat, the advocate's office would have a small Community Advisory Committee as well as the mandate to carry out focus groups on an on-going basis. The Advocate's Office would provide an avenue for the voices of children, youth and their natural advocates to be heard within the structure of government. It would work to educate the general public concerning the rights of the child and to build partnerships with natural advocates in the community. The office would be responsible, along with the secretariat, for promoting service integration, proactive policies and community-based services. In addition, it could be responsible for ongoing social research, both primary and secondary. The office could provide valuable assistance to government, indirectly, by helping to explain the long-term benefits of efforts to integrate services and empower communities. The advocate would be appointed by the House of Assembly for a five year term and would be eligible for one further term. The Office of the Advocate would consist of a small permanent staff of five people. The office could also hire additional research staff on an ad-hoc basis."⁴⁴

This Statutory Office was not established until 2001. The *Child and Youth Advocate Act* in its current form defines the powers and duties of the Advocate in sections 15, 16, 16.1 and 17.

Powers and duties of the advocate

- 15.** (1) In carrying out the duties of the advocate's office, the advocate may
- (a) receive, review and investigate a matter relating to a child or youth or a group of them, whether or not a request or complaint is made to the advocate;
 - (b) advocate or mediate or use another dispute resolution process on behalf of a child, youth or a group of them, whether or not a request or complaint is made to the advocate;
 - (c) where advocacy or mediation or another dispute resolution process has not resulted in an outcome the advocate believes is satisfactory, conduct an investigation on behalf of the child or youth or a group of them, whether or not a request or complaint is made to the advocate;
 - (d) initiate and participate in, or assist children and youth to initiate and participate in, case conferences, administrative reviews, mediations, or other processes in which decisions are made about the provision of services;
 - (e) meet with and interview children and youth;
 - (f) inform the public about the needs and rights of children and youth including about the office of the advocate; and
 - (g) make recommendations to the government, an agency of the government or communities about legislation, policies and practices respecting services to or the rights of children and youth.
- (2) The advocate may not act as legal counsel.

Reference by Lieutenant-Governor in Council

- 16.** The Lieutenant-Governor in Council or a minister may refer to the advocate, for review, investigation and report, a matter relating to the interests and well-being of children and youth and the advocate shall,
- (a) subject to a special direction of the Lieutenant-Governor in Council, investigate or review the matter to the extent that it is within the advocate's jurisdiction; and
 - (b) make a report to the Lieutenant-Governor in Council or minister that the advocate considers appropriate.

Report to advocate required

- 16.1** (1) For the purpose of this section,
- (a) "critical injury" means an injury, including a physical or psychological injury, which may result in the death of a child or youth or may cause serious or long-term impairment of the health of a child or youth; and
 - (b) "designated services" means the following services provided directly to a child or youth:
 - (i) services provided by the Department of Children, Seniors and Social Development under its protective intervention, kinship, in care, youth services and community youth corrections programs, and
 - (ii) services provided by the Department of Justice and Public Safety to children or youth in custody at the Newfoundland and Labrador Youth Centre or a designated youth holding facility or to children or youth temporarily held in adult correction facilities administered by Corrections and Community Services or a successor division of the Department of Justice and Public Safety.
- (2) Where a child or youth dies or experiences a critical injury while receiving a designated service or within 12 months of receiving a designated service, the deputy minister of a department, or the deputy minister's designate, shall report the death or critical injury to the advocate.
- (3) The report required by subsection (2) shall be made as soon as practicable after the deputy minister or the deputy minister's designate becomes aware of the death or critical injury.

⁴⁴ Link: <https://www.releases.gov.nl.ca/releases/1996/house/0617n04.htm>

(4) An action does not lie against a person for anything the person may do or report or say in the course of the exercise or performance, or the intended exercise or performance, of a duty under this section unless it is shown the person acted in bad faith.

Communication by child or youth

17. (1) Where a child or youth in a facility, caregiver's home, group home or other home or place in which the child or youth is placed under an Act of the province, the *Criminal Code* or the *Youth Criminal Justice Act* (Canada), asks to communicate with the advocate, that request shall be forwarded to the advocate immediately by the person in charge of the place.

(2) Where a child or youth in a place referred to in subsection (1) writes a letter addressed to the advocate, the person in charge of the place shall forward the letter immediately, unopened, to the advocate.

(3) Every facility, caregiver's home, group home or other home or place in which a child is placed under an Act of the province, the *Criminal Code* or the *Youth Criminal Justice Act* (Canada), shall be given written information telling them about the office of the advocate, their right to bring any grievance to the advocate, and how they may contact the advocate.

Considering scope, depth and quantity of the reports of the Child and Youth Advocate since the inception of this Statutory Office and the wide range of continuing challenges faced by children and youth in Newfoundland and Labrador, it is clear that a full-time Child and Youth Advocate is required along with the requisite research and support staff, and the Advocate should not be tasked with the additional responsibilities of another Statutory Office that would divert the attention of the Office from the challenges of children and youth, a unique and sizeable demographic. Any move to erode the Child and Youth Advocate Office would be a giant step backward and would be met by fierce opposition from the public and Members of the House of Assembly.

The Statutory Office of the Child and Youth Advocate must remain a stand-alone Statutory Office with a full-time principal who is not shouldered with the responsibilities of another Statutory Office.

Seniors' Advocate

The Statutory Office of the Seniors' Advocate was established by the *Seniors' Advocate Act* of 2016. The powers and duties of the Advocate are defined in sections 16 and 17.

Powers and duties of advocate

16. (1) In carrying out the powers and duties of his or her office the advocate may

- (a) receive and review matters related to seniors;
- (b) initiate and participate in reviews related to seniors;
- (c) conduct research related to seniors, including interviews and surveys;
- (d) consult with seniors, service providers and the public;
- (e) request information, other than
 - (i) personal health information within the meaning of the *Personal Health Information Act*, and
 - (ii) personal information within the meaning of the *Access to Information and Protection of Privacy Act, 2015*;
- (f) make recommendations to government, government agencies, service providers and community groups respecting legislation, policies, programs and services impacting seniors; and
- (g) inform the public about the Office of the Seniors' Advocate and promote awareness of systemic issues related to seniors.

(2) A service provider, department or government agency who receives a request for information under this Act shall, if he, she or it has custody or control of the information, provide the information.

Referral to Citizens' Representative

17. Where the advocate becomes aware of a matter relating to a senior, the advocate may refer that senior to the Citizens' Representative for investigation of that matter.

The defined powers of the Seniors' Advocate pale in comparison to those of the Child and Youth Advocate. Nevertheless, it is clear from the reports of the Seniors' Advocate that the Office has been very active since its inception, publishing important recommendations such as those in the wide-ranging 2019 report "Long May Your Big Jib Draw: Setting Sail"⁴⁵ and the ground-breaking 2023 study "What We Heard: Engagement with Seniors, Family Members and/or Caregivers, and Service Providers."⁴⁶ The Office has also been active in holding the government to account for its actions (or failures) to implement its recommendations, as we saw in its 2022-23 Status Report.⁴⁷

Newfoundland and Labrador has a rapidly aging demographic profile with approximately 120,000 seniors currently over age 65⁴⁸ – a quarter of our people. Seniors generally face far greater difficulties, particularly in dealing with public institutions, because of health, mobility, housing and income challenges. The Health Accord said seniors are particularly vulnerable in Newfoundland and Labrador relative to the rest of Canada. "Compared to the rest of Canada, the population of Newfoundland and Labrador has aged more rapidly over the last 50 years, and over a quarter of its population over 65 years is considered frail. The province has the largest proportion of seniors with three or more chronic illnesses. The consequence of advanced age and more than two chronic illnesses is frailty. Data suggest that the prevalence of frailty in acute care in this province is higher than the national average, with approximately 80% of individuals over the age of 65 years who are admitted to hospitals being vulnerable or frail."⁴⁹

The COVID-19 pandemic revealed severe deficiencies in seniors' care in Canada, including serious issues in our own province where seniors in care were improperly treated. The Advocate's "What We Heard" report revealed that a shocking proportion of the province's seniors lack sufficient income to feed, house and medicate themselves properly. These issues will not be addressed in the absence of greater attention and accountability mechanisms. Seniors need a dedicated Advocate who is empowered to consider the challenges they face, both broadly as a demographic group and individually. While the Seniors' Advocate is empowered to consider issues of general application, the Office is not properly equipped to examine individual challenges and is therefore advised to refer such matters to the Citizens' Representative for investigation. When the legislation was brought before the House for debate in 2016, the Opposition raised concerns that the office was not sufficiently empowered. "With thousands and

⁴⁵ Link: <https://www.seniorsadvocatenl.ca/pdfs/LongMayYourBigJibDrawSettingSail2019.pdf>

⁴⁶ Link: <https://www.seniorsadvocatenl.ca/pdfs/WhatWeHeard-March27-2023.pdf>

⁴⁷ Link: <https://www.seniorsadvocatenl.ca/pdfs/StatusReportOnRecommendations2022-23.pdf>

⁴⁸ Page 10 of <https://www.seniorsadvocatenl.ca/pdfs/WhatWeHeard-March27-2023.pdf>

⁴⁹ Page 88 of https://www.healthaccordnl.ca/wp-content/uploads/2022/02/HANL_Report_Document_Web_modFeb28-2022.pdf

thousands of our seniors in the care of government, the Seniors' Advocate, we truly believe, ought to have been created using the Child and Youth Advocate model and actually have some teeth in their ability to advocate to government." Also: "The Seniors' Advocate has been given no role or authority to see that the *Adult Protection Act* is actually enforced." The Opposition recommended "that this legislation be strengthened to give the Advocate the actual authority they need to make the decisions that are in the best interest of the seniors of Newfoundland and Labrador".⁵⁰

The Statutory Office of the Seniors' Advocate must remain a stand-alone Statutory Office with a full-time principal who is not shouldered with the responsibilities of another Statutory Office. Further, the duties, powers and resources of the Seniors' Advocate should be significantly increased to enable the Advocate to address the individual concerns of seniors, and to be directly informed of and empowered to investigate any circumstances where seniors appear to have been abused.

⁵⁰ Link to Hansard of December 13, 2016: <https://assembly.nl.ca/HouseBusiness/Hansard/ga48session1/16-12-13.htm>

Citizens' Representative

In December of 1990, the Wells administration brought forward legislation to repeal the *Parliamentary Commissioner (Ombudsman) Act*, which had been in place in the province for two decades.⁵¹ The Opposition described the legislation as a "major bill abolishing one of our fundamental democratic institutions and doing away with an officer of our House of Assembly." MHA Lynn Verge stated: "the Ombudsman, by legislation, has special powers to investigate, to require the production of information and documents, and to summon witnesses to give evidence on oath. The Ombudsman is entitled to deal directly with Ministers and the Premier and then, of course, to report to the House of Assembly. The Ombudsman is an officer of our House of Assembly. No appeal board or MHA has equivalent powers". The 1970 version of the Act stated in section 14: "the principal duty and function of the Commissioner shall be to investigate any decision or recommendation made, including any recommendation made to a Minister, or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any Department or agency, or by any officer, employee or member thereof in the exercise of any power or function conferred on him by any enactment."⁵² Any committee of the House could also refer a matter to the Commissioner for an investigation.

Why, then, did the government of the day eliminate the office? The answer may be relevant to the current review.

The government defended the move, saying people had new avenues to appeal government decisions, making the office redundant. On December 4, 1990, Treasury Board president Winston Baker said the "government has provided the individual MHAs with the ability to do that portion of their job that takes most of their time, and that is acting as an Ombudsman"; "an MHA has a lot of power"; "an MHA has easy access to the decision makers in Government, whether it be at the political level or at the civil service level"; "a number of alternatives have been mentioned ... Ron Pumphrey and Bill Rowe, and the advent of the action lines on radio"; "we have developed an extensive network of appeals processes that are there to protect the rights of the individual and to protect them against hasty and sometimes incorrect Government decisions, bureaucratic decisions" such as "an Adoptions Appeal Board", "a Forest Land's Tax Review Board; and we have a Driver's Licence Suspension Review Board"; "We have a Livestock Owners Compensation Board; we have a Mineral Rights Adjudication Board; we have a Mining Tax Review Board; we have regional appeals boards for municipal affairs all over this Province; we have residential tenancy boards"; "There is a Social Assistance Appeal Board; there is a Student Aid Appeals Committee; there is a Workers' Compensation Appeals Tribunal; there is a Processing Licence Appeals Board; there is a Timber Users Appeal Advisory Board; there is an Appeals Board for the St. John's Urban Regional Agricultural Zone; there is a Land Consolidation Review Committee for land problems; there is a Labour Relations Board and a Labour Standards Board for that kind of process. There is a Labour Standards Tribunal"; "There is the Building Accessibility Advisory Board; a Child Welfare Board; the Young Offender's Act Review Board; and it goes on and on." Baker also addressed the issue of cost savings, rejecting the notion that "Government is a bottomless pit, a bottomless pit of money and all you do is keep adding on and on and on". Rather, he said, you "bring about change by looking at your system, by changing things that need to be changed, by, perhaps, eliminating things that have outlived their usefulness, by improving things that need to be improved, and certainly by doing new things."

Challenging Baker, Verge stated: "Contrary to what the Government House Leader said, the Government's move to eliminate the Ombudsman's Office has nothing to do with cutting costs. It has nothing to do with eliminating duplication. It has nothing to do with safeguarding the rights of the citizens of the Province through the provision of Appeals Boards or MHAs or even open line radio hosts. This move to abolish the Office of the Ombudsman has all to do with petty, partisan vindictiveness." "They promised to make Ombudsman a certain intellectual citizen of the Province who had been supporting the Liberals when they were campaigning." "And then when the Premier realized how bad it would look if they fired Mr. Peddle, since he had been a PC politician prior to his appointment more than

⁵¹ Hansard of December 4, 1990: <https://assembly.nl.ca/HouseBusiness/Hansard/ga41session2/December4-1990-night-sitting-included.pdf>; and December 5, 1990: <https://assembly.nl.ca/HouseBusiness/Hansard/ga41session2/December5-1990.pdf>

⁵² Chapter 285 of https://www.assembly.nl.ca/legislation/sr/historicallegislation/historical_annualstatutes/RSN1970v6M-Pcc233-298.pdf

fifteen years ago, and substituted him with a Liberal supporter, in a fit of pique he commanded, he decreed that the whole institution be abolished. If his Liberal crony could not have the appointment, then nobody was going to have it." Regarding cost: "the cost of the Ombudsman Office in our Province is not \$400,000 a year as the Premier said in Question Period last week, but actually, as anyone can see by referring to the estimates, about \$236,000. The bulk of that annual outlay is for salaries. The incumbent, Mr. Ambrose Peddle, was appointed under present legislation for a second term of ten years, four years ago; he has six years to run in his term of office. And in eliminating the Office, the Government is going to have to settle with Mr. Peddle, and I would suggest is going to have to pay the equivalent of the outstanding six years' salary." Regarding power and authority: "Next I will deal with the notion that the Ombudsman is no longer needed because we have appeals boards and fifty-two MHAs. The Ombudsman's powers are unique. Under the Parliamentary Commissioner's Act the Ombudsman has security of tenure although, of course, that is being demolished along with the whole institution through this legislative measure, but the Ombudsman had the security of tenure inherent in the ten year term of appointment, in the mechanism of appointment, through unanimous resolution of the House of Assembly prompting an Order in Council appointment through the mechanism for establishing salary, which is a linkage to the salary of the Chief Provincial Court Judge. Then the Ombudsman, by legislation, has special powers to investigate, to require the production of information and documents, and to summon witnesses to give evidence on oath. The Ombudsman is entitled to deal directly with Ministers and the Premier and then, of course, to report to the House of Assembly. The Ombudsman is an officer of our House of Assembly. No appeal board or MHA has equivalent powers, and I would suggest that no MHA has a comparable degree of objectivity or impartiality."

In 1990, the Ombudsman was a powerful watchdog for the people vis-à-vis the government. For the reasons the government gave, the government eliminated the office and silenced the watchdog – a watchdog role that, a decade later, a government of the same political stripe contended the people of the province did indeed need. It would be appalling if the current government were to use the current review process as a cover to justify measures that would, in effect, undermine or silence the watchdogs we now have, including – yet again, as in 1990 – the Ombudsman, the Citizens' Representative.

Following the actions of 1990, Newfoundland and Labrador remained without an Ombudsman until the province in 2001 passed "*An Act Respecting the Appointment of a Citizens' Representative for the Province Who Shall Have the Powers Traditionally Conferred on an Ombudsman.*" This *Citizens' Representative Act* provided this Statutory Officer with considerable powers traditionally associated with an ombuds, a role that has existed in some jurisdictions such as Denmark, Norway and Sweden for centuries, and was preceded by similar roles in Asian countries centuries before that. The Act defines certain duties and considerable powers of the Citizens' Representative.

Investigation

15. The Citizens' Representative may, on a written complaint or on his or her own initiative, investigate a decision or recommendation made, including a recommendation made to a minister, or an act done or omitted, relating to a matter of administration in or by a department or agency of the government, or by an officer, employee or member of the department or agency, where a person is or may be aggrieved.

Reference by Lieutenant-Governor in Council

16. The Lieutenant-Governor in Council may refer to the Citizens' Representative, for investigation and report by him or her, a matter relating to administration in or by a department or agency of the government, or by an officer, employee or member of it, and the Citizens' Representative shall,

- (a) subject to a special direction of the Lieutenant-Governor in Council, investigate the matter referred to him or her so far as it is within his or her jurisdiction; and
- (b) make a report to the Lieutenant-Governor in Council that he or she considers appropriate.

Reference by House of Assembly

17. The House of Assembly may refer to the Citizens' Representative, for investigation and report by him or her, any petition that is presented to it for consideration or any matter to which the petition relates, and, in that case, the Citizens' Representative shall,

- (a) subject to special directions of the House of Assembly, investigate the matters referred to him or her as far as it is within his or her jurisdiction; and
- (b) make a report to the House of Assembly that he or she considers appropriate, but nothing in section 24, 25 or 39 applies in respect of an investigation or report made under this section.

Exercise of powers

18. The Citizens' Representative may exercise and perform the powers, duties and functions conferred or imposed on him or her under this Act notwithstanding a provision of another Act to the effect that a proceeding, decision, recommendation, act or omission that he or she is investigating is

- (a) final;
- (b) not subject to appeal; or
- (c) not subject to be challenged, reviewed, quashed or called into question.

Private investigation

27. Every investigation by the Citizens' Representative under this Act shall be conducted in private.

Hearings

28. The Citizens' Representative may hold hearings and hear or obtain information from a person and make an inquiry that he or she considers appropriate.

Right to be heard

29. The Citizens' Representative is not required to hold a hearing and a person is not entitled, as of right, to be heard by the Citizens' Representative, but, where it appears to the Citizens' Representative that there is sufficient grounds for his or her making a report or recommendation in respect of a matter that may adversely affect a department, agency of the government, or person, he or she shall give to the department, agency, or person, an opportunity to make representations in respect of the matter, and the department, agency, or person may make representations in respect of the matter by counsel.

Consultation with minister

30. (1) The Citizens' Representative may, during or after an investigation, consult a minister who is concerned in the matter of the investigation.

(2) Where, during or after an investigation, the Citizens' Representative is of the opinion that there is evidence of a breach of duty or misconduct by a department or agency of the government or an officer or employee of it, he or she shall inform the deputy minister or administrative head of the department or agency of the government of his or her opinion.

Evidence

31. (1) The Citizens' Representative may require a person who, in his or her opinion, is able to give information relating to a matter being investigated by him or her

- (a) to furnish the information to him or her; and
- (b) to produce a document, paper or thing that in his or her opinion relates to the matter being investigated and that may be in the possession or under the control of the person,

whether or not the person is an officer, employee or member of the department or agency of the government and whether or not the document, paper or thing is in the custody or under the control of a department or agency of the government.

(2) The Citizens' Representative may summon before him or her and examine on oath or affirmation

- (a) a person who is an officer or employee or member of a department or agency of the government and who in the opinion of the Citizens' Representative is able to give information relating to a matter being investigated by him or her;
- (b) a complainant; and
- (c) another person who in the opinion of the Citizens' Representative is able to give information relating to a matter being investigated by him or her.

Right of entry

36. (1) For the purpose of this Act, the Citizens' Representative may enter the premises occupied by a department or agency of the government and carry out an investigation within his or her jurisdiction.

(2) Upon entering a premises under subsection (1), the Citizens' Representative shall notify the deputy minister or administrative head of the department or agency of the government that occupies the premises.

Report on investigation

37. (1) Where, after making an investigation under this Act, the Citizens' Representative is of the opinion

- (a) that a decision, recommendation, act or omission that is the subject matter of the investigation appears to be
 - (i) contrary to law,
 - (ii) unreasonable,
 - (iii) unjust,
 - (iv) oppressive,
 - (v) improperly discriminatory,
 - (vi) in accordance with a practice or procedure that is or may be unreasonable, unjust, oppressive, or improperly discriminatory,
 - (vii) based wholly or partly on a mistake of law or fact, or
 - (viii) wrong;
- (b) that in making a decision or recommendation, or in doing or omitting an act, a power or right has been exercised
 - (i) for an improper purpose,
 - (ii) on irrelevant grounds, or
 - (iii) on the taking into account of irrelevant considerations; or
- (c) that reasons should have been given for a decision, recommendation, act or omission that was the subject matter of the investigation,

the Citizens' Representative shall report his or her opinion and his or her reasons and may make those recommendations that he or she considers appropriate to the appropriate minister and to the department or agency of the government concerned.

- (2) In making a report under subsection (1), the Citizens' Representative may recommend
 - (a) that a matter should be referred to the appropriate authority for further consideration;
 - (b) that an omission should be rectified;
 - (c) that a decision should be cancelled or varied;
 - (d) that a practice on which a decision, recommendation, act or omission was based should be altered or reviewed;
 - (e) that a law on which a decision, recommendation, act or omission was based should be reconsidered;
 - (f) that reasons should be given for a decision, recommendation, act or omission; or
 - (g) that other steps should be taken.

Notice of proposed steps

38. (1) Where the Citizens' Representative makes a recommendation under section 37, he or she may request the department or agency of the government to notify him or her within a specified time of the action it has taken or proposes to take to give effect to his or her recommendations.

(2) Where within a reasonable time after a request respecting recommendations is made under this section, no action is taken which seems to the Citizens' Representative to be adequate and appropriate, the Citizens' Representative, in his or her discretion, after considering the comments made by or on behalf of the department or agency of the government affected, may report the matter, including a copy of the report containing the recommendations, to the Lieutenant-Governor in Council and may mention the report in the Citizens' Representative's next annual report to the House of Assembly.

(3) A report made under subsection (2) shall include comments made by or on behalf of the department or agency of the government upon the opinion or recommendation of the Citizens' Representative.

Offence and penalty

46. A person who

- (a) without lawful justification or excuse wilfully obstructs, hinders, or resists the Citizens' Representative or another person in the exercise or performance of his or her functions and duties under this Act;
- (b) without lawful justification or excuse refuses or wilfully fails to comply with a lawful requirement of the Citizens' Representative or another person under this Act; or
- (c) wilfully makes a false statement to or misleads or attempts to mislead the Citizens' Representative or another person in the exercise or performance of his or her functions and duties under this Act,

is guilty of an offence and liable, on summary conviction, to a fine of not more than \$500 or to imprisonment for a term not exceeding 3 months, or to both.

The 2014 *Public Interest Disclosure and Whistleblower Protection Act* also spells out a relatively new role for the Citizens' Representative. For example, section 6 states: "An employee who is considering making a disclosure may request advice from the citizens' representative"; section 7 states: "Where an employee reasonably believes that he or she has information that could show that a wrongdoing has been committed or is about to be committed, the employee may make a disclosure to the citizens' representative"; section 9 states: "Where an employee makes a disclosure to the citizens' representative, the citizens' representative may take the steps he or she considers appropriate to help resolve the matter within the public service"; section 14 states: "The citizens' representative is responsible for investigating disclosures that he or she receives under this Act"; section 16 states: "The citizens' representative and persons employed under the citizens' representative have the powers and protections provided for in the Citizens' Representative Act when conducting an investigation of a disclosure under this Act"; section 17 states: "Where, during an investigation, the citizens' representative has reason to believe that another wrongdoing has been committed, the citizens' representative may investigate that wrongdoing in accordance with this Act"; and more.

Effective April 1, 2020, the Citizens' Representative also plays an important role in the Harassment-Free Workplace Policy Applicable to Complaints Against Members of the House of Assembly.⁵³ It is the responsibility of the Citizens' Representative to:

- Identify and retain the services required to establish the position of Independent Support Advisor;
- Oversee the work of the Intake Officer, and ensure the incumbent has the necessary skills, knowledge, and training to receive and provide advice on complaints of harassment;
- Review complaints with the Intake Officer to identify whether allegations are within scope of the Policy;
- Conduct investigations if/when a complaint proceeds to the formal resolution stage. In that regard, the Citizens' Representative has a responsibility to:
 - Inform the complainant, respondent, witnesses, and support persons of the process that will be followed and their roles in the investigation, including the process for disclosure of statements/evidence in accordance with the principles of procedural fairness;
 - Conduct the investigation in a fair and impartial manner;
 - Respect confidentiality at all times;
 - Interview the parties and witnesses and prepare written statements;

⁵³ Link: <https://www.assembly.nl.ca/pdfs/HFWPApplicableToComplaintsAgainstMHAsConcurredDec2-2019EffectiveApr1-20.pdf>

- Review all statements and evidence collected in the investigation;
- Prepare an investigative report that provides an analysis of the evidence gathered and findings as to whether harassment has occurred in accordance with the Policy;
- Provide written notification to the complainant and respondent on the status of the investigation processes throughout the course of the investigation.
- Submit the final investigative report to the Standing Committee on Privileges and Elections, and be available to that Committee as necessary to discuss the report and its findings;
- Notify the complainant of any decision voted on in the House of Assembly under the Policy;
- Develop and administer documentation to support the Policy;
- Provide interpretation and guidance regarding the Policy;
- Act as a subject matter resource for the development of orientation, training, and information programs with respect to the policy; and
- Respect the confidentiality of all processes under the Policy.

This Office processes and reports on between 600 and 800 matters per year in connection with the variety of functions it performs.⁵⁴ It is clear from the broad scope of the work and purview of this Statutory Office that there is no office in the province of comparable power and authority. It is also clear from the quantity and depth of its work that the office is required full-time and its principal would not have the time to shoulder the responsibilities of other offices.

If there are concerns that the work of the Citizens' Representative may overlap with the work of the Child and Youth Advocate and the Seniors' Advocate, consider the argument that it is better to have more checks and balances on the operations of the government than too few. It is imperative that children and youth be the focus of the work of a dedicated Child and Youth Advocate and that seniors be the focus of the work of a dedicated Seniors' Advocate, but it is no less important that citizens generally, whistleblowers and subjects of alleged harassment be afforded the services of a dedicated Citizens' Representative. There may also be times when the Statutory Offices can work together to investigate and report on matters of overlapping concern.

The Statutory Office of the Citizens' Representative must remain a stand-alone Statutory Office with a full-time principal who is not shouldered with the responsibilities of another Statutory Office.

⁵⁴ Page 20 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

Information and Privacy Commissioner

The Statutory Office of the Information and Privacy Commissioner was created by legislation⁵⁵ passed in 2002 to amend the *Access to Information and Protection of Privacy Act (ATIPPA)*, which itself was passed in 2002.⁵⁶ Although passed in 2002, ATIPPA was not proclaimed until 2004-05.⁵⁷ ATIPPA replaced the *Freedom of Information Act*, which lacked the accountability mechanisms of ATIPPA.

As Justice Minister and Attorney General Tom Marshall stated at the time: "we embark on this new path, and this new era of accountability and transparency, ushered in by this new legislation on access and privacy." Also: "over 460 public bodies will be subject to this act, including all government departments and agencies, school boards, public, post-secondary institutions, health boards and municipalities." Also: "the Office of the Commissioner, which is totally independent of government and answerable directly to this House of Assembly, is crucial to its success and to the openness and accountability that are the hallmarks of the legislation." Also: "the Access and Privacy Office within the Department of Justice has already started this process and will continue to develop policies, provide training and assist public bodies with respect to privacy over the coming months." Also: "an open and transparent government is fundamental to the operation of democratic institutions. The Province's existing *Freedom of Information Act* was adopted in 1981. It was a modern piece of legislation in its time. Indeed, in 1981 only New Brunswick and Nova Scotia had legislated in this area. After more than twenty years however, the time for a complete overhaul has come."⁵⁸

ATIPPA was replaced in 2015 with the *Access to Information and Protection of Privacy Act, 2015* (ATIPPA, 2015). Under this legislation, the Commissioner's powers and duties are defined as follows.

General powers and duties of commissioner

95. (1) In addition to the commissioner's powers and duties under Parts II and III, the commissioner may
- (a) conduct investigations to ensure compliance with this Act and the regulations;
 - (b) monitor and audit the practices and procedures employed by public bodies in carrying out their responsibilities and duties under this Act;
 - (c) review and authorize the collection of personal information from sources other than the individual the information is about;
 - (d) consult with any person with experience or expertise in any matter related to the purpose of this Act; and
 - (e) engage in or commission research into anything relating to the purpose of this Act.
- (2) In addition to the commissioner's powers and duties under Parts II and III, the commissioner shall exercise and perform the following powers and duties:
- (a) inform the public about this Act;
 - (b) develop and deliver an educational program to inform people of their rights and the reasonable limits on those rights under this Act and to inform public bodies of their responsibilities and duties, including the duty to assist, under this Act;
 - (c) provide reasonable assistance, upon request, to a person;
 - (d) receive comments from the public about the administration of this Act and about matters concerning access to information and the confidentiality, protection and correction of personal information;
 - (e) comment on the implications for access to information or for protection of privacy of proposed legislative schemes, programs or practices of public bodies;
 - (f) comment on the implications for protection of privacy of
 - (i) using or disclosing personal information for record linkage, or
 - (ii) using information technology in the collection, storage, use or transfer of personal information;
 - (g) take actions necessary to identify, promote, and where possible cause to be made adjustments to practices and procedures that will improve public access to information and protection of personal information;
 - (h) bring to the attention of the head of a public body a failure to fulfil the duty to assist applicants;
 - (i) make recommendations to the head of a public body or the minister responsible for this Act about the administration of this Act;
 - (j) inform the public from time to time of apparent deficiencies in the system, including the office of the commissioner; and
 - (k) establish and implement practices and procedures in the office of the commissioner to ensure efficient and timely compliance with this Act.
- (3) The commissioner's investigation powers and duties provided in this Part are not limited to an investigation under paragraph (1)(a) but apply also to an investigation in respect of a complaint, privacy complaint, audit, decision or other action that the commissioner is authorized to take under this Act.

⁵⁵ Link: <https://www.assembly.nl.ca/legislation/sr/annualstatutes/2002/0216.chp.htm>

⁵⁶ Link: <https://www.assembly.nl.ca/legislation/sr/annualstatutes/2002/A01-1.c02.htm>

⁵⁷ Link: <https://www.releases.gov.nl.ca/releases/2004/just/1213n03.htm>

⁵⁸ Hansard of December 13, 2004: <https://www.assembly.nl.ca/HouseBusiness/Hansard/ga45session1/04-12-13.htm>

Representation during an investigation

96. (1) During an investigation, the commissioner may give a person an opportunity to make a representation.

(2) An investigation may be conducted by the commissioner in private and a person who makes representations during an investigation is not, except to the extent invited by the commissioner to do so, entitled to be present during an investigation or to comment on representations made to the commissioner by another person.

(3) The commissioner may decide whether representations are to be made orally or in writing.

(4) Representations may be made to the commissioner through counsel or an agent.

Production of documents

97. (1) This section and section 98 apply to a record notwithstanding

(a) paragraph 5 (1)(c), (d), (e), (f), (g), (h) or (i);

(b) subsection 7 (2);

(c) another Act or regulation; or

(d) a privilege under the law of evidence.

(2) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the *Public Inquiries Act, 2006*.

(3) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.

(4) As soon as possible and in any event not later than 10 business days after a request is made by the commissioner, the head of a public body shall produce to the commissioner a record or a copy of a record required under this section.

(5) The head of a public body may require the commissioner to examine the original record at a site determined by the head where

(a) the head of the public body has a reasonable basis for concern about the security of a record that is subject to solicitor and client privilege or litigation privilege;

(b) the head of the public body has a reasonable basis for concern about the security of another record and the Commissioner agrees there is a reasonable basis for concern; or

(c) it is not practicable to make a copy of the record.

(6) The head of a public body shall not place a condition on the ability of the commissioner to access or examine a record required under this section, other than that provided in subsection (5).

Right of entry

98. The commissioner has the right

(a) to enter an office of a public body and examine and make copies of a record in the custody of the public body; and

(b) to converse in private with an officer or employee of the public body.

Annual report

105. The commissioner shall report annually to the House of Assembly through the Speaker on

(a) the exercise and performance of his or her duties and functions under this Act;

(b) a time analysis of the functions and procedures in matters involving the commissioner in a complaint, from the date of receipt of the request for access or correction by the public body to the date of informal resolution, the issuing of the commissioner's report, or the withdrawal or abandonment of the complaint, as applicable;

(c) persistent failures of public bodies to fulfil the duty to assist applicants, including persistent failures to respond to requests in a timely manner;

(d) the commissioner's recommendations and whether public bodies have complied with the recommendations;

(e) the administration of this Act by public bodies and the minister responsible for this Act; and

(f) other matters about access to information and protection of privacy that the commissioner considers appropriate.

Special report

106. The commissioner may at any time make a special report to the House of Assembly through the Speaker relating to

(a) the resources of the office of the commissioner;

(b) another matter affecting the operations of this Act; or

(c) a matter within the scope of the powers and duties of the commissioner under this Act.

Report – investigation or audit

107. On completing an investigation under paragraph 95 (1)(a) or an audit under paragraph 95 (1)(b), the commissioner

(a) shall prepare a report containing the commissioner's findings and, where appropriate, his or her recommendations and the reasons for those recommendations;

(b) shall send a copy of the report to the head of the public body concerned; and

(c) may make the report public.

The Information and Privacy Commissioner also has a significant role under the *Personal Health Information Act*. The personal health information of many thousands of people was recently compromised in a cyberattack, not long after the government was warned of data insecurity. The Commissioner has been attempting to investigate this breach. The Act defines the Commissioner's role:

Complaint to commissioner

66. (1) Where a custodian has refused the request of an individual for access under subsection 53(1) or for correction under subsection 60(1), the affected individual may file a complaint with the commissioner.

- (2) A complaint under subsection (1) shall be in writing and shall be filed with the commissioner within 60 days from the date
- (a) that the individual receives notice of the custodian's refusal under section 56 or paragraph 62(1)(b) or a longer time period permitted by the commissioner; or
 - (b) that the custodian is considered to have refused the request under subsection 56(2) or 62(2) or a longer time period as permitted by the commissioner.
- (3) Where an individual believes on reasonable grounds that a custodian has contravened or is about to contravene a provision of this Act or the regulations in respect of his or her personal health information or the personal health information of another, he or she may file a complaint with the commissioner.
- (4) A complaint made under subsection (3) shall be in writing and shall be filed with the commissioner within
- (a) one year after the subject-matter of the complaint first came to the attention of the complainant or should reasonably have come to the attention of the complainant; or
 - (b) a longer period of time as permitted by the commissioner where he or she is satisfied that it will not result in prejudice to another person.
- (5) The commissioner shall provide a copy of the complaint to the custodian whose decision or action is the subject matter of the complaint.
- (6) A complaint to the commissioner under this Part may not be made by an individual who has appealed a decision of a custodian directly to the Trial Division under Part VII .

Informal resolution

- 67.** (1) The commissioner may take steps that he or she considers appropriate to resolve a complaint under section 66 informally to the satisfaction of the complainant and the custodian, and in a manner consistent with this Act.
- (2) Where the commissioner is unable to achieve an informal resolution of the complaint within 60 days of receipt of the complaint, the commissioner shall conduct a review of the subject matter of the complaint if he or she is satisfied that there are reasonable grounds to do so.
- (3) The commissioner may decide not to conduct a review where he or she is satisfied that
- (a) the custodian has responded adequately to the complaint;
 - (b) the complaint has been or could be more appropriately dealt with by a procedure or proceeding other than a complaint under this Act;
 - (c) the length of time that has elapsed between the date when the subject-matter of the complaint arose and the date when the complaint was filed is such that a review under this Part would be likely to result in undue prejudice to a person or that a report would not serve a useful purpose; or
 - (d) the complaint is trivial, frivolous, vexatious or is made in bad faith.
- (4) Where the commissioner decides not to conduct a review, he or she shall give notice of that decision, together with reasons, to the complainant and the affected custodian and advise the complainant of his or her right to appeal the refusal of the custodian to grant access or make a correction to the Trial Division under section 83 and the time limit for the commencement of an appeal provided in that section.
- (5) Section 8.1 of the *Evidence Act* does not apply to a review conducted by the commissioner under this Part.

Conduct of review

- 68.** (1) In conducting a review, the commissioner has the powers, privileges and immunities that may be conferred on a commissioner under the *Public Inquiries Act, 2006* except as otherwise provided in this Part.
- (2) A review shall be conducted in private and the burden of proof in respect of the subject-matter of the complaint is on the custodian.
- (3) In conducting a review the commissioner may receive and accept any evidence and other information that the commissioner sees fit, whether on oath or by affidavit or otherwise, and whether or not it is or would be admissible in a court of law.
- (4) The complainant and the affected custodian shall be given an opportunity to make representations to the commissioner during the review, either in person or by counsel or agent, but neither is entitled to be present during, to have access to, or to comment on representations made to the commissioner by the other.
- (5) The commissioner may decide whether representations are to be made orally or in writing.

Investigative powers

- 69.** (1) In conducting a review, the commissioner may
- (a) demand from the custodian a copy of a book, record or document or extract from a book, record or document relevant to the subject-matter of the review;
 - (b) inquire into all information, records, information practices of the custodian and other matters that are relevant to the subject-matter of the review; and
 - (c) use a data storage, processing or retrieval device or system belonging to the custodian under investigation in order to produce a record in readable form of a book, record or other document relevant to the subject-matter of the review.
- (2) A demand by the commissioner for a copy of information under paragraph (1)(a) shall be in writing and shall include a statement of the nature of the things that are required to be produced.
- (3) Except as otherwise provided under subsection (4), a custodian shall produce to the commissioner a copy of the information demanded under paragraph (1)(a) within 14 days of receipt of the demand, notwithstanding another Act or regulations or a privilege under the law of evidence.
- (4) Where it is not practicable to make a copy of a record required under this section, the custodian may require the commissioner to examine the original at its site.

Entry onto premises

70. (1) In conducting a review, and notwithstanding another Act or regulation or a privilege under the law of evidence, the commissioner may, where he or she reasonably believes that the premises contains a book, record or other document relevant to the subject-matter of the review, without a warrant or court order,

- (a) enter a premises to view or inspect the premises;
- (b) demand the production of records, documents, including documents or records maintained in electronic form, or another thing relating to the subject-matter of the review for the purposes of examination or copying; and
- (c) make inquiries of a person on the premises into all matters relating to the subject-matter of the review.

(2) The commissioner shall exercise the power to enter premises under subsection (1) only during reasonable hours for the premises and only in such a manner so as not to interfere with health care that is being provided to an individual on the premises at the time of entry.

(3) Notwithstanding subsection (1), where

- (a) the commissioner is refused or denied entry;
- (b) the premises to be entered are used as a dwelling in whole or in part; or
- (c) the entry is to occur outside normal business hours,

the commissioner shall not exercise his or her power of entry except under the authority of a warrant issued under subsection (4).

(4) Where a judge is satisfied by evidence upon oath or affirmation that there are reasonable grounds to believe that it is necessary to enter premises to facilitate a review and that the commissioner cannot exercise his powers under subsection (1) without a warrant for a reason referred to in subsection (3), he or she may issue a warrant authorizing entry by the commissioner or other person named in the warrant in accordance with any conditions contained in the warrant.

Power to inspect records

71. Notwithstanding sections 69 and 70, the commissioner shall not examine or copy or inquire into a record of personal health information without the consent of the individual to whom the record relates except where

- (a) the commissioner first determines that it is reasonably necessary to do so in order to carry out the review and that the public interest in carrying out the review justifies dispensing with obtaining the individual's consent in the circumstances; and
- (b) the commissioner provides a statement to the custodian having custody or control of the record to be examined or copied or the evidence or information to be inquired into, setting out the commissioner's determination under paragraph (a), together with written reasons for the determination.

Commissioner's recommendation

72. (1) The commissioner shall conclude his or her review within 120 days of receiving a complaint under section 66.

(2) As a result of his or her review, the commissioner may make one of the following recommendations:

- (a) where the review relates to a complaint respecting a refusal of access to a record of personal health information, recommend that the custodian grant the individual access to the requested record;
- (b) where the review relates to a complaint respecting a refusal to correct a record of personal health information, recommend that the custodian make the requested correction;
- (c) where the review relates to a complaint under subsection 66(3), that a custodian has contravened or is about to contravene a provision of this Act or the regulations, recommend that the custodian
 - (i) cease collecting, using or disclosing personal health information where the commissioner determines that the custodian is collecting, using or disclosing the information contrary to the Act or regulations or an agreement entered into under the Act,
 - (ii) dispose of records of personal health information that the commissioner determines the custodian collected, used or disclosed in contravention of this Act, the regulations or an agreement entered into under this Act,
 - (iii) modify, cease or not commence an information practice, policy or procedure identified in the report of the commissioner where the commissioner determines that the information practice, policy or procedure contravenes this Act or the regulations, or
 - (iv) that the custodian implement an information practice identified by the commissioner where the commissioner determines that the information practice is reasonably necessary to achieve compliance with this Act or the regulations; and
- (d) a recommendation on the privacy aspect of the matter that is the subject of the review.

(3) Where the commissioner does not make a recommendation under paragraph (2)(a) or (b), he or she shall be considered to have confirmed the decision of a custodian to refuse to grant access or make a correction, as the context requires.

Commissioner's report

73. (1) After concluding his or her review, the commissioner shall prepare a report setting out his or her findings and recommendations and, where the commissioner does not make a recommendation under paragraph 72(2)(a) or (b), the report shall also contain reasons for not making a recommendation and advise the complainant of his or her right to appeal the refusal of the custodian to grant access or make a correction to the Trial Division under section 83 and the time limit for the commencement of an appeal provided in that section.

(2) The commissioner shall provide a copy of his or her report to the complainant and the affected custodian.

The Information and Privacy Commissioner requested an independent oversight role⁵⁹ as part of the government's Bill 22 of 2022-23, *An Act to Amend the Management of Information Act*,⁶⁰ which is currently before the House of Assembly.⁶¹ As the Commissioner stated on March 22, 2023⁶²:

As required by ATIPPA, 2015, the provincial government initially consulted the Office of the Information and Privacy Commissioner in fall 2022 on this draft bill. At that time we expressed three fundamental concerns:

- It exempts the entire Cabinet decision-making process;
- It has no independent oversight; and
- It does not actually create a mandatory duty to document due to the discretionary nature afforded to the Chief Information Officer.

The proposed Bill does not address these concerns. Given the importance of this subject to the mandate of the Information and Privacy Commissioner, we are sharing these concerns publicly to assist in the debate of the Bill within the House of Assembly.

A legislative duty to document would be a requirement in law for government to adequately document its decisions in writing. It was recommended in 2015 by the Statutory Review Committee of the Access to Information and Protection of Privacy Act (ATIPPA, 2015), led by former Premier Clyde Wells. More recently it was recommended by Justice Richard LeBlanc when, in his 2020 report of the Inquiry into the Muskrat Falls Project, he found that decisions regarding the troubled project were not properly documented in both government and in its energy crown corporation, Nalcor / NL Hydro. Former Justice David Orsborn commented on a duty to document in his 2021 report of the 2020 Statutory Review of ATIPPA, 2015 saying that "enough time has passed".

The OIPC has great respect for the role that Cabinet Secretariat plays with respect to the management of the Cabinet decision-making process and agrees that a special role for it vis-à-vis Cabinet documents is warranted; however, Bill 22 excludes cabinet documents (whether in the custody of Cabinet Secretariat or not) from the duty to document altogether.

As it relates to independent oversight, Bill 22 would require the Minister to table an annual summary of compliance in the House of Assembly prepared by the Chief Information Officer, a government executive who serves at the pleasure of the Premier and reports to the Minister. This avoids implementing the Wells Committee recommendation to provide the Information and Privacy Commissioner, an independent statutory officer of the House, with authority for oversight of the duty to document. Many reports are tabled in the House of Assembly every year, often while it is closed, and receive little attention.

Finally, Bill 22 would require a duty to document to be implemented through a policy that the Chief Information Officer may develop, and could be amended – or discontinued – without even reference to Cabinet.

"A duty to document is critical to access to information – and ultimately transparent, accountable, democratic government," said Commissioner Harvey, "While every day the Office of the Information and Privacy Commissioner works to get citizens the access to government documents to which they are entitled under law, there is nothing we can do when decisions are not properly documented. Bill 22 does not meet its potential as duty to document legislation. I encourage legislators to address these concerns with Bill 22 as it is considered by the House of Assembly. By addressing these gaps, we could continue to be the leaders in access to information in Canada".

The Minister proposing Bill 22 stated on March 22, 2023: "we didn't feel it was necessary at this time."⁶³

It is clear from the duties of this Statutory Office and the volume of its publications that it is among the busiest of all Statutory Offices. It is inconceivable that the far-reaching functions of ATIPPA could function without a dedicated, stand-alone Office of the Information and Privacy Commissioner with a dedicated, full-time Statutory Officer. It is also inconceivable that the province could roll back the clock to a time when ATIPPA did not exist. People rely on the access provisions and privacy protections this Statutory Office ensures. If anything, the importance of privacy protections is growing, given the importance of information in the modern age and the vulnerability of personal data to negligent or bad actors.

The Statutory Office of the Information and Privacy Commissioner must remain a stand-alone Statutory Office with a full-time principal who is not shouldered with the responsibilities of another Statutory Office. Further, as it is a natural extension of the work of this Statutory Office, the OIPC should be given an independent oversight role with respect to the 'duty to document' provisions of the *Management of Information Act*.

⁵⁹ Link: <https://www.gov.nl.ca/releases/2023/oipc/0322n03/>

⁶⁰ Link: <https://assembly.nl.ca/HouseBusiness/Bills/ga50session2/bill2322.htm>

⁶¹ Link: <https://assembly.nl.ca/HouseBusiness/Bills/ga50session2/>

⁶² Link: <https://www.gov.nl.ca/releases/2023/oipc/0322n03/>

⁶³ Hansard of March 22, 2023: <https://assembly.nl.ca/HouseBusiness/Hansard/ga50session2/23-03-22.htm>

Chief Electoral Officer

The Statutory Office of the Chief Electoral Office is established under the *Elections Act, 1991*, which defines the duties of the office in section 5.

Duties of Chief Electoral Officer

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.
- (2) The Chief Electoral Officer shall report on his or her activities to the House of Assembly through the Speaker.

Under section 4 of the Charter of Rights and Freedoms, a provincial general election must be held at least once every five years except in grave circumstances. Under section 3 of the *House of Assembly Act* (which is non-binding), a general election should be held every four years. Under section 3.1 of that Act (which is also non-binding), an election should be called within a year of the governing party electing a new leader and Premier. In practice in Newfoundland and Labrador, a general election could be called at any time. The 1999 general election was held on February 9, 1999, less than three years after the prior general election of February 22, 1996. The 1972 general election was held on March 24, 1972, less than a year after the general election of October 28, 1971. Even in the era of fixed-date elections, the 2019 general election was held on May 16, 2019, not on the second Tuesday of October 2019 as mandated. The 2015 general election was held on November 20, 2015, not on the second Tuesday of October as mandated. The 2015 election date was established by an amendment of the *House of Assembly Act*, but in 2019, the government simply ignored this provision of the Act altogether.⁶⁴

Under section 54 of the *House of Assembly Act*, a by-election should be called within 60 days of a seat becoming vacant, unless a general election is imminent. Resignations of Members, while not frequent, can happen at any time for a multitude of reasons. In both 2007 and 2014, by-elections were held in five districts, and in 2001, there were by-elections in four districts.

The Office of the Chief Electoral Office would also be responsible for conducting a plebiscite, such as those that were conducted regarding denominational education on September 5, 1995⁶⁵ and September 2, 1997⁶⁶. Plebiscites are even more infrequent than by-elections, but could be called at any time.

The Chief Electoral Office would normally be most busy during elections, after elections and for a considerable period of time in the lead-up to anticipated general elections. During the COVID-19 pandemic, the Office would have been exceptionally busy because of the particular challenges of running a general election that was expected because of a pending change in Premier.

While many of the people who work with the Office during elections are hired only temporarily, it is necessary to have a principal and core staff who maintain a constant state of preparedness so an election can be conducted if required. This is particularly true when the governing party is a minority in the House (as was the case from 2019 to 2021), because a confidence vote or other circumstances can quickly trigger an election.

The chaos of the election of 2021 demonstrates how important it is to have a Chief Electoral Officer ready to oversee and be accountable for the operations of the Office. It is difficult to imagine having a principal who takes a leave of absence between elections but who is ready to step up at a moment's notice any time an election is called.

In recent years, the Chief Electoral Officer has served simultaneously as the Commissioner for Legislative Standards. While it may be possible to hold both offices simultaneously, recent events show that forcing

⁶⁴ Link: <https://www.cbc.ca/news/canada/newfoundland-labrador/newfoundland-labrador-election-may-15-1.5100584>

⁶⁵ Link: <https://www.elections.gov.nl.ca/elections/resources/pdf/electionreports/plebs/Sept-1995.pdf>

⁶⁶ Link: <https://www.elections.gov.nl.ca/elections/resources/pdf/electionreports/plebs/Sept-1997.pdf>

the principal to step down from one role pending an investigation inevitably causes a vacancy to occur in the other role as well.

Considering the fact that the House of Assembly is currently considering an overhaul of the legislation and processes governing elections in light of problems in 2021, this may be a time when the dedicated services of a full-time Chief Electoral Officer will be needed for a considerable period of time of adjustment. Given how important it is to ensure the integrity of elections to safeguard the fundamental rights and freedoms of citizens, it would be imprudent to take any actions that would compromise the full functioning of the Chief Electoral Office at this time, in particular.

Another consideration is the fact that challenges of 2021 elections in some of the electoral districts are currently before the courts in a protracted process, and the Chief Electoral Office might be expected to be involved in those proceedings. The Chief Electoral Officer would certainly be impacted if the courts were to overturn one or more of those elections and trigger new elections.

The next general election is just two years away, according to the fixed-date election law, but could happen sooner under various circumstances. Because the practice of holding a fixed-date election on the second Tuesday of October every four years has been followed only twice (2007, 2011) in the five general elections that have happened since it was established (2007, 2011, 2015, 2019, 2021), and also because the provision establishing that practice is not binding, therefore people do not have any good reason to be confident that the next general election will happen on the second Tuesday of October 2025. As the discussion following the 2023 Budget made clear⁶⁷, people fully expect the government to revert to the practice of calling general elections without notice, whenever the political climate is favourable to them. In that context, the Chief Electoral Office and its principal must always be prepared for a snap election call.

The Statutory Office of the Chief Electoral Officer should remain a stand-alone Statutory Office with a full-time principal who is not shouldered with the responsibilities of another Statutory Office, particularly in anticipation of pending election law changes and in recognition of the fact that the person currently serving in the role is relatively new to the post at a particularly busy time.

⁶⁷ Link: <https://vocm.com/2023/03/24/204493/>

Commissioner for Legislative Standards / Ethics Commissioner

Prior to the Green Report of 2006-07, there was a Commissioner for Members' Interests, constituted under the *House of Assembly Act*. It was Green who suggested expanding the role and renaming the officer the Commissioner for Legislative Standards.⁶⁸ The Commissioner's important role is defined under the *House of Assembly Act*, in provisions that demonstrate the scope and importance of the work involved.

Commissioner

- 34.** (1) On resolution of the House of Assembly, the Lieutenant-Governor in Council shall appoint a Commissioner for Legislative Standards.
- (2) The commissioner is an officer of the House of Assembly and is not eligible to be nominated for election, to be elected or to sit as a member of the House of Assembly.
- (3) The commissioner may hold the office of Chief Electoral Officer but shall not hold another public office or carry on a trade, business or profession.
- (4) Unless he or she sooner resigns, dies or is removed from office, the commissioner shall hold office for 6 years from the date of his or her appointment, and he or she may be re-appointed for a second term of 6 years, but shall not hold office for more than 2 terms.
- (5) The commissioner may resign his or her office in writing addressed to the Speaker of the House of Assembly, or, where there is no Speaker or the Speaker is absent, to the Clerk of the House of Assembly.
- (6) 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 commissioner from office because of an incapacity to act or for misconduct, cause or neglect of duty.
- (7) When the House of Assembly is not sitting, the Lieutenant-Governor in Council may suspend the commissioner because of an incapacity to act or for misconduct, cause or neglect of duty but the suspension shall not continue in force beyond the end of the next sitting of the House of Assembly.
- (8) The Lieutenant-Governor in Council may, on the recommendation of the House of Assembly Management Commission, appoint an acting commissioner if
- (a) the commissioner is temporarily unable to perform his or her duties;
- (b) the office of the commissioner becomes vacant or the commissioner is suspended when the House of Assembly is not sitting; or
- (c) the office of the commissioner becomes vacant or the commissioner is suspended when the House of Assembly is sitting, but the House of Assembly does not pass a resolution to appoint a commissioner before the end of that sitting.
- (9) Where the office of the commissioner becomes vacant and an acting commissioner is appointed under paragraph (8)(b) or (c), the term of the acting commissioner shall not extend beyond the end of the next sitting of the House of Assembly.
- (10) An acting commissioner holds office until
- (a) the commissioner returns to his or her duties after a temporary inability to perform;
- (b) the suspension of the commissioner ends or is dealt with in the House of Assembly; or
- (c) a person is appointed as commissioner under subsection (1).
- (11) The commissioner shall be paid a salary fixed by the Lieutenant-Governor in Council after consultation with the House of Assembly Management Commission.
- (12) The salary of the commissioner shall not be reduced except on resolution of the House of Assembly.
- (13) The commissioner is subject to the *Public Service Pensions Act, 2019* where he or she was subject to that Act before his or her appointment as commissioner.
- (14) Where the commissioner was not subject to the *Public Service Pensions Act, 2019* before his or her appointment as commissioner, he or she shall be paid, for contribution to a registered retirement savings plan, an amount equivalent to the amount which he or she would have contributed to the Public Service Pension Plan were the circumstances in subsection (13) applicable.
- (15) The commissioner is eligible to receive the same benefits as a deputy minister, with the exception of a pension where subsection (14) applies.
- (16) The commissioner may, subject to the approval of the House of Assembly Management Commission continued under section 18 of the *House of Assembly Accountability, Integrity and Administration Act*, appoint for the term and on the conditions that the commissioner may determine those employees and officers that are necessary for the performance of the duties of the commissioner.
- (17) The commissioner and every person employed by the commissioner shall swear an oath or make a solemn declaration to keep confidential information relating to the personal interests and property of members received or obtained under this Part.

Annual report

- 35.** (1) The commissioner shall report annually upon the affairs of his or her office to the Speaker of the Assembly who shall present the report to the House of Assembly within 15 sitting days of receiving it and, if the assembly is not in session, within 15 sitting days of the beginning of the next session.
- (2) The commissioner may from time to time issue summaries of advice given, where it is possible to summarize the advice without disclosing information of a confidential nature or identifying the individual concerned.
- (3) In each annual report made under this section the commissioner shall take every reasonable precaution to avoid revealing information likely to identify a member or a member's family.

⁶⁸ Page 5.10 of <https://www.assembly.nl.ca/business/electronicdocuments/mainreport.pdf>

Disclosure statement

- 36.** (1) Every elected member and appointed minister shall,
- (a) within 60 days of his or her election or appointment; and
 - (b) before the second April 1 occurring after the date of his or her election or appointment; and
 - (c) before each April 1 subsequent to the date referred to in paragraph (b),
- file with the commissioner a disclosure statement in the form set by the commissioner.
- (2) The disclosure statement shall contain,
- (a) a full statement of the member's private interests other than personal property referred to in subparagraph 20(a)(iv) where the possession, ownership or use of that property does not give rise to the possibility of a conflict of interest;
 - (b) the audited financial statement of the assets, financial interests and liabilities of
 - (i) a corporation in which the member and the member's family together hold 10% or more of the shares,
 - (ii) a partnership in which the member and the member's family together hold a 10% or more interest, and
 - (iii) a partnership or corporation controlled by a partnership or corporation referred to in subparagraph (i) or (ii);
 - (c) a statement, to the best of the member's knowledge, information and belief, of each private interest of the member's family.
- (3) The statement referred to in paragraph (2)(c) shall contain
- (a) a full statement of the private interests of the member's family;
 - (b) the audited financial statement of the assets, financial interests and liabilities of
 - (i) a corporation in which the member's family holds 10% or more of the shares,
 - (ii) a partnership in which the member's family holds a 10% or more interest, and
 - (iii) a partnership or corporation controlled by a partnership or corporation referred to in subparagraph (i) or (ii).
- (4) A material change to information required to be disclosed to the commissioner under this section, shall be reported to the commissioner in writing by the member not more than 60 days after the change occurs.
- (5) A disclosure statement made under this section is privileged except to the extent necessary to insure compliance with this Part.
- (6) After reviewing the disclosure statement received from a member the commissioner may require that the member meet with the commissioner to ensure that adequate disclosure has been made and to discuss the member's obligations under this Part.

Public disclosure statement

- 37.** (1) The commissioner shall prepare a public disclosure statement for each member, which shall be submitted to the member for review.
- (2) The public disclosure statement shall identify each private interest other than an excluded private interest of the member and the member's family disclosed to the commissioner by the member, but shall not show the amount or the value of a private interest.
- (3) An interest may be qualified in the public disclosure statement by the words "nominal", "significant" or "controlling" where in the opinion of the commissioner it would be in the public interest to do so.
- (4) The public disclosure statement of each member shall then be placed on file at the office of the commissioner, and made available for public inspection during normal business hours.

Commissioner to advise member

- 38.** (1) Upon reviewing the disclosure statement received from the member, and after considering information received during a meeting with the member, the commissioner shall advise the member whether steps need be taken to ensure that the member's obligation under this Part are fulfilled.
- (2) The commissioner may make a recommendation to a member that in order to fulfil the member's obligations under this Part, the member sell a private interest at arm's length, place the private interest in a trust on those terms and conditions that the commissioner may specify, with or without those other arrangements to be made that will ensure that the member's obligations under this Part are fulfilled.
- (3) Where the commissioner is satisfied on the basis of the disclosure statement and subsequent steps taken by a member, whether in response to advice received from the commissioner or not, that the member has fulfilled the member's disclosure obligations, then if the member requests, the commissioner shall certify in writing to the member, and the member is entitled to rely on that certificate, for all purposes of this Part, according to its terms.
- (4) Advice or a certificate given by the commissioner to a member under this section is privileged, except to the extent necessary to insure compliance with this Part, to the member, and may be made public only by the member or with the member's written consent.
- (5) Notwithstanding subsection (4), a copy of any advice or certificate given under this section shall be given by the commissioner to the Premier, where the advice or certificate relates to a minister, or relates to that member's family.

Interest designated as excluded

- 39.** Where it would not be contrary to the purposes of this Part, and would be consistent with the public interest, the commissioner may designate a private interest of the member or the member's family to be an excluded private interest, either absolutely or on stated conditions.

Commissioner's opinion and advice

- 40.** (1) A member may, by application in writing, request that the commissioner give an opinion and make recommendations on a matter respecting the obligations of the member under this Part or of a code of conduct .
- (2) The commissioner may make whatever inquiries that the commissioner considers appropriate and provide the member with a written opinion and recommendations.
- (3) The opinion and recommendations of the commissioner are privileged, but may be released by the member or with the consent of the member in writing.

(4) Notwithstanding subsection (3), a copy of any advice or opinion given under this section shall be given by the commissioner to the Premier, where the advice or certificate relates to a minister, or relates to that member's family.

Commissioner to destroy documents

41. The commissioner shall retain all documents in the possession of the commissioner that relate to a member or the member's family for a period of 12 months after a member ceases to be a member, after which the commissioner shall destroy all documents in his or her possession that relate to the member or the member's family, unless there is an inquiry current under this part or a charge has been laid against the member or the member's family under the *Criminal Code* to which the documents relate or may relate.

Commissioner's opinion on referred question

42. (1) A member who has reasonable grounds to believe that another member is in contravention of this Part or a code of conduct may, by application in writing setting out the grounds for the belief and the nature of the contravention alleged, request that the commissioner give an opinion respecting the compliance of the other member with the provisions of this Part or a code of conduct.

(2) The commissioner, on his or her own initiative, may conduct an inquiry to determine whether a member has failed to fulfil an obligation under this Part or a code of conduct when in the opinion of the commissioner it is in the public interest to do so.

(3) The House of Assembly may, by resolution, request that the commissioner give an opinion on a matter respecting the compliance of a member with the provisions of this Part or a code of conduct.

(4) The Premier may request that the commissioner give an opinion on a matter respecting the compliance of a minister with the provisions of this Part or a code of conduct.

(5) Where a matter has been referred to the commissioner under subsection (1) or (3), the House of Assembly or a committee of the House of Assembly shall not conduct an inquiry into the matter.

Inquiry

43. (1) Upon receiving a request under subsection 42(1), (3) or (4), or where the commissioner decides to conduct an inquiry under subsection 42(2), and on giving the member concerned reasonable notice, the commissioner may conduct an inquiry.

(2) Where the commissioner conducts an inquiry under subsection (1), the commissioner shall give the member to whom the inquiry relates a copy of the request and at all appropriate stages throughout the inquiry the commissioner shall give the member reasonable opportunity to be present and to make representations to the commissioner in writing or in person or by counsel or other representative.

(3) Where the commissioner decides to conduct an inquiry under subsection (1), the commissioner has all the powers of a commissioner under the *Public Enquiries Act*.

(4) Where the commissioner determines that the subject-matter of an inquiry conducted by him or her is under investigation by police or is the subject-matter of criminal proceedings, the commissioner shall hold the inquiry in abeyance pending final disposition of that investigation or those proceedings.

(5) Where during the course of an inquiry the commissioner determines that there are reasonable grounds to believe that an offence contrary to an Act of the province or the Parliament of Canada has been committed, the commissioner shall immediately refer the matter to the appropriate authorities and hold the inquiry in abeyance pending final disposition of a resulting investigation and proceedings.

Report

44. (1) Where the request for an opinion is made under subsection 42(1) or (3), or where the commissioner conducts an inquiry under subsection 42(2), the commissioner shall report his or her opinion to the Speaker of the Assembly who shall present the report to the House of Assembly within 15 sitting days of receiving it if it is in session or, if not, within 15 sitting days of the beginning of the next session.

(2) Where the request for an opinion is made under subsection 42(4), the commissioner shall report his or her opinion to the Premier.

(3) In all cases, the commissioner shall report the results of an inquiry to the member concerned.

(4) The commissioner shall report the results of an inquiry as soon as possible, and in any event no later than 90 days after beginning the inquiry.

Penalties

45. (1) Where the commissioner determines that a member has failed to fulfil an obligation under this Part or a code of conduct, the commissioner may recommend in the report under section 44

(a) that the member be reprimanded;

(b) that the member make restitution or pay compensation;

(c) that the member be suspended from the House of Assembly, with or without pay, for a period specified in the report; or

(d) that the member's seat be declared vacant.

Concurrence of House of Assembly

46. (1) A recommendation in a report of the commissioner shall not take effect unless the report is sent to the Speaker under subsection 44(1) and concurred in by resolution of the House of Assembly.

(2) A report tabled in the House of Assembly under subsection 44(1) shall be taken up and disposed of within 15 sitting days after the day on which it was tabled or within a longer period, not to exceed 6 months, that the House of Assembly may determine.

Suit for compensation allowed

47. (1) Where a report to the House of Assembly under section 46 is adopted and the report recommends the payment of compensation or restitution the House may, in an Act passed for the purpose, order the payment of compensation or restitution.

(2) Compensation ordered to be paid under subsection (1) is a debt due to the person identified in the report as having suffered damage and may be recovered from the member to whom the report relates by that person in a court.

Examination of member

48. (1) Where, after considering a matter under section 43, the commissioner concludes that, having regard to all the circumstances, there was no failure without reasonable justification in the member's fulfilment of an obligation under this Part or a code of conduct, then the commissioner shall, without providing further information, so certify to the member in writing and shall give a copy of the certificate

- (a) to the Premier, where the inquiry was begun as a result of a request under subsection 42(4); or
- (b) to the Speaker of the House of Assembly where the inquiry was conducted as a result of a request under subsection 42(1) or (3) or by the commissioner under subsection 42(2).

(2) Where the commissioner gives a copy of a certificate to a member under this section, the commissioner shall, on the request of the member, provide the member with the information and explanations in support of the conclusion referred to in subsection (1) that the commissioner considers appropriate in the circumstances, and the member may publish or otherwise deal with information and explanations so provided as the member sees fit.

Other functions as well as comparable functions of the Commissioner are defined in the *House of Assembly Accountability, Integrity and Administration Act* with respect to the Codes of Conduct and other matters.

Codes of conduct

35. (1) The speaker shall, immediately after the coming into force of this Act, refer to the standing committee of the House of Assembly on Privileges and Elections the responsibility of developing and proposing to the House of Assembly the adoption, by resolution, of a code of conduct for members to assist members in the discharge of their obligations to the House of Assembly, their constituents and the public at large that

- (a) provides guidance on the standards of conduct expected of members in discharging their legislative and public duties; and
- (b) provides the openness and accountability necessary to reinforce public confidence in the manner in which members perform those duties.

(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 and by the public; and
- (b) in addition to other standards of duty and responsibility imposed on members by this Act and any other law.

(3) The commission shall, within 90 days of the coming into force of this Act, develop and adopt a code of conduct applicable to the officers and other persons employed in the House of Assembly service and in the statutory offices.

(4) Before February 1 in a year, a member shall file with the clerk a declaration reaffirming the member's commitment to follow the code of conduct for members.

Request for opinion

36. (1) A member who has reasonable grounds to believe that another member is in contravention of the code of conduct adopted under subsection 35 (1) may, by application in writing setting out the grounds for the belief and the nature of the alleged contravention, request that the commissioner give an opinion respecting the compliance of the other member with the provisions of the code of conduct.

(2) The commissioner, on his or her own initiative, may conduct an inquiry to determine whether a member has failed to fulfil an obligation under the code of conduct where in the opinion of the commissioner it is in the public interest to do so.

(3) The House of Assembly may, by resolution, request that the commissioner give an opinion on a matter respecting the compliance of a member with the code of conduct.

(4) [Rep. by 2020 c2 s3]

(5) Where a matter has been referred to the commissioner under subsection (1) or (3), the House of Assembly or a committee of the House of Assembly shall not conduct an inquiry into the matter until the commissioner has completed his or her work.

Inquiry

37. (1) Upon receiving a request under subsection 36 (1), (3) or (4), or where the commissioner decides to conduct an inquiry under subsection 36 (2), and on giving the member concerned reasonable notice, the commissioner may conduct an inquiry.

(2) Where the commissioner conducts an inquiry under subsection (1), he or she shall give the member to whom the inquiry relates a copy of the request and at all appropriate stages throughout the inquiry the commissioner shall give the member reasonable opportunity to be present and to make representations to the commissioner in writing or in person or by counsel or other representative.

(3) Where the commissioner conducts an inquiry under subsection (1), he or she has all the powers of a commissioner under the *Public Inquiries Act, 2006*.

(4) Where the commissioner determines that the subject-matter of an inquiry conducted by him or her is under investigation by police or is the subject-matter of criminal proceedings, the commissioner shall hold the inquiry in abeyance pending final disposition of that investigation or those proceedings if, in his or her opinion, the continuation of the inquiry would inappropriately interfere with the investigation or proceeding.

(5) Where during the course of an inquiry the commissioner determines that there are reasonable grounds to believe that an offence contrary to an Act of the province or the Parliament of Canada has been committed, the commissioner shall immediately refer the matter to the appropriate authorities and hold the inquiry in abeyance pending final disposition of a resulting investigation and proceedings.

Report

38. (1) Where a request for an opinion is made under subsection 36 (1) or (3), or where the commissioner conducts an inquiry under subsection 36 (2), he or she shall report his or her opinion to the commission which shall present the report to the House of Assembly within 15 sitting days of receiving it if it is in session or, if not, within 15 sitting days of the beginning of the next session.

(2) [Rep. by 2020 c2 s4]

(3) In all cases, the commissioner shall report the results of an inquiry to the member concerned.

(4) The commissioner shall report the results of an inquiry as soon as possible, and in any event no later than 90 days after beginning the inquiry.

Penalties

39. Where the commissioner determines that a member has failed to fulfil an obligation under the code of conduct, he or she may recommend in the report under section 38

(a) that the member be reprimanded;

(b) that the member make restitution or pay compensation;

(c) that the member be suspended from the House of Assembly, with or without pay, for a period specified in the report; or

(d) that the member's seat be declared vacant.

Concurrence of House of Assembly

40. (1) A recommendation in a report of the commissioner shall not take effect unless the report is sent to the commission under subsection 38 (1) and concurred in by resolution of the House of Assembly.

(2) A report tabled in the House of Assembly under subsection 38 (1) shall be taken up and disposed of within 15 sitting days after the day on which it was tabled or within a longer period, not to exceed 6 months, that the House of Assembly may determine.

Confidentiality of identity

40.1 The identity of a person requesting an opinion under section 36 shall be kept confidential to the extent permitted by law and consistent with the need to conduct a proper investigation and the requirements of procedural fairness.

Suit for compensation allowed

41. (1) Where a report to the House of Assembly under section 38 is adopted and the report recommends the payment of compensation or restitution, the House of Assembly may, in an Act passed for the purpose, order the payment of compensation or restitution.

(2) Compensation ordered to be paid under subsection (1) is a debt due to the person identified in the report as having suffered damage and may be recovered from the member to whom the report relates by that person in a court.

Examination of member

42. (1) Where, after considering a matter under section 37, the commissioner concludes that, having regard to all the circumstances, there was no failure without reasonable justification in the member's fulfilment of an obligation under the code of conduct, then he or she, without providing further information, shall certify to the member in writing and shall give a copy of the certificate to the commission where the inquiry was conducted as a result of a request under subsection 36 (1) or (3) or by the commissioner under subsection 36 (2).

(2) Where the commissioner gives a copy of a certificate to a member under this section, he or she shall, on the request of the member, provide the member with the information and explanations in support of the conclusion referred to in subsection (1) that the commissioner considers appropriate in the circumstances, and the member may publish or otherwise deal with information and explanations so provided as the member sees fit.

Definitions

42.1 In sections 42.2 to 42.11,

(a) "harassment" means harassment as defined in the policy; and

(b) "policy" means the Harassment-free Workplace Policy Applicable to Complaints Against Members of the House of Assembly recommended by the Privileges and Elections Committee and concurred in by the House of Assembly, and includes any amendments to it.

Harassment

42.2 (1) Notwithstanding sections 36 to 42, where a matter relates to a complaint of harassment against a member, that matter shall not be dealt with under sections 36 to 42, but shall be investigated and reported upon by the citizens' representative in accordance with the policy.

(2) Notwithstanding subsection (1), where a complaint has been made to the citizens' representative under the policy but the citizens' representative is of the opinion that the matter does not fall within his or her jurisdiction, a complainant who is a member may make a request for an opinion to the commissioner under section 36.

(3) Where a request for an opinion has been made to the commissioner under section 36 but the commissioner is of the opinion that the matter does not fall within his or her jurisdiction under sections 36 to 42, a complainant is not prohibited from making a complaint on the matter in accordance with the policy.

(4) Where a matter has been referred to either the commissioner or the citizens' representative under this Act or the policy and the commissioner or the citizens' representative, as appropriate, has issued a report or discontinued an investigation

of that matter, the decision of the commissioner or citizens' representative, as appropriate, is final and the matter may not be subsequently referred to the statutory officer who has not yet heard it.

Where complainant is citizens' representative

42.9 Where the person making a complaint under the policy is the citizens' representative, the commissioner may exercise the powers of the citizens' representative under the policy and sections 42.1 to 42.8 as if the commissioner were the citizens' representative.

Review of allowance use

52. (1) At the request of a member or of the clerk on his or her own initiative, the speaker may conduct, in his or her capacity as chair of the commission, a review that the speaker considers necessary to determine whether a member's use of an allowance, disbursement, payment, good, premises or service provided under this Act complies with

- (a) the purposes for which the allowance, disbursement, payment, good, premises or service was provided; or
- (b) the purpose of this Act, the rules or the directives of the commission.

(2) The speaker shall inform a member of a review concerning that member as soon as is reasonably possible.

(3) Where, after a review, the speaker determines that a member's use of an allowance, disbursement, payment, goods, premises or service provided under this Act does or does not comply with the purposes for which it was provided or the purposes of this Act or a rule or directive of the commission, the speaker shall

- (a) inform the member of the determination; and
- (b) provide a copy of that determination to the commission.

(4) A member who is the subject of the speaker's determination may, within 10 days of his or her receipt of that determination, inform the speaker that he or she disagrees with the determination and the speaker or that member may request that the commissioner investigate and provide a written opinion.

(5) Where the commissioner receives a request under subsection (4), he or she may conduct an investigation sufficient to provide an opinion and shall provide that written opinion to the

- (a) member who was the subject of the investigation;
- (b) commission; and
- (c) speaker.

(6) Where an opinion provided under subsection (5) differs from that provided by the speaker under subsection (3), the commissioner's opinion shall prevail.

(7) Where a member does not disagree in writing within 30 days after receiving the speaker's determination or if he or she does disagree but the commissioner, in the commissioner's written opinion, supports the speaker's determination, the speaker may direct, in writing, that the member

- (a) comply with this Act, the rules or the directives of the commission; and
- (b) pay back the amount of the allowance, disbursement, funding or payment paid or the value of the good, service or use of the premises provided.

(8) The speaker may order that an allowance, disbursement, payment, good, premises or service otherwise payable or to be provided to a member under this Act or a rule or directive of the commission, be withheld from the member where

- (a) the speaker has given the member a written direction under subsection (7); and
- (b) either
 - (i) the speaker determines that the member continues to use an allowance, disbursement, payment, good, premises or service paid or provided in a manner that does not comply with the purpose for which it was provided or with the purpose of this Act or a directive of the commission, or
 - (ii) the speaker is of the opinion that the withholding is necessary to protect the public interest.

(9) An order made under subsection (8) remains in force until

- (a) the speaker is satisfied that the member's proposed use of the allowance, disbursement, payment, good, premises or service complies with the purpose for which it was provided or with the purposes of this Act or directives of the commission; or
- (b) it is revoked by the speaker.

(10) The speaker may impose a term or condition on an order made under subsection (8) that he or she considers appropriate.

(11) Where the request for a review under this section relates to the speaker, the review shall be conducted by the deputy speaker, and the references to speaker in subsections (1) to (10) shall be read as references to the deputy speaker.

In recent years, the Commissioner for Legislative Standards has been tasked with producing a flurry of investigative reports, dated September 14, 2022, April 12, 2022, November 3, 2020, September 24, 2020, November 13, 2019, June 25, 2019, October 19, 2018, October 18, 2018, October 3, 2018, August 24, 2018, August 24, 2018, May 2017, April 2014 and August 2013.⁶⁹ The Commissioner has even been called before the Bar of the House of Assembly to answer questions about the work of the office.⁷⁰

The Commissioner must be available as needed to provide advice to Members about compliance with the disclosure rules and to handle allegations of harassment, as well as other matters.

⁶⁹ Link: <https://www.assembly.nl.ca/About/ReportsPublications/>

⁷⁰ Hansard of November 5, 2018: <https://assembly.nl.ca/HouseBusiness/Hansard/ga48session3/18-11-05.htm>

Considering the scandal that precipitated the Green Report of 2006-07, it would be not just imprudent, but foolish and outrageous to erode the Office of the Commissioner for Legislative Standards that was strengthened to prevent a recurrence of such a scandal. Such an erosion would be all the more imprudent now that the importance of properly handling harassment allegations has been acknowledged and the Commissioner’s duties have been expanded accordingly.

NEWFOUNDLAND AND LABRADOR NEEDS AN ETHICS COMMISSIONER

The Official Opposition is proposing that the Commissioner for Legislative Standards should be given expanded powers and responsibilities and a new title parallel to those of the federal Conflict of Interest and Ethics Commissioner. The Office of the federal Conflict of Interest and Ethics Commissioner explains the federal Commissioner’s role and mandate. This role is much broader than the role defined for our province’s Commissioner for Legislative Standards. There is currently no Statutory Office or other office in Newfoundland and Labrador capable of investigating serious ethical breaches comparable those the federal Commissioner is empowered to investigate. A mature democracy must have such checks and balances on those who hold positions of authority.

During the chaos following the 2021 election and in circumstances since that time, it became apparent that Newfoundland and Labrador is lacking important functionalities that exist federally in Canada and to some extent in other jurisdictions. One such instance occurred when the Premier allegedly accepted a gift – a fishing trip at the private lodge of the proponent of a massive wind power project that was not going to be allowed to proceed without a significant change in provincial government policy, a change that was indeed made not long after that fishing trip occurred and for which the Premier has never produced receipts to support a claim that he financed the trip. In the public domain, this has been described as a serious ethical breach. There is no Statutory Office in this province empowered to investigate such a breach; but an Ethics Commissioner with powers parallel to those of the federal Commissioner could conduct such a probe, deliver findings and recommendations, and raise the bar on ethics among public office holders in Newfoundland and Labrador. This is the opportunity for such a recommendation to make Newfoundland and Labrador a leader in ethical standards and practices. We urge you to bring this recommendation forward.

The following is a list of the various offices in place federally and in the other provinces, with links to their respective websites:

Jurisdiction	Officer
Canada	Conflict of Interest and Ethics Commissioner ⁷¹
Nova Scotia	Conflict of Interest Commissioner ⁷²
Prince Edward Island	Ethics and Integrity Commissioner ⁷³
New Brunswick	Integrity Commissioner ⁷⁴
Quebec	Ethics Commissioner ⁷⁵
Ontario	Integrity Commissioner ⁷⁶
Manitoba	Conflict of Interest Commissioner ⁷⁷
Saskatchewan	Conflict of Interest Commissioner ⁷⁸
Alberta	Ethics Commissioner ⁷⁹
British Columbia	Conflict of Interest Commissioner ⁸⁰

⁷¹ Link: <https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/default.aspx>; and https://en.wikipedia.org/wiki/Ethics_Commissioner_of_Canada

⁷² Link: <https://nslegislature.ca/about/supporting-offices/conflict-interest-commissioner>

⁷³ Link: <https://www.princeedwardisland.ca/en/information/public-service-commission/ethics-and-integrity-commissioner>; and <https://www.cbc.ca/1.3017037>

⁷⁴ Link: <https://oic-bci.ca/>

⁷⁵ Link: <https://www.ced-qc.ca/en/a-propos/7-la-commissaire>

⁷⁶ Link: <https://www.oico.on.ca/en/>

⁷⁷ Link: <https://www.mbcoic.ca/commissioner.html>

⁷⁸ Link: <https://www.saskatchewan.ca/government/news-and-media/2019/november/25/lobbyist-and-conflict-legislation>

⁷⁹ Link: <http://ethicscommissioner.ab.ca/>

⁸⁰ Link: <https://coibc.ca/>

The Office of the federal Conflict of Interest and Ethics Commissioner defines the federal Commissioner's role and mandate as follows⁸¹:

The Governor in Council shall, by commission under the Great Seal, appoint a Conflict of Interest and Ethics Commissioner after consultation with the leader of every recognized party in the House of Commons and approval of the appointment by resolution of that House.
Parliament of Canada Act, s. 81(1)

The Conflict of Interest and Ethics Commissioner administers the Conflict of Interest Act for public office holders and the Conflict of Interest Code for Members of the House of Commons. These two regimes seek to prevent conflicts between private interests and the public duties of appointed and elected officials. The Commissioner also provides confidential advice to the Prime Minister about conflict of interest and ethics issues.

The position of Conflict of Interest and Ethics Commissioner was created under the Federal Accountability Act. The Commissioner is an Officer of Parliament whose mandate is set out in the Parliament of Canada Act.

The Commissioner is completely independent of the government of the day and reports directly to Parliament, through the Speaker of the House of Commons. The Office of the Conflict of Interest and Ethics Commissioner, along with the Senate, the Office of the Senate Ethics Officer, the House of Commons and the Library of Parliament, is part of the parliamentary infrastructure. The Commissioner enjoys the privileges and immunities of the House of Commons and its Members when carrying out official duties and functions.

Canada's first Conflict of Interest and Ethics Commissioner was appointed in July 2007.

CONFLICT OF INTEREST ACT

The Conflict of Interest Act applies to almost 2,800 public office holders.

All of them are subject to the Act's core set of conflict of interest and post-employment rules. For example, they cannot participate in decisions or votes in connection with their public office where they would be in a conflict of interest. They are also prohibited from using insider information to advance private interests, and from accepting gifts or other advantages that could reasonably be seen to have been given to influence them.

More than half of those covered by the Act are subject only to these general rules. This group is primarily made up of part-time members of federal boards, commissions and tribunals, as well as some part-time ministerial staff.

About 1,300 public office holders, mostly full-time, are considered reporting public office holders. Reporting public office holders include ministers, parliamentary secretaries, ministerial staff and all full-time Governor in Council appointees such as deputy ministers, heads of Crown corporations and members of federal boards. They are subject not only to the Act's general rules but also to its reporting and public disclosure provisions, as well as prohibitions against outside activities and holding controlled assets. The Act contains additional requirements for ministers and parliamentary secretaries.

For more information, please see the separate fact sheet on the Conflict of Interest Act. [*via the footnote*]

CONFLICT OF INTEREST CODE FOR MEMBERS OF THE HOUSE OF COMMONS

The Code, which is appended to the Standing Orders of the House of Commons, applies to all 338 elected Members of Parliament.

It prohibits Members from using their public office to further their private interests or those of their family, or from improperly furthering the private interests of another person or entity. This general rule is complemented by rules on avoiding conflict of interest, including restrictions on the gifts that Members can accept, processes for the confidential disclosure of private interests to the Commissioner, procedures for making Members' summary information public and an advisory role for the Commissioner.

Members must also disclose to the Commissioner any sponsored travel that they accept, for themselves and guests, whose costs exceed \$200. Sponsored travel is travel whose costs are not wholly or substantially paid from the Consolidated Revenue Fund or by Members personally, their political party or any interparliamentary association or friendship group recognized by the House of Commons.

For more information, please see the separate fact sheet on the Conflict of Interest Code for Members of the House of Commons. [*via the footnote*]

ADMINISTRATION OF THE ACT AND THE CODE

The Office of the Conflict of Interest and Ethics Commissioner administers these regimes by:

⁸¹ Link: <https://ciiec-ccie.parl.gc.ca/en/About-APropos/Pages/RoleMandate-RoleMandat.aspx>

- Providing confidential advice to public office holders and Members of the House of Commons on their obligations under the Act and the Code.
- Reviewing confidential reports. Individuals covered by the Act and the Code must make a number of confidential disclosures relating to their assets, liabilities and outside activities. These disclosures help the Office determine relevant compliance measures and provide appropriate advice and guidance.
- Making information available. While disclosures remain confidential, the Office prepares summaries containing general information that are placed in a public registry.
- Investigating possible contraventions of the Act and the Code. Investigations are called "examinations" under the Act and "inquiries" under the Code.
- Reporting to Parliament. The Commissioner reports annually to Parliament through the Speaker of the House of Commons on the administration of the Act and the Code, and prepares an annual list of sponsored travel by Members of the House of Commons. The Commissioner reports on examinations under the Act to the Prime Minister and on inquiries under the Code to the House of Commons. All of these reports are made public.

The Office's activities in support of the administration of the Act and the Code also include working with counterparts across Canada and around the world, exchanging information and sharing best practices, to ensure that the Office remains abreast of issues and developments in the field.

This role is much broader than the role defined for our province's Commissioner for Legislative Standards.

The federal Commissioner's office describes in detail what they do.⁸²

INVESTIGATIONS UNDER THE ACT

Investigations under the Act are called "examinations."

The Commissioner can launch an examination of a possible contravention of the Conflict of Interest Act at the request of a Senator or a Member of the House of Commons who provides reasonable grounds to believe the Act has been contravened. The Commissioner may also consider information from the public that is brought to their attention by a Senator or a Member of the House of Commons.

The Commissioner can also self-initiate an examination where there is reason to believe that the Act has been contravened. Although members of the public cannot request that an examination be conducted, the Commissioner may consider information received from members of the public and other public sources.

The Commissioner issues a public report upon the completion of an examination. When the Commissioner decides to discontinue an examination launched in response to a request from a Senator or Member, a discontinuance report is issued....

The federal Commissioner's Office also describes the history of the office and its predecessor roles.⁸³

HISTORY

The Office of the Conflict of Interest and Ethics Commissioner began operating in its current form in July 2007, when the Conflict of Interest Act came into force. The Act was part of the 2006 Federal Accountability Act. The Office has several predecessors. ...

CHRONOLOGY

PRE-1900s - The Standing Orders established after Confederation prohibit Members of the House of Commons from voting on questions in which they have a direct pecuniary interest.

1900-1969 - Questions are raised regarding votes by Members on matters in which they have a pecuniary interest. Prime Minister Lester Pearson writes ministers about a code of ethics and Prime Minister Pierre Trudeau urges ministers to give up directorships in commercial entities.

⁸² Link: <https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/InvestigationsAct-EnquetesLoi.aspx>

⁸³ Link: <https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/History-Histoire.aspx>

1970s - Conflict of interest guidelines for ministers are developed; they are further strengthened by Prime Minister Joe Clark. The first registry of Cabinet ministers' financial holdings is opened for public inspection. The Office of Assistant Deputy Registrar General (ADRG) is created; David Taylor is appointed Canada's first federal conflict of interest administrator.

1980s - A task force on conflict of interest is appointed. In response to its report, Prime Minister Pierre Trudeau extends conflict of interest guidelines for ministers to their families. Prime Minister Brian Mulroney establishes the Conflict of Interest and Post-Employment Code for Public Office Holders. The Clerk of the House of Commons is required to maintain a registry of sponsored travel by Members.

1990s - Howard Wilson is appointed the first Ethics Counsellor in charge of lobbying and conflict of interest, replacing the ADRG. An Auditor General's report looks at Ethics and Fraud Awareness in Government and Parliament sets up a joint committee to develop a code of conduct. The Office of Public Service Values and Ethics is established.⁸⁴

2000-2005 - The Auditor General recommends that parliamentarians revisit the issue of conflict of interest and a code of conduct. The Conflict of Interest Code for Members of the House of Commons is adopted. It is administered by Dr. Bernard Shapiro, appointed to the new position of Ethics Commissioner.⁸⁵

2006-2010 - The Conflict of Interest Act is passed as part of the Federal Accountability Act under Prime Minister Stephen Harper; it replaces the Conflict of Interest and Post-Employment Code for Public Office Holders. The Office of the Conflict of Interest and Ethics Commissioner is created and Mary Dawson is named the first Conflict of Interest and Ethics Commissioner.

2011-2017 - The Conflict of Interest Act and the Conflict of Interest Code for Members of the House of Commons are reviewed by parliamentary committees. Reflecting the conflict of interest regimes' application to even the most senior government officials, the Office investigates the Prime Minister under both the Act and the Code and releases a public investigation report.

2018-PRESENT - Mario Dion is appointed the second Conflict of Interest and Ethics Commissioner. He retires on February 21, 2023. Prime Minister Justin Trudeau is the subject of two more examination reports released by the Office. A parliamentary committee studies the events surrounding the matter investigated in one of those reports.

The federal Commissioner's Office provides an overview of the federal Code, which differs from our own in its scope and specificity.⁸⁶

Overview of the Conflict of Interest Code for Members of the House of Commons

The Conflict of Interest Code for Members of the House of Commons (Members' Code), administered by the Conflict of Interest and Ethics Commissioner, seeks to prevent conflicts between private interests and the public duties of all 338 Members of the House of Commons. It is appended to the Standing Orders of the House of Commons, the rules under which the House regulates its proceedings.

Members of the House of Commons who are ministers or parliamentary secretaries are also subject to the Conflict of Interest Act.

When performing parliamentary duties and functions, a Member shall not act in any way to further his or her private interests or those of a member of the Member's family, or to improperly further another person's or entity's private interests. (section 8)

⁸⁴ The Office of the Ethics Counsellor was created in 1994 and dissolved in May 2004. The Ethics Counsellor administered the Conflict of Interest and Post-Employment Code for Public Office Holders. <https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/Previous-Precedents.aspx>

⁸⁵ The Office of the Ethics Commissioner was created in 2004 and dissolved in July 2007. The Ethics Commissioner's role was to perform the duties and functions assigned by the House of Commons regarding the conduct of its Members and to administer any ethical principles, rules or obligations established by the prime minister for public office holders. The Ethics Commissioner administered the Conflict of Interest and Post-Employment Code for Public Office Holders, and the Conflict of Interest Code for Members of the House of Commons. <https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/Previous-Precedents.aspx>

⁸⁶ Link: <https://ciec-ccie.parl.gc.ca/en/rules-reglements/Documents/FactSheet/Fact%20Sheet%20-%20Overview%20of%20the%20Code.pdf>

Rules of Conduct

This general rule set out in the Members' Code is complemented by rules that prohibit Members from using their public office to influence a decision and taking advantage of insider information, in order to further their private interests or those of a family member, or to improperly further another person's or entity's private interests.

Members and their families cannot accept any gift or other benefit that might reasonably be seen to have been given to influence the Member in the exercise of a duty or function of his or her office. Gifts and benefits include meal and event invitations, gifts and benefits related to attendance at charitable or political events, and those received from an all-party caucus established in relation to a particular subject or interest. There is an exception to this rule for gifts and benefits received as a normal expression of courtesy or protocol, or that are within the customary standards of hospitality that normally accompany a Member's position.

Private Interests

The concept of "private interest" is the heart of the Members' Code.

The Members' Code does not define "private interest". Instead, it sets out the circumstances where a private interest is considered to be furthered, and those where it is not.

For example, furthering a private interest would include cases where a Member's actions result, directly or indirectly, in outcomes such as an increase in a person's assets or obtaining a business position. A private interest would not be considered to be furthered when the matter in question is of general application or affects the Member or the other person as one of a broad class of the public.

Disclosure Requirements

- **Initial Compliance:** Within 60 days after notice of their election is published in the Canada Gazette, Members must file with the Commissioner a confidential Disclosure Statement describing their assets, liabilities, sources of income and activities outside of Parliament. They must make reasonable efforts to disclose the same information for their spouses or common-law partners and dependent children. The Office of the Conflict of Interest and Ethics Commissioner prepares a disclosure summary based on this information and sends it to the Member, who then has 60 days to review, sign and submit it to the Office. Signed disclosure summaries are placed in the public registry maintained by the Office. Members must also meet a number of ongoing disclosure requirements throughout their term of office.
- **Material Changes:** Any change to the information required in the Disclosure Statement must be disclosed to the Commissioner within 60 days.
- **Gifts and Benefits:** Members must disclose to the Commissioner any gift or benefit with a value of \$200 or more, within 60 days of its acceptance.
- **Sponsored Travel:** Members may accept, for themselves and guests, sponsored travel that arises from or relates to their position. If travel costs exceed \$200 and are not wholly paid from the Consolidated Revenue Fund or by Members personally, their political party or any parliamentary association recognized by the House of Commons, Members must advise the Commissioner of the sponsored travel, within 60 days after the end of the trip. The Commissioner is required to submit to the Speaker of the House of Commons, by March 31 each year, a list of sponsored travel by Members during the previous calendar year. The list is made public.
- **Recusals:** Members are required to disclose the general nature of any private interest that they have that could be affected by a matter that is before the House or a committee to which they belong, and refrain from participating in any debate or vote on the issue. Recusals are included in the public registry under the Members' Code.

- Annual Review: Members must participate in an annual review of the information required in the Disclosure Statement.

Public Registry

The public registry of publicly declarable information under the Members' Code contains current Members' Disclosure Summaries and public statements relating to gifts or other benefits, sponsored travel and material changes.

The registry can be consulted on the Office's website and in printed form at the Office. Documents may be viewed during normal business hours at 66 Slater Street, 22nd floor, in Ottawa, and are also available to the public on request, by mail or fax.

Role of Commissioner

The Conflict of Interest and Ethics Commissioner provides confidential advice to Members on their obligations under the Members' Code, receives their confidential disclosures and reviews the information to ensure that it is complete and accurate, and maintains a public registry of the information that Members must publicly declare.

The Commissioner can also investigate possible contraventions of the Members' Code at the request of a Member, by a resolution of the House of Commons or on the Commissioner's own initiative when there are reasonable grounds to believe that a contravention has occurred. Reports on the Commissioner's inquiries under the Members' Code are made public.

For more information, please see the separate fact sheet on the Role and Mandate of the Conflict of Interest and Ethics Commissioner.

The federal Code itself is defined in the Standing Orders of the House of Commons,⁸⁷ to which we have added emphasis at sections 8-10, 12-13, and 14.

APPENDIX I

CONFLICT OF INTEREST CODE FOR MEMBERS OF THE HOUSE OF COMMONS

Purposes

1.

The purposes of this code are to

- (a) maintain and enhance public confidence and trust in the integrity of members as well as the respect and confidence that society places in the House of Commons as an institution;
- (b) demonstrate to the public that members are held to standards that place the public interest ahead of their private interests and to provide a transparent system by which the public may judge this to be the case;
- (c) provide for greater certainty and guidance for members in how to reconcile their private interests with their public duties and functions; and
- (d) foster consensus among members by establishing common standards and by providing the means by which questions relating to proper conduct may be answered by an independent, non-partisan adviser.

Principles

2.

Given that service in Parliament is a public trust, the House of Commons recognizes and declares that members are expected

- (a) to serve the public interest and represent constituents to the best of their abilities;

⁸⁷ Link: <https://www.ourcommons.ca/procedure/standing-orders/appa1-e.html>

- (b) to fulfill their public duties with honesty and uphold the highest standards so as to avoid real or apparent conflicts of interests, and maintain and enhance public confidence and trust in the integrity of each member and in the House of Commons;
- (c) to perform their official duties and functions and arrange their private affairs in a manner that bears the closest public scrutiny, an obligation that may not be fully discharged by simply acting within the law;
- (d) to arrange their private affairs so that foreseeable real or apparent conflicts of interest may be prevented from arising, but if such a conflict does arise, to resolve it in a way that protects the public interest; and
- (e) not to accept any gift or benefit connected with their position that might reasonably be seen to compromise their personal judgment or integrity except in accordance with the provisions of this code.

Interpretation

3.

Definitions.

(1) The following definitions apply in this code.

"all-party caucus" « caucus multipartite ».

"all-party caucus" means a caucus open to all political parties.

"benefit" « avantage ».

"benefit" means

(a) an amount of money if there is no obligation to repay it; and

(b) a service or property, or the use of property or money that is provided without charge or at less than its commercial value, other than a service provided by a volunteer working on behalf of a member; but does not include a benefit received from a riding association or a political party.

"commissioner" « commissaire ».

"commissioner" means the Conflict of Interest and Ethics Commissioner appointed under section 81 of the Parliament of Canada Act.

"common-law partner" « conjoint de fait ».

"common-law partner", with respect to a member, means a person who is cohabiting with the member in a conjugal relationship, having so cohabited for a period of at least one year.

"spouse" « époux ».

"spouse", with respect to a member, does not include a person from whom the member is separated where all support obligations and family property have been dealt with by a separation agreement or by a court order.

Furthering private interests.

(2) Subject to subsection (3), a member is considered to further a person's private interests, including his or her own private interests, when the member's actions result, directly or indirectly, in any of the following

(a) an increase in, or the preservation of, the value of the person's assets;

(b) the extinguishment, or reduction in the amount, of the person's liabilities;

(c) the acquisition of a financial interest by the person;

(d) an increase in the person's income from a source referred to in subsection 21(2);

(e) the person becoming a director or officer in a corporation, association or trade union; and

(f) the person becoming a partner in a partnership.

Not furthering private interests.

(3) For the purpose of this code, a member is not considered to further his or her own private interests or the interests of another person if the matter in question

(a) is of general application;

(b) affects the member or the other person as one of a broad class of the public;

(b.1) consists of being a party to a legal action relating to actions of the member as a member of Parliament; or

(c) concerns the remuneration or benefits of the member as provided under an act of Parliament.

Family members.

(4) The following are the members of a member's family for the purposes of this code:

- (a) the member's spouse or common-law partner; and
- (b) a son or daughter of the member, or a son or daughter of the member's spouse or common-law partner, who has not reached the age of 18 years or who has reached that age but is primarily dependent on the member or the member's spouse or common-law partner for financial support.

3.1

Interpretation: purposes and principles.

In interpreting and applying members' obligations under this code, the commissioner may have regard to the purposes and principles in sections 1 and 2.

Application

4.

Application to members.

The provisions of this code apply to conflicts of interest of all members of the House of Commons when carrying out the duties and functions of their office as members of the House, including members who are ministers of the Crown or parliamentary secretaries.

5.

Assisting constituents.

A member does not breach this code if the member's activity is one in which members normally and properly engage on behalf of constituents.

6.

Jurisdiction of the Board of Internal Economy.

Nothing in this code affects the jurisdiction of the Board of Internal Economy of the House of Commons to determine the propriety of the use of any funds, goods, services or premises made available to members for carrying out their parliamentary duties and functions.

7.

Activities outside Parliament.

Nothing in this code prevents members who are not ministers of the Crown or parliamentary secretaries from any of the following, as long as they are able to fulfill their obligations under this code:

- (a) engaging in employment or in the practice of a profession;
- (b) carrying on a business;
- (c) being a director or officer in a corporation, association, trade union or non-profit organization; and
- (d) being a partner in a partnership.

Rules of Conduct

8.

Furthering private interests.

When performing parliamentary duties and functions, a member shall not act in any way to further his or her private interests or those of a member of the member's family, or to improperly further another person's or entity's private interests.

9.

Using influence.

A member shall not use his or her position as a member to influence a decision of another person so as to further the member's private interests or those of a member of his or her family, or to improperly further another person's or entity's private interests.

10.

Insider information.

(1) A member shall not use information obtained in his or her position as a member that is not generally available to the public to further the member's private interests or those of a member of his or her family, or to improperly further another person's or entity's private interests.

Information not to be communicated.

(2) A member shall not communicate information referred to in subsection (1) to another person if the member knows, or reasonably ought to know, that the information may be used to further the member's private interests or those of a member of his or her family, or to improperly further another person's or entity's private interests.

11.

Attempts.

A member shall not attempt to engage in any of the activities prohibited under sections 8 to 10.

12.

Disclosure of a private interest: House and committee.

(1) A member who has a private interest that might be affected by a matter that is before the House of Commons or a committee of which the member is a member shall, if present during consideration of the matter, disclose orally or in writing the general nature of the private interest at the first opportunity. The general nature of the private interest shall be disclosed forthwith in writing to the Clerk of the House.

Subsequent disclosure.

(2) If a member becomes aware at a later date of a private interest that should have been disclosed in the circumstances of subsection (1), the member shall make the required disclosure forthwith.

Disclosure recorded.

(3) The Clerk of the House shall cause the disclosure to be recorded in the Journals and shall send the disclosure to the commissioner, who shall file it with the member's public disclosure documents.

Disclosure of a private interest: other circumstances.

(4) In any circumstances other than those in subsection (1) that involve the member's parliamentary duties and functions, a member who has a private interest that might be affected shall disclose orally or in writing the general nature of the private interest at the first opportunity to the party concerned. The member shall also file a notice in writing concerning the private interest with the commissioner, who shall file it with the member's public disclosure documents.

13.

Debate and voting.

A member shall not participate in debate on or vote on a question in which he or she has a private interest.

13.1

Private interest.

For the purpose of sections 12 and 13, "private interest" means those interests that can be furthered in subsection 3(2), but does not include the matters listed in subsection 3(3).

14.

Prohibition: gifts and other benefits.

(1) Neither a member nor any member of a member's family shall accept, directly or indirectly, any gift or other benefit, except compensation authorized by law, that might reasonably be seen to have been given to influence the member in the exercise of a duty or function of his or her office.

(1.1) For greater certainty, subsection (1) applies to gifts or other benefits:

(a) related to attendance at a charitable or political event; and

(b) received from an all-party caucus established in relation to a particular subject or interest.

Exception.

(2) Despite subsection (1), a member or a member of a member's family may accept gifts or other benefits received as a normal expression of courtesy or protocol, or within the customary standards of hospitality that normally accompany the member's position.

Statement: gift or other benefit.

(3) If gifts or other benefits that are related to the member's position are accepted under this section and have a value of \$200 or more, or if the total value of all such gifts or benefits received from one source in a 12-month period is \$200 or more, the member shall, within 60 days after receiving the gifts or other benefits, or after that total value is exceeded, file with the commissioner a statement disclosing the nature of the gifts or other benefits, their source and the circumstances under which they were given.

Exception.

(4) Any disclosure made pursuant to the requirements of section 15 does not need to be disclosed as a gift or other benefit under subsection (3).

15.

Sponsored travel.

(0.1) Despite subsection 14(1), a member may accept, for the member and guests of the member, sponsored travel that arises from or relates to his or her position.

Statement: sponsored travel.

(1) If travel costs exceed \$200 and those costs are not wholly paid from the consolidated revenue fund or by the member personally, his or her political party or any parliamentary association recognized by the House, the member shall, within 60 days after the end of the trip, file a statement with the commissioner disclosing the trip.

Content of statement.

(2) The statement shall disclose the name of the person or organization paying the travel costs, the name of any person accompanying the member, the destination or destinations, the purpose and length of the trip, the nature of the benefits received and the value, including supporting documents for transportation and accommodation.

Publication.

(3) By March 31 of each year, the commissioner shall prepare a list of all sponsored travel for the previous calendar year, including the details set out in subsection (2), and the Speaker shall lay the list upon the table when the House next sits.

16.

Government contracts.

(1) A member shall not knowingly be a party, directly or through a subcontract, to a contract with the Government of Canada or any federal agency or body under which the member receives a benefit unless the commissioner is of the opinion that the contract is unlikely to affect the member's obligations under this code.

Clarification.

(2) A member may participate in a program operated or funded, in whole or in part, by the Government of Canada under which the member receives a benefit if

- (a) the member meets the eligibility requirements of the program;
- (b) the member does not receive any preferential treatment with respect to his or her participation;
- and
- (c) the member does not receive any special benefit not available to other participants.

17.

Public corporations.

(1) A member is not prohibited from owning securities in a public corporation that contracts with the Government of Canada unless the commissioner is of the opinion that the size of the holdings is so significant that it is likely to affect the member's obligations under this code.

Trust.

(2) If the commissioner is of the opinion that the member's obligations under this code are likely to be affected under the circumstances of subsection (1), the member may comply with the code by placing the securities in a trust under such terms established in section 19 as the commissioner considers appropriate.

18.

Partnerships and private corporations.

A member shall not have an interest in a partnership or in a private corporation that is a party, directly or through a subcontract, to a contract with the Government of Canada under which the partnership or corporation receives a benefit unless the commissioner is of the opinion that the interest is unlikely to affect the member's obligations under this code.

19.

Pre-existing contracts.

(1) Sections 16 and 18 do not apply to a contract that existed before the member's election to the House of Commons, but they do apply to its renewal or extension.

Trust.

(2) Section 18 does not apply if the member has entrusted his or her interest in a partnership or in a private corporation that is a party to a contract with the Government of Canada under which the partnership or corporation receives a benefit to one or more trustees on all of the following terms:

- (a) the provisions of the trust have been approved by the commissioner;
- (b) the trustees are at arm's length from the member and have been approved by the commissioner;
- (c) the trustees may not consult with the member with respect to managing the trust, but they may consult with the commissioner;
- (d) the trustees may, however, consult with the member, with the approval of the commissioner and in his or her presence if an extraordinary event is likely to materially affect the trust property;
- (e) in the case of an interest in a corporation, the member shall resign any position of director or officer in the corporation;
- (f) the trustees shall provide the commissioner with a written annual report at the same time as the member files his or her annual disclosure statement setting out the nature of the trust property, the value of that property, the trust's net income for the preceding year and the trustees' fees, if any; and
- (g) the trustees shall give the member sufficient information to permit the member to submit returns as required by the Income Tax Act and give the same information to the Canada Customs and Revenue Agency.

Interest acquired by inheritance.

(3) Sections 16 to 18 do not apply to an interest acquired by inheritance until the first anniversary date of the acquisition.

20.

Disclosure statement.

(1) A member shall file with the commissioner a full statement disclosing the member's private interests and the private interests of the members of the member's family within:

- (i) 60 days after the notice of his or her election to the House of Commons is published in the Canada Gazette; and
- (ii) 60 days after the date established by the commissioner for the annual review.

Extension of time.

(1.1) The commissioner may extend the deadlines referred to in subsection (1) at the request of the member and any reasonable request shall not ordinarily be refused.

Reasonable efforts.

(2) Information relating to the private interests of the members of the member's family shall be to the best of the member's knowledge, information and belief. The member shall make reasonable efforts to determine such information.

Confidentiality.

(3) The commissioner shall keep the statement confidential.

21.

Content of disclosure statement.

(1) The statement shall

(a) identify and state the value of each asset or liability of the member and the members of the member's family that;

(i) in the case of a credit card balance, exceeds \$10,000 and has been outstanding for more than six months;

(ii) in all other cases, exceeds \$10,000;

(b) state the amount and indicate the source of any income greater than \$1,000 that the member and the members of the member's family have received during the preceding 12 months and are entitled to receive during the next 12 months;

(b.1) Notwithstanding paragraph (b), every member shall disclose to the commissioner every trust known to the member from which he or she could, currently or in the future, either directly or indirectly, derive a benefit or income;

(c) state all benefits that the member and the members of the member's family, and any private corporation in which the member or a member of the member's family has an interest, have received during the preceding 12 months, and those that the member and the members of the member's family or corporation are entitled to receive during the next 12 months, as a result of being a party, directly or through a subcontract, to a contract with the Government of Canada, and describe the subject matter and nature of each such contract or subcontract;

(c.1) For the purpose of paragraph (1)(c), benefits include compensation resulting from expropriation by the Government of Canada;

(d) if the statement mentions a private corporation:

(i) include any information about the corporation's activities and sources of income that the member is able to obtain by making reasonable inquiries;

(ii) state the names of any other corporations with which that corporation is affiliated;

(iii) list the names and addresses of all persons who have an interest in the corporation; and

(iv) list the real property or immovables owned by the private corporation.

(e) list the directorships or offices in a corporation, trade or professional association or trade union held by the member or a member of the member's family and list all partnerships in which he or she or a member of his or her family is a partner; and

(f) include any other information that the commissioner may require.

Source of income.

(2) For the purposes of paragraph (1)(b), a source of income is

(a) in the case of income from employment, the employer;

(b) in the case of income from a contract, the party with whom the contract is made; and

(c) in the case of income arising from a business or profession, that business or profession.

Statement: material change.

(3) The member shall file a statement reporting any material change to the information required under subsection (1) to the commissioner within 60 days after the change.

22.

Meeting with the commissioner.

After reviewing a member's statement filed under section 20 or subsection 21(3), the commissioner may require that the member meet with the commissioner, and may request the attendance of any of the members of the member's family, if available, to ensure that adequate disclosure has been made and to discuss the member's obligations under this code.

23.

Disclosure summary.

(1) The commissioner shall prepare a disclosure summary based on each member's statement filed under sections 20 and 21 and submit it to the member for review. Upon receipt of the disclosure summary, the member shall have 60 days to complete the review and submit the signed summary to the commissioner.

Extension of time.

(1.1) The commissioner may extend the deadlines referred to in subsection (1) at the request of the member and any reasonable request shall not ordinarily be refused.

Public inspection.

(2) At the expiry of the period provided for in subsection (1), including an extension granted under subsection (1.1), each summary is to be placed on file at the office of the commissioner and made available for public inspection during normal business hours, and posted on the website of the commissioner. Each summary shall also be available to the public, on request, by fax or mail.

24.

Content of disclosure summary.

(1) The summary shall

- (a) subject to subsection (3), set out the source and nature, but not the value, of the income, assets and liabilities referred to in the member's statement filed under section 20;
- (b) identify any contracts or subcontracts referred to in paragraph 21(1)(c) and describe their subject matter and nature;
- (c) list the names of any affiliated corporations referred to in that statement;
- (d) include a copy of any statements of disclosure filed by the member under subsections 14(3), 15(1) and 21(3);
- (e) list the positions and corporations, trade or professional associations and trade unions disclosed under paragraph 21(1)(e); and
- (f) list any trusts disclosed under paragraph 21(1)(b.1).

Categorization of interests.

(2) An interest in a partnership or corporation may be qualified in the summary by the word "nominal", "significant" or "controlling" if, in the opinion of the commissioner, it is in the public interest to do so.

Items not to be disclosed.

(3) The following shall not be set out in the summary:

- (a) an asset or liability with a value of less than \$10,000;
- (b) a source of income of less than \$10,000 during the 12 months before the relevant date;
- (c) real property or immovables that the member uses as a principal residence or uses principally for recreational purposes;
- (d) personal property or movable property that the member uses primarily for transportation, household, educational, recreational, social or aesthetic purposes;
- (e) cash on hand or on deposit with a financial institution that is entitled to accept deposits;
- (f) fixed-value securities issued or guaranteed by a government or by a government agency;
- (g) a registered retirement savings plan that is not self-administered or self-directed;
- (h) investments in a registered retirement savings plan that is self-administered or self-directed that would not be publicly disclosed under this section if held outside the plan;
- (i) an interest in a pension plan, employee benefit plan, annuity or life insurance policy;
- (j) an investment in an open-ended mutual fund;

- (k) a guaranteed investment certificate or similar financial instrument;
(k.1) any information relating to the place or manner of employment of a son or daughter of the member, or a son or daughter of the member's spouse or common-law partner; and
(l) any other asset, liability or source of income that the commissioner determines should not be disclosed because
(i) the information is not relevant to the purposes of this code, or
(ii) a departure from the general principle of public disclosure is justified in the circumstances.

25.

Evasion.

A member shall not take any action that has as its purpose the circumvention of the member's obligations under this code.

Opinions

26.

Request for opinion.

(1) In response to a request in writing from a member on any matter respecting the member's obligations under this code, the commissioner shall provide the member with a written opinion containing any recommendations that the commissioner considers appropriate.

Confidentiality.

(2) The opinion is confidential and may be made public only by the member, with his or her written consent or if the member has made the opinion public.

Opinion binding.

(3) An opinion given by the commissioner to a member is binding on the commissioner in relation to any subsequent consideration of the subject matter of the opinion so long as all the relevant facts that were known to the member were disclosed to the commissioner.

Publication.

(4) Nothing in this section prevents the commissioner from publishing opinions for the guidance of members, provided that no details are included that could identify the member.

Timely response.

(5) In this section and in any other situation in which a member seeks an opinion from the commissioner, the commissioner shall provide the opinion in a timely manner.

Inquiries

27.

Request for an inquiry.

(1) A member who has reasonable grounds to believe that another member has not complied with his or her obligations under this code may request that the commissioner conduct an inquiry into the matter.

Form of request.

(2) The request shall be in writing, signed, and shall identify the alleged non-compliance and set out the reasonable grounds for that belief.

No public comment.

(2.1) The member who requested that an inquiry be conducted shall make no public comments relating to the inquiry until the commissioner confirms that the member who is the subject of the inquiry has received a copy of the complaint or 14 days have elapsed following the receipt of the request by the commissioner, whichever is earlier.

Direction by the House.

(3) The House may, by way of resolution, direct the commissioner to conduct an inquiry to determine whether a member has complied with his or her obligations under this code.

Notice.

(3.1) The commissioner shall forward without delay the request for an inquiry to the member who is the subject of the request and afford the member 30 days to respond.

Preliminary review.

(3.2) The commissioner shall:

- (a) conduct a preliminary review of the request and the response to determine if an inquiry is warranted; and
- (b) notify in writing both members of the commissioner's decision within 15 working days of receiving the response.

Initiative of commissioner.

(4) If, after giving the member concerned written notice and 30 days to respond to the commissioner's concerns, the commissioner has reasonable grounds to believe that a member has not complied with his or her obligations under this code, the commissioner may, on his or her own initiative, conduct an inquiry to determine whether the member has complied with his or her obligations under this code.

Public comments.

(5.1) The commissioner shall make no public comments relating to any preliminary review or inquiry except to:

- (i) confirm that a request for an inquiry has been received;
- (ii) confirm that a preliminary review or inquiry has commenced or been completed; or
- (iii) describe the reasons for not proceeding with an inquiry where the matter to which the inquiry relates has already been made public.

Non-meritorious requests.

(6) If the commissioner is of the opinion that a request for an inquiry was frivolous or vexatious or was not made in good faith, the commissioner shall so state in dismissing the request in a report under section 28(6) and may recommend that further action be considered against the member who made the request.

Inquiry to be private.

(7) The commissioner shall conduct an inquiry in private and with due dispatch, provided that at all appropriate stages throughout the inquiry the commissioner shall give the member reasonable opportunity to be present and to make representations to the commissioner in writing or in person by counsel or by any other representative.

Cooperation.

(8) Members shall cooperate with the commissioner with respect to any inquiry.

28.

Report to the House.

(1) Forthwith following an inquiry, the commissioner shall report to the Speaker, who shall present the report to the House when it next sits.

Report to be public.

(2) The report of the commissioner shall be made available to the public upon tabling in the House, or, during a period of adjournment or prorogation, upon its receipt by the Speaker.

Report after dissolution.

(3) During the period following a dissolution of Parliament, the commissioner shall make the report public.

No contravention.

(4) If the commissioner concludes that there was no contravention of this code, the commissioner shall so state in the report.

Mitigated contravention.

(5) If the commissioner concludes that a member has not complied with an obligation under this code but that the member took all reasonable measures to prevent the non-compliance, or that the non-compliance was trivial or occurred through inadvertence or an error in judgment made in good faith, the commissioner shall so state in the report and may recommend that no sanction be imposed.

Sanctions.

(6) If the commissioner concludes that a member has not complied with an obligation under this code, and that none of the circumstances in subsection (5) apply, or is of the opinion that a request for an inquiry was frivolous or vexatious or was not made in good faith, the commissioner shall so state in the report and may recommend appropriate sanctions.

Reasons.

(7) The commissioner shall include in the report reasons for any conclusions and recommendations.

General recommendations.

(8) The commissioner may include in his or her report any recommendations arising from the matter that concern the general interpretation of this code and any recommendations for revision of this code that the commissioner considers relevant to its purpose and spirit.

Right to speak.

(9) Within 10 sitting days after the tabling of the report of the commissioner in the House of Commons, the member who is the subject of the report shall have a right to make a statement in the House immediately following question period, provided that he or she shall not speak for more than 20 minutes.

Deemed concurrence.

(10) A motion to concur in a report referred to in subsection (4) or (5) may be moved during Routine Proceedings. If no such motion has been moved and disposed of within 30 sitting days after the day on which the report was tabled, a motion to concur in the report shall be deemed to have been proposed and adopted at the expiry of that time.

Report to be considered.

(11) A motion respecting a report referred to in subsection (6) may be moved during Routine Proceedings, when it shall be considered for no more than two hours, after which the Speaker shall interrupt any proceedings then before the House and put forthwith and successively, without further debate or amendment, every question necessary to dispose of the motion. During debate on the motion, no member shall speak more than once or longer than 10 minutes.

Vote.

(12) If no motion pursuant to subsection (11) has been previously moved and disposed of, a motion to concur in the report shall be deemed to have been proposed on the 30th sitting day after the day on which the report was tabled, and the Speaker shall immediately put every question necessary to dispose of the motion.

Referral back.

(13) At any point before the House has dealt with the report, whether by deemed disposition or otherwise, the House may refer it back to the commissioner for further consideration, with instruction.

29.

Suspension of inquiry.

(1) The commissioner shall immediately suspend the inquiry into a matter if

(a) there are reasonable grounds to believe that the member has committed an offence under an act of Parliament, in which case the commissioner shall notify the proper authorities of the commissioner's belief; or

(b) it is discovered that:

- (i) the act or omission under investigation is also the subject of an investigation to determine if an offence under an act of Parliament has been committed, or
- (ii) a charge has been laid with respect to that act or omission.

Inquiry continued.

(2) The commissioner shall not continue his or her inquiry until the other investigation or the charge regarding the act or omission has been finally disposed of.

Miscellaneous

30.

Guidelines and forms.

(1) The commissioner shall submit any proposed procedural and interpretative guidelines and all forms relating to the code to the Standing Committee on Procedure and House Affairs for approval.

Tabling.

(2) Any guidelines and forms approved by the committee shall be reported to the House and shall come into effect when the report is concurred in by the House.

Confidential until tabled.

(3) Until the guidelines and forms are reported to the House, they shall remain confidential.

31.

Retention of documents.

The commissioner shall retain all documents relating to a member for a period of 12 months after he or she ceases to be a member, after which the documents shall be destroyed unless there is an inquiry in progress under this code concerning them or a charge has been laid against the member under an act of Parliament and the documents may relate to that matter.

31.1

Confidentiality.

Except as otherwise ordered by the House or a court, or as required for the purposes of this code, the commissioner shall keep confidential documents and information received pursuant to this code, including documents and information received in the course of an inquiry that the commissioner suspended in accordance to paragraph 29(1)(a) or documents and information referred to in section 31.

32.

Educational activities.

The commissioner shall undertake educational activities for members and the general public regarding this code and the role of the commissioner.

33.

Committee review.

The Standing Committee on Procedure and House Affairs shall, within every five-year period following the preceding comprehensive review, undertake a comprehensive review of the provisions and operation of this code, and shall submit a report thereon, including a statement of any changes the committee recommends.

34.

Part of the Standing Orders.

This code shall form part of the Standing Orders of the House of Commons.

The federal Commissioner's Office provides a fact sheet on the application of the *Conflict of Interest Act*.⁸⁸ We have added emphasis to certain lines.

OVERVIEW OF THE CONFLICT OF INTEREST ACT

The Conflict of Interest Act, administered by the Conflict of Interest and Ethics Commissioner, seeks to prevent conflicts between private interests and the public duties of appointed government officials, called "public office holders."

Public office holders are in a conflict of interest when they exercise an official power, duty or function that provides an opportunity to further their private interests or those of their relatives or friends, or to improperly further another person's private interests. (section 4)

APPLICATION

The Act applies to some 2,200 public office holders. More than half are part-time members of federal boards, commissions and tribunals or part-time ministerial staff and are subject only to the Act's core set of conflict of interest and post-employment rules. The rest are considered reporting public office holders, and include ministers, parliamentary secretaries and most ministerial staff, as well as Governor in Council appointees such as deputy ministers, heads of Crown corporations and full-time members of federal boards.

Reporting public office holders are subject not only to the Act's general rules but also to its reporting and public disclosure provisions, as well as prohibitions against outside activities and holding controlled assets. Ministers and parliamentary secretaries have additional obligations.

GENERAL DUTIES

All public office holders have a general duty to arrange their private affairs to prevent conflicts of interest, to abstain from making or participating in decisions that would place them in a conflict of interest, and to refrain from taking any action aimed at circumventing the Act.

PROHIBITED ACTIVITIES

All public office holders are prohibited from:

● **Providing preferential treatment to any person or organization based on the identity of the person or organization representing it.**

- Using information that is not available to the public to further private interests.

● **Using their position to influence a decision to further private interests.**

- Being influenced in exercising their duties by offers of outside employment.

● **Accepting any gift or other advantage that might reasonably be seen to have been given to influence them in exercising their official duties.**

- Entering into a contract or employment relationship, in the exercise of their official duties, with a spouse, common-law partner, child, sibling or parent, or permitting the entity for which they work to do so.
- Personally soliciting funds if it places them in a conflict of interest.

⁸⁸ Link: <https://ciec-ccie.parl.gc.ca/en/rules-reglements/Documents/FactSheet/Fact%20Sheet%20-%20Overview%20of%20the%20Act.pdf>

Ministers and parliamentary secretaries, members of their families, ministerial advisers and ministerial staff may not accept travel on a non-commercial chartered or private aircraft unless required in their capacity as public office holders or in exceptional circumstances.

The Act contains broad prohibitions against reporting public office holders engaging in outside employment or other activities, and holding controlled assets. They must divest any controlled assets that they hold upon appointment, either through an arm's-length sale to a third party or by placing them in a blind trust.

RECUSALS

Public office holders must recuse themselves from any discussion, decision, debate or vote if it would place them in a conflict of interest.

CONFIDENTIAL DISCLOSURES

Within 60 days after their appointment, new reporting public office holders must submit to the Commissioner a confidential report describing their assets, liabilities, income and certain activities. They have 120 days from the time of their appointment to complete any compliance measures necessary to ensure they meet their obligations under the Act.

Reporting public office holders have an ongoing obligation throughout their term of office to disclose to the Commissioner any material changes to their disclosure statement. They must also disclose any gifts or other advantages from any one source, other than relatives and friends, that exceed \$200 in value in a 12-month period, within 30 days after acceptance or of the day on which their total value exceeds \$200.

They must disclose to the Commissioner any firm offers of outside employment, within seven days of receiving them, and the acceptance of any offer, within seven days of accepting it.

PUBLIC DECLARATIONS

In addition to their confidential disclosures, reporting public office holders have the obligation to publicly declare certain information.

Within 120 days after their appointment, they must publicly declare all assets that are neither controlled nor exempt.

Throughout their term of office, reporting public office holders must publicly declare any recusals made for reasons of conflict of interest, within 60 days, any acceptable gift or other advantage, other than from a relative or friend, whose value is \$200 or more, within 30 days after acceptance, and any outside activities approved by the Commissioner. Ministers and parliamentary secretaries, their families, and ministerial advisers and staff must publicly declare any travel accepted on non-commercial chartered or private aircraft, within 30 days after acceptance.

The Commissioner maintains a public registry of publicly declarable information under the Act. It includes summary statements based on reporting public office holders' confidential reports, and declarations of gifts, recusals and outside activities.

POST-EMPLOYMENT RESTRICTIONS

All public office holders are prohibited for life from taking improper advantage of a previously held public office, switching sides, and improperly using information obtained in their capacity as public office holders.

There is a cooling-off period of two years for former ministers and one year for other reporting public office holders during which they cannot work for, contract with or make representations before an

entity with which they had direct and significant official dealings during their last year in office. During their two-year cooling-off period, former ministers may not make representations to a current minister who was in cabinet at the same time as they were.

ENFORCEMENT

The Commissioner can impose administrative monetary penalties of up to \$500 for failure to meet certain reporting deadlines.

The Commissioner may order a public office holder to take any compliance measure that the Commissioner determines is necessary.

The Commissioner can also investigate any public office holder or former public office holder at the request of a Member of the Senate or House of Commons, or on the Commissioner's own initiative if there is reason to believe that the person has contravened a specific section of the Act.

For more information, please see the separate fact sheet on the role and mandate of the Conflict of Interest and Ethics Commissioner.

Here are excerpts from the federal *Conflict of Interest Act*, which would apply to the work of the federal Commissioner:⁸⁹

From s.2(1)

public office holder means

- o (a) a minister of the Crown, a minister of state or a parliamentary secretary;
- o (a.1) the Chief Electoral Officer;
- o (b) a member of ministerial staff;
- o (c) a ministerial adviser;
- o (d) a Governor in Council appointee, other than the following persons, namely,
 - . (i) a lieutenant governor,
 - . (ii) officers and staff of the Senate, House of Commons and Library of Parliament,
 - . (iii) a person appointed or employed under the Public Service Employment Act who is a head of mission as defined in subsection 15(1) of the Department of Foreign Affairs, Trade and Development Act,
 - . (iv) a judge who receives a salary under the Judges Act,
 - . (v) a military judge within the meaning of subsection 2(1) of the National Defence Act,
 - . (vi) a Deputy Commissioner of the Royal Canadian Mounted Police, and
 - . (vii) a member of the National Security and Intelligence Committee of Parliamentarians;
- o (d.01) the Parliamentary Budget Officer;
- o (d.1) a ministerial appointee whose appointment is approved by the Governor in Council; and
- o (e) a person or a member of a class of persons if the person or class of persons is designated under subsection 62.1(1) or 62.2(1). (titulaire de charge publique)

From Part 1

PART 1 Conflict of Interest Rules

Marginal note: Conflict of interest

4 For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.

⁸⁹ Link: <https://laws-lois.justice.gc.ca/eng/acts/C-36.65/FullText.html>

Marginal note: General duty

5 Every public office holder shall arrange his or her private affairs in a manner that will prevent the public office holder from being in a conflict of interest.

Marginal note: Decision-making

- 6 (1) No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.

- Marginal note: Abstention from voting

(2) No minister of the Crown, minister of state or parliamentary secretary shall, in his or her capacity as a member of the Senate or the House of Commons, debate or vote on a question that would place him or her in a conflict of interest.

Marginal note: Preferential treatment

7 No public office holder shall, in the exercise of an official power, duty or function, give preferential treatment to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization.

Marginal note: Insider information

8 No public office holder shall use information that is obtained in his or her position as a public office holder and that is not available to the public to further or seek to further the public office holder's private interests or those of the public office holder's relatives or friends or to improperly further or to seek to improperly further another person's private interests.

Marginal note: Influence

9 No public office holder shall use his or her position as a public office holder to seek to influence a decision of another person so as to further the public office holder's private interests or those of the public office holder's relatives or friends or to improperly further another person's private interests.

Marginal note: Offers of outside employment

10 No public office holder shall allow himself or herself to be influenced in the exercise of an official power, duty or function by plans for, or offers of, outside employment.

Marginal note: Gifts and other advantages

- 11 (1) No public office holder or member of his or her family shall accept any gift or other advantage, including from a trust, that might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function.

- Marginal note: Exception

(2) Despite subsection (1), a public office holder or member of his or her family may accept a gift or other advantage

- o (a) that is permitted under the Canada Elections Act;
- o (b) that is given by a relative or friend; or
- o (c) that is received as a normal expression of courtesy or protocol, or is within the customary standards that normally accompany the public office holder's position.

From part 4

PART 4 Administration and Enforcement

Mandate and Powers of the Commissioner

Marginal note: Confidential advice

43 In addition to carrying out his or her other duties and functions under this Act, the Commissioner shall

- (a) provide confidential advice to the Prime Minister, including on the request of the Prime Minister, with respect to the application of this Act to individual public office holders; and
- (b) provide confidential advice to individual public office holders with respect to their obligations under this Act.

Marginal note: Request from parliamentarian

• 44 (1) A member of the Senate or House of Commons who has reasonable grounds to believe that a public office holder or former public office holder has contravened this Act may, in writing, request that the Commissioner examine the matter.

• Marginal note: Content of request

(2) The request shall identify the provisions of this Act alleged to have been contravened and set out the reasonable grounds for the belief that the contravention has occurred.

• Marginal note: Examination

(3) If the Commissioner determines that the request is frivolous or vexatious or is made in bad faith, he or she may decline to examine the matter. Otherwise, he or she shall examine the matter described in the request and, having regard to all the circumstances of the case, may discontinue the examination.

• Marginal note: Information from public

(4) In conducting an examination, the Commissioner may consider information from the public that is brought to his or her attention by a member of the Senate or House of Commons indicating that a public office holder or former public office holder has contravened this Act. The member shall identify the alleged contravention and set out the reasonable grounds for believing a contravention has occurred.

• Marginal note: Confidentiality

(5) If a member of the Senate or House of Commons receives information referred to in subsection (4), the member, while considering whether to bring that information to the attention of the Commissioner, shall not disclose that information to anyone. If the member brings that information to the attention of the Commissioner under that subsection, the member shall not disclose that information to anyone until the Commissioner has issued a report under this section in respect of the information.

• Marginal note: Referral to Speaker

(6) Where the Commissioner is of the opinion that a member of the Senate or House of Commons has failed to comply with the confidentiality provision of subsection (5), the Commissioner may refer the matter, in confidence, to the Speaker of the Senate or House of Commons.

• Marginal note: Report

(7) The Commissioner shall provide the Prime Minister with a report setting out the facts in question as well as the Commissioner's analysis and conclusions in relation to the request. The report shall be provided even if the Commissioner determines that the request was frivolous or vexatious or was made in bad faith or the examination of the matter was discontinued under subsection (3).

• Marginal note: Making report available

(8) The Commissioner shall, at the same time that the report is provided under subsection (7), provide a copy of it to the member who made the request — and the public office holder or former public office holder who is the subject of the request — and make the report available to the public.

• Marginal note: Confidentiality

(9) The Commissioner may not include in the report any information that he or she is required to keep confidential.

Marginal note: Examination on own initiative

- 45 (1) If the Commissioner has reason to believe that a public office holder or former public office holder has contravened this Act, the Commissioner may examine the matter on his or her own initiative.

- Marginal note: Discontinuance

(2) The Commissioner, having regard to all the circumstances of the case, may discontinue the examination.

- Marginal note: Report

(3) Unless the examination is discontinued, the Commissioner shall provide the Prime Minister with a report setting out the facts in question as well as the Commissioner's analysis and conclusions.

- Marginal note: Making report available

(4) The Commissioner shall, at the same time that the report is provided under subsection (3) to the Prime Minister, provide a copy of it to the public office holder or former public office holder who is the subject of the report and make the report available to the public.

Marginal note: Presentation of views

46 Before providing confidential advice under paragraph 43(a) or a report under section 44 or 45, the Commissioner shall provide the public office holder or former public office holder concerned with a reasonable opportunity to present his or her views.

Marginal note: Conclusion in report final

47 A conclusion by the Commissioner set out in a report under section 44 or 45 that a public office holder or former public office holder has or has not contravened this Act may not be altered by anyone but is not determinative of the measures to be taken as a result of the report.

Marginal note: Powers

- 48 (1) For the purposes of paragraph 43(a) and sections 44 and 45, the Commissioner has the power to summon witnesses and require them

- o (a) to give evidence — orally or in writing — on oath or, if they are persons entitled to affirm in civil matters, on affirmation; and

- o (b) to produce any documents and things that the Commissioner considers necessary.

- Marginal note: Enforcement

(2) The Commissioner has the same power to enforce the attendance of witnesses and to compel them to give evidence as a court of record in civil cases.

- Marginal note: Powers exercised in private

(3) The powers referred to in subsections (1) and (2) shall be exercised in private.

- Marginal note: Inadmissibility

(4) Information given by a person under this section is inadmissible against the person in a court or in any proceeding, other than in a prosecution of the person for an offence under section 131 of the Criminal Code (perjury) in respect of a statement made to the Commissioner.

By contrast, this province's Member's Code of Conduct is somewhat vague and pertains specifically to Members acting in their roles as Members, not expressly in governmental roles.⁹⁰

CODE OF CONDUCT FOR MEMBERS OF THE HOUSE OF ASSEMBLY

A Code of Conduct for Members of the House of Assembly was developed by the Standing Committee on Privileges and Elections as directed by section 35 of the House of Assembly Accountability, Integrity and Administration Act, and passed by a resolution of the House on May 26, 2008. It was amended by resolution of the House on December 2, 2019.

The Code is the standard by which all Members agree to govern themselves in carrying out their responsibilities as elected officials. As a part of the oath of office, all Members agree to follow this Code of Conduct before being permitted to take their seat.

Code of Conduct

Commitments:

Members of this House of Assembly recognize that we are responsible to the people of Newfoundland and Labrador and will responsibly execute our official duties in order to promote the human, environmental and economic welfare of Newfoundland and Labrador.

Members of this House of Assembly respect the law and the institution of the Legislature and acknowledge our need to maintain the public trust placed in us by performing our duties with accessibility, accountability, courtesy, honesty and integrity.

Principles:

1. Members shall inform themselves of and shall conduct themselves in accordance with the provisions and spirit of the Standing Orders of the House of Assembly, the House of Assembly Accountability, Integrity and Administration Act, the Members' Resources and Allowances Rules, the Elections Act, 1991, the House of Assembly Act and this Code of Conduct and shall ensure that their conduct does not bring the integrity of their office or the House of Assembly into disrepute.
2. It is a fundamental objective of their holding public office that Members serve their fellow citizens with integrity in order to improve the economic and social conditions of the people of the province.
3. Members reject political corruption and refuse to participate in unethical political practices which tend to undermine the democratic traditions of our province and its institutions.
4. Members will act lawfully and in a manner that will withstand the closest public scrutiny. Neither the law nor this code is designed to be exhaustive and there will be occasions on which Members will find it necessary to adopt more stringent norms of conduct in order to protect the public interest and to enhance public confidence and trust.
5. Members will not engage in personal conduct that exploits for private reasons their positions or authorities or that would tend to bring discredit to their offices.
6. Members will carry out their official duties and arrange their private financial affairs in a manner that protects the public interest and enhances public confidence and trust in government and in high standards of ethical conduct in public office.
7. Members will base their conduct on a consideration of the public interest. They are individually responsible for preventing conflicts of interest and will endeavour to prevent them from arising. Members will take all reasonable steps to resolve any such conflict quickly and in a manner which is in the best interests of the public.

⁹⁰ Link: <https://assembly.nl.ca/Members/MembersCodeOfConduct.aspx>

8. In performing their official duties, Members will apply public resources prudently and only for the purposes for which they are intended.
9. Members will not use official information which is not in the public domain, or information obtained in confidence in the course of their official duties, for personal gain or the personal gain of others.
10. Members should have regard to the duty of public service employees to remain politically impartial when carrying out their duties.
11. Members should promote and support these principles by leadership and example.
12. This Code of Conduct has a continuing effect except as amended or rescinded by resolution of the House of Assembly.

Members may be investigated under the *House of Assembly Act*, as these excerpts from the Act describe:

Commissioner's opinion on referred question

42. (1) A member who has reasonable grounds to believe that another member is in contravention of this Part or a code of conduct may, by application in writing setting out the grounds for the belief and the nature of the contravention alleged, request that the commissioner give an opinion respecting the compliance of the other member with the provisions of this Part or a code of conduct.
- (2) The commissioner, on his or her own initiative, may conduct an inquiry to determine whether a member has failed to fulfil an obligation under this Part or a code of conduct when in the opinion of the commissioner it is in the public interest to do so.
- (3) The House of Assembly may, by resolution, request that the commissioner give an opinion on a matter respecting the compliance of a member with the provisions of this Part or a code of conduct.
- (4) The Premier may request that the commissioner give an opinion on a matter respecting the compliance of a minister with the provisions of this Part or a code of conduct.
- (5) Where a matter has been referred to the commissioner under subsection (1) or (3), the House of Assembly or a committee of the House of Assembly shall not conduct an inquiry into the matter.

Inquiry

43. (1) Upon receiving a request under subsection 42(1), (3) or (4), or where the commissioner decides to conduct an inquiry under subsection 42(2), and on giving the member concerned reasonable notice, the commissioner may conduct an inquiry.
- (2) Where the commissioner conducts an inquiry under subsection (1), the commissioner shall give the member to whom the inquiry relates a copy of the request and at all appropriate stages throughout the inquiry the commissioner shall give the member reasonable opportunity to be present and to make representations to the commissioner in writing or in person or by counsel or other representative.
- (3) Where the commissioner decides to conduct an inquiry under subsection (1), the commissioner has all the powers of a commissioner under the Public Enquiries Act.
- (4) Where the commissioner determines that the subject-matter of an inquiry conducted by him or her is under investigation by police or is the subject-matter of criminal proceedings, the commissioner shall hold the inquiry in abeyance pending final disposition of that investigation or those proceedings.
- (5) Where during the course of an inquiry the commissioner determines that there are reasonable grounds to believe that an offence contrary to an Act of the province or the Parliament of Canada has been committed, the commissioner shall immediately refer the matter to the appropriate authorities and hold the inquiry in abeyance pending final disposition of a resulting investigation and proceedings.

Report

44. (1) Where the request for an opinion is made under subsection 42(1) or (3), or where the commissioner conducts an inquiry under subsection 42(2), the commissioner shall report his or her opinion to the Speaker of the Assembly who shall present the report to the House of Assembly within 15 sitting days of receiving it if it is in session or, if not, within 15 sitting days of the beginning of the next session.
- (2) Where the request for an opinion is made under subsection 42(4), the commissioner shall report his or her opinion to the Premier.
- (3) In all cases, the commissioner shall report the results of an inquiry to the member concerned.
- (4) The commissioner shall report the results of an inquiry as soon as possible, and in any event no later than 90 days after beginning the inquiry.

They may also be investigated under parallel sections of the *House of Assembly Accountability, Integrity and Administration Act*, as the following sections indicate:

Request for opinion

36. (1) A member who has reasonable grounds to believe that another member is in contravention of the code of conduct adopted under subsection 35 (1) may, by application in writing setting out the grounds for the belief and the nature of the

alleged contravention, request that the commissioner give an opinion respecting the compliance of the other member with the provisions of the code of conduct.

(2) The commissioner, on his or her own initiative, may conduct an inquiry to determine whether a member has failed to fulfil an obligation under the code of conduct where in the opinion of the commissioner it is in the public interest to do so.

(3) The House of Assembly may, by resolution, request that the commissioner give an opinion on a matter respecting the compliance of a member with the code of conduct.

(4) [Rep. by 2020 c2 s3]

(5) Where a matter has been referred to the commissioner under subsection (1) or (3), the House of Assembly or a committee of the House of Assembly shall not conduct an inquiry into the matter until the commissioner has completed his or her work.

Inquiry

37. (1) Upon receiving a request under subsection 36 (1), (3) or (4), or where the commissioner decides to conduct an inquiry under subsection 36 (2), and on giving the member concerned reasonable notice, the commissioner may conduct an inquiry.

(2) Where the commissioner conducts an inquiry under subsection (1), he or she shall give the member to whom the inquiry relates a copy of the request and at all appropriate stages throughout the inquiry the commissioner shall give the member reasonable opportunity to be present and to make representations to the commissioner in writing or in person or by counsel or other representative.

(3) Where the commissioner conducts an inquiry under subsection (1), he or she has all the powers of a commissioner under the Public Inquiries Act, 2006.

(4) Where the commissioner determines that the subject-matter of an inquiry conducted by him or her is under investigation by police or is the subject-matter of criminal proceedings, the commissioner shall hold the inquiry in abeyance pending final disposition of that investigation or those proceedings if, in his or her opinion, the continuation of the inquiry would inappropriately interfere with the investigation or proceeding.

(5) Where during the course of an inquiry the commissioner determines that there are reasonable grounds to believe that an offence contrary to an Act of the province or the Parliament of Canada has been committed, the commissioner shall immediately refer the matter to the appropriate authorities and hold the inquiry in abeyance pending final disposition of a resulting investigation and proceedings.

Report

38. (1) Where a request for an opinion is made under subsection 36 (1) or (3), or where the commissioner conducts an inquiry under subsection 36 (2), he or she shall report his or her opinion to the commission which shall present the report to the House of Assembly within 15 sitting days of receiving it if it is in session or, if not, within 15 sitting days of the beginning of the next session.

(2) [Rep. by 2020 c2 s4]

(3) In all cases, the commissioner shall report the results of an inquiry to the member concerned.

(4) The commissioner shall report the results of an inquiry as soon as possible, and in any event no later than 90 days after beginning the inquiry.

This province also has a *Conflict of Interest Act, 1995*, the provisions of which are inferior to those of federal legislation. Here are some excerpts from that Act.

Interpretation

2. (1) In this Act

(a.1) "commissioner" means the Commissioner for Legislative Standards appointed under the House of Assembly Act ;

(g) "public office holder" means a person who receives a salary or other remuneration, in whole or in part, from money voted by the legislature and includes a person employed by

(i) an agent of the Crown, designated by statute, or

(ii) a person or body not otherwise an agent of the Crown but carrying out a function on behalf of, or a function that is usually carried out by, the Crown who or which is considered to be an agent for the purpose of this Act by order of the Lieutenant-Governor in Council;

Conflict of Interest Advisory Committee

14. (1) The Lieutenant-Governor in Council shall appoint a Conflict of Interest Advisory Committee.

(2) The committee shall

(a) comprise 5 persons, an official of the Public Service Commission, a senior official of the Department of Justice and 3 other persons representing government departments and agencies of government;

(b) monitor the administration and enforcement of this Act to ensure consistency of application to public office holders;

(c) advise deputy ministers and chief operating officers on their duties under this Act;

(d) advise a head of an agency or deputy minister as to whether a public office holder is in a conflict of interest;

(e) have the duty to educate public office holders as to what constitutes a conflict of interest; and

(f) certify whether an interest is an excluded private interest.

(3) The committee members shall choose a chairperson from amongst themselves.

Disclosure

15. (1) A public office holder who proposes to undertake an activity that may contravene this Act, or who becomes aware that an activity that he or she has already undertaken, may contravene this Act shall disclose in writing full particulars of the activity to his or her deputy minister or chief operating officer.

(2) The deputy minister or chief operating officer shall decide whether or not an activity proposed to be engaged in or engaged in by a public office holder is prohibited under this Act and that public office holder shall comply with the decision of the deputy minister or chief operating officer.

Determination of issue

16. (1) A question concerning whether a public office holder has failed to fulfil an obligation under this Act shall be determined by his or her minister, deputy minister or chief operating officer, whichever is appropriate.

(2) Where the minister, deputy minister or chief operating officer responsible for a department, agency, board or commission determines that a public office holder has failed to fulfil an obligation under this Act the minister, deputy minister or chief operating officer may

- (a) reprimand the public office holder; or
- (b) decide that the public office holder
 - (i) divest himself or herself of the interest,
 - (ii) place the interest in trust in a manner approved by the minister, deputy minister or chief operating officer,
 - (iii) quit the employment, office or position outside his or her public office, and
 - (iv) be transferred to another position,

and the public office holder shall comply with the decision of the minister, deputy minister or chief operating officer.

(3) The minister or the deputy minister of the relevant department or the chief operating officer or an agency may consult with the committee to ascertain whether a public office holder is in a conflict of interest situation.

PART IV APPEALS

Appeals

17. (1) A public office holder may appeal from a decision taken under section 15 or 16 within 30 days of the decision being communicated to the public office holder.

(2) An appeal from a determination under section 16(1)

- (a) by a public office holder other than political staff, chief operating officer or deputy minister is to the commissioner; and
- (b) by political staff, chief operating officer or deputy minister is to the Trial Division.

Disciplinary measures

18. Where an appeal under section 17 upholds a decision of a minister, deputy minister or chief operating officer under section 16, and the public office holder fails to comply with the decision of the minister, deputy minister or chief operating officer, he or she may

- (a) reprimand the public office holder;
- (b) suspend the public office holder;
- (c) order the public office holder to make restitution or compensation; or
- (d) recommend to the Lieutenant-Governor in Council the dismissal of the public office holder.

Post-office employment

19. (1) A person who within the previous year was a public office holder or a corporation or other entity in which the person holds 10% or more of the shares or of which the person is an employee, director or partner shall not enter into a contract with or receive a benefit from a department of government, or an agency of the Crown with which he or she was employed within the previous year.

(2) Notwithstanding subsection (1) a deputy minister or chief operating officer of an agency may, after consultation with the committee, grant the public office holder a waiver or variance.

(3) Notwithstanding subsections (1) and (2), where the public office holder referred to in subsection (1) is a political staff member, a deputy minister or a chief operating officer of an agency, the Lieutenant-Governor in Council may grant that public office holder a waiver or variance.

(4) Subsection (1) does not apply to a contract awarded by public tender or by another method of contracting under which no special preference or treatment was given because the person to whom it was awarded was, within the previous year, a public office holder, or because the corporation or other entity to which it was awarded is one in which the person holds 10% or more of the shares or of which he or she is an employee, director or partner.

(5) Except in accordance with a waiver or variance granted by a deputy minister or chief operating officer or the Lieutenant-Governor in Council, a person who was a public office holder shall not, within one year after ceasing to be a public office holder, make representations to or otherwise have dealings with a department or entity for which the former public office holder was responsible during the last year of service in that office.

(6) A person who was a public office holder shall not advise or represent a person or entity, in return for a fee or other benefit, concerning a proceeding, transaction, negotiation or case to which the government of the province is a party, and in respect of which the former public office holder acted for or advised the government of the province while in office, where the matter might result in the conferring of a benefit of a commercial or private nature on a person, or a benefit of another nature on a person or class of persons that is other than the general public or a broad class.

In brief, comparing the federal and provincial commissioners in terms of their current scopes of responsibilities, powers and reporting protocols:

Scope of Responsibilities

Federal Commissioner

The person against whom a complaint is made must be subject to one or both of the regimes the commissioner administers: the *Conflict of Interest Act* for public office holders, and the Conflict of Interest Code for MPs. The Act applies to ministers, parliamentary secretaries, ministerial staff and Governor-in-Council appointees. The Code applies to Members of Parliament (but not to their staff).

Provincial Commissioner

The provincial commissioner has responsibilities under three provincial statutes. The *House of Assembly Act* and the *House of Assembly Accountability, Integrity and Administration Act* pertain only to elected MHAs. The commissioner's role under the *Conflict of Interest Act, 1995* is very limited and comes into play only when certain public office holders want to appeal a decision by a minister, deputy minister or CEO that the public office holder has failed to fulfil an obligation.

Powers

Federal Commissioner

The commissioner can launch an examination of a possible contravention of the Conflict of Interest Act at the request of a Senator or MP, or based on information from the public that is brought to their attention by a Senator or MP, and can self-initiate an examination related to information received from members of the public and other public sources. The commissioner can also investigate possible contraventions of the Code at the request of a Member, by a resolution of the Commons or on the commissioner's own initiative when there are reasonable grounds to believe that a contravention has occurred. Reports on the commissioner's inquiries under the Code are made public. The commissioner reports annually to parliament through the Speaker on the administration of the Act and the Code, and prepares an annual list of sponsored travel by MPs. The commissioner reports on examinations under the Act to the Prime Minister and on inquiries under the Code to the House of Commons. All of these reports are made public.

Provincial Commissioner

The commissioner can self-initiate an investigation or be requested by certain others to initiate an investigation relate to an MHA's compliance with the code of conduct or the provisions on public disclosure and conflict of interest. Regarding conflict of interest for other office holders, the initial decision on compliance comes from the minister, deputy minister or CEO, and may be based on advice – NOT from the "commissioner" – but from the Cabinet-appointed Conflict of Interest Advisory Committee (which is 5 persons: an official of the Public Service Commission, a senior official of the Department of Justice and 3 other persons representing government departments and agencies of government). If such a decision is appealed by a public office holder other than political staff, CEO or deputy minister, the appeal is to the commissioner. There seems to be no broad power to self-initiate an examination.

Reporting Protocols

Federal Commissioner

The commissioner issues a public report after completing the examination, or a discontinuance report after deciding to discontinue the examination. Their office maintains a public registry of publicly declarable information under the *Conflict of Interest Act* and the Conflict of Interest Code for MPs. The registry is a searchable database.

Provincial Commissioner

The commissioner's investigative reports on alleged breaches of the code by members may go to the Speaker or the Management Commission for tabling in the House. Public Disclosure Statements of

members are on file in the Commissioner's office for public inspection. If there are conflict of interest appeals by officials, the number of appeals is stated in the annual report. In recent years, there have been 1 or 2 or none.

This is the moment to establish a broader Newfoundland and Labrador Office of the Ethics Commissioner, and this review is the ideal platform for giving this recommendation the gravitas it deserves.

In summary on this part, the Statutory Office of the Commissioner for Legislative Standards and Ethics Commissioner should remain a stand-alone Statutory Office with a full-time principal who is not shouldered with the responsibilities of another Statutory Office. The role and mandate of the Commissioner should be expanded to parallel that of the federal Conflict of Interest and Ethics Commissioner, and the title of the Office and Officer should be changed accordingly. To the extent that this revised role duplicates the work of other offices overseeing conflicts of interest, changes should be made to ensure the responsibility rests with the new provincial Conflict of Interest and Ethics Commissioner.

Bullet #3: Full- or Part-Time Statutory Officers

Bullet #3 regards: "Whether each Statutory Office requires the dedication of a full-time statutory officer or whether it could be part-time or on an as-needed basis."

Our recommendations regarding this bullet were provided in our response to Bullet #2.

There are strong reasons for having full-time Statutory Officers in all six of the offices under the current review, these being:

- the Commissioner for Legislative Standards / Ethics Commissioner;
- the Chief Electoral Officer;
- the Child and Youth Advocate;
- the Citizens' Representative;
- the Information and Privacy Commissioner; and
- the Seniors' Advocate

All six have hefty workloads and significant obligations that require their early attention and dedication throughout the year and throughout their terms of office.

To take a Statutory Officer away from their role for part of the year or part of their term would be to erode the proper functioning of the office, to deprive the people of the province of their dedicated services when they are required, to risk undermining the integrity of these offices of the people's House, and to relieve the government of the scrutiny and accountability that these Statutory Officers were established to enforce.

The government should not be relieved of the pressure that these Statutory Offices and their principals impose on the government's activities. To do so would be to erode transparency, accountability and people's confidence in their governing institutions. This is not a time to take a step back from accountability. It should be made clear that the current review must not be misused to excuse any efforts by the government to escape the proper scrutiny of Statutory Offices.

In summary, each of the six Statutory Offices under the current review requires the dedication of a full-time Statutory Officer.

Bullet #4: From Recruitment to Removal

Bullet #4 regards: "How each statutory officer should be recruited, appointed, re-appointed, compensated, disciplined, and removed from office."

Regarding recruitment and appointment,

currently, for five of the six Statutory Offices under the current review (excepting the Information and Privacy Commissioner), the respective pieces of legislation do not define the recruitment and appointment processes other than to say: "On resolution of the House of Assembly, the Lieutenant-Governor in Council shall appoint" the Statutory Officer.

The processes for recruiting and appointing all six of the Statutory Offices under the current review should parallel the process currently in place for the Information and Privacy Commissioner, as defined in section 85 of the *Access to Information and Protection of Privacy Act, 2015*, which states:

<p>85. (1) The office of the Information and Privacy Commissioner is continued.</p> <p>(2) The office shall be filled by the Lieutenant-Governor in Council on a resolution of the House of Assembly.</p> <p>(3) Before an appointment is made, the Speaker shall establish a selection committee comprising</p> <p>(a) the Clerk of the Executive Council or his or her deputy;</p> <p>(b) the Clerk of the House of Assembly or, where the Clerk is unavailable, the Clerk Assistant of the House of Assembly;</p> <p>(c) the Chief Judge of the Provincial Court or another judge of that court designated by the Chief Judge; and</p> <p>(d) the President of Memorial University or a vice-president of Memorial University designated by the President.</p> <p>(4) The selection committee shall develop a roster of qualified candidates and in doing so may publicly invite expressions of interest for the position of commissioner.</p> <p>(5) The selection committee shall submit the roster to the Speaker of the House of Assembly.</p> <p>(6) The Speaker shall</p> <p>(a) consult with the Premier, the Leader of the Official Opposition and the leader or member of a registered political party that is represented on the House of Assembly Management Commission; and</p> <p>(b) cause to be placed before the House of Assembly a resolution to appoint as commissioner one of the individuals named on the roster.</p>

Statutory Office holders should hold their offices for a period that is longer than the longest General Assembly (i.e., more than five years), so they have the security of tenure required for them to engage in the challenging work of holding the government to account without being unduly vulnerable to the aggressive overreach of a vindictive administration.

Currently, the term of appointment

- for the Commissioner for Legislative Standards is 6 years under subsection 34(4) of the *House of Assembly Act*;
- for the Chief Electoral Officer is 6 years under subsection 5.2(1) of the *Elections Act, 1991*;
- for the Child and Youth Advocate is 6 years under subsection 6(1) of the *Child and Youth Advocate Act*;
- for the Citizens' Representative is 6 years under subsection 5(1) of the *Citizens' Representative Act*;
- for the Seniors' Advocate is 6 years under subsection 6(1) of the *Seniors' Advocate Act*;
- and for the Information and Privacy Commissioner is 6 years under subsection 87(1) of the *Access to Information and Protection of Privacy Act, 2015*.

A term of 6 years seems reasonable for each Statutory Officer.

Regarding reappointment,

the House should have the discretion to re-appoint a Statutory Officer who Members believe is doing a good job in that role.

Currently,

- under subsection 34(4) of the *House of Assembly Act*, the Commissioner for Legislative Standards may be reappointed for a second term of 6 years, but shall not hold office for more than 2 terms;
- under subsection 5.2(1) of the *Elections Act, 1991*, the Chief Electoral Officer may be reappointed for a second term of 6 years, but shall not hold office for more than 2 terms;
- under subsection 6(1) of the *Child and Youth Advocate Act*, the Child and Youth Advocate may be reappointed for a second term of 6 years, but shall not hold office for more than 2 terms;
- under subsection 5(1) of the *Citizens' Representative Act*, the Citizens' Representative may be reappointed for a second term of 6 years, but shall not hold office for more than 2 terms;
- under subsection 6(1) of the *Seniors' Advocate Act*, the Seniors' Advocate may be reappointed for a second term of 6 years, but shall not hold office for more than 2 terms;
- and under subsection 87(2) of the *Access to Information and Protection of Privacy Act, 2015*:
"The Lieutenant-Governor in Council may, with the approval of a majority of the members on the government side of the House of Assembly and separate approval of a majority of the members on the opposition side of the House of Assembly, re-appoint the [Information and Privacy] commissioner for one further term of 6 years."

The requirement established for the reappointment of the Information and Privacy Commission – that there must be majority votes of both the government side and the opposition side of the House – should be replicated for all Statutory Officers. Specifically, each law should be amended to state: "The Lieutenant-Governor in Council may, with the approval of a majority of the members on the government side of the House of Assembly and separate approval of a majority of the members on the opposition side of the House of Assembly, re-appoint the [Statutory Officer] for one further term of 6 years."

Regarding compensation,

the processes should remain as they currently are, although the legislation pertaining to the Seniors' Advocate should be updated to refer to the *Public Service Pensions Act, 2019*.

Below are the relevant excerpts from the respective laws pertaining to the Statutory Officers under review.

Compensation for the Commissioner for Legislative Standards is defined in the *House of Assembly Act* as follows:

- 34.**(11) The commissioner shall be paid a salary fixed by the Lieutenant-Governor in Council after consultation with the House of Assembly Management Commission.
- (12) The salary of the commissioner shall not be reduced except on resolution of the House of Assembly.
- (13) The commissioner is subject to the *Public Service Pensions Act, 2019* where he or she was subject to that Act before his or her appointment as commissioner.
- (14) Where the commissioner was not subject to the *Public Service Pensions Act, 2019* before his or her appointment as commissioner, he or she shall be paid, for contribution to a registered retirement savings plan, an amount equivalent to the amount which he or she would have contributed to the Public Service Pension Plan were the circumstances in subsection (13) applicable.
- (15) The commissioner is eligible to receive the same benefits as a deputy minister, with the exception of a pension where subsection (14) applies.

Compensation for the Chief Electoral Officer is defined in the *Elections Act, 1991* as follows:

Salary, pension and benefits

- 6.** (1) The Chief Electoral Officer shall be paid a salary fixed by the Lieutenant-Governor in Council after consultation with the House of Assembly Management Commission.
- (2) The salary of the Chief Electoral Officer shall not be reduced except on resolution of the House of Assembly.
- (3) The Chief Electoral Officer is subject to the *Public Service Pensions Act, 2019* where he or she was subject to that Act before his or her appointment as Chief Electoral Officer .
- (4) Where the Chief Electoral Officer was not subject to the *Public Service Pensions Act, 2019* before his or her appointment as Chief Electoral Officer , he or she shall be paid, for contribution to a registered retirement savings plan, an amount equivalent to the amount which he or she would have contributed to the Public Service Pension Plan were the circumstances in subsection (3) applicable.
- (5) The Chief Electoral Officer is eligible to receive the same benefits as a deputy minister, with the exception of a pension where subsection (4) applies.

Compensation for the Child and Youth Advocate is defined in the *Child and Youth Advocate Act* as follows:

Salary, pension and benefits

- 9.** (1) The advocate shall be paid a salary fixed by the Lieutenant-Governor in Council after consultation with the House of Assembly Management Commission.
- (2) The salary of the advocate shall not be reduced except on resolution of the House of Assembly.
- (3) The advocate is subject to the *Public Service Pensions Act, 2019* where the advocate was subject to that Act before the appointment as advocate.
- (4) Where the advocate was not subject to the *Public Service Pensions Act, 2019* before appointment as advocate, the advocate shall be paid, for contribution to a registered retirement savings plan, an amount equivalent to the amount which the advocate would have contributed to the Public Service Pension Plan were the circumstances in subsection (3) applicable.
- (5) The advocate is eligible to receive the same benefits as a deputy minister, with the exception of a pension where subsection (4) applies.

Compensation for the Citizens' Representative is defined in the *Citizens' Representative Act* as follows:

Salary, pension and benefits

- 8.** (1) The Citizens' Representative shall be paid a salary fixed by the Lieutenant-Governor in Council after consultation with the House of Assembly Management Commission.
- (2) The salary of the Citizens' Representative shall not be reduced except on resolution of the House of Assembly.
- (3) The Citizens' Representative is subject to the *Public Service Pensions Act, 2019* where he or she was subject to that Act before his or her appointment as Citizens' Representative.
- (4) Where the Citizens' Representative was not subject to the *Public Service Pensions Act, 2019* before his or her appointment as Citizens' Representative, he or she shall be paid, for contribution to a registered retirement savings plan, an

amount equivalent to the amount which he or she would have contributed to the Public Service Pension Plan were the circumstances in subsection (3) applicable.

(5) The Citizens' Representative is eligible to receive the same benefits as a deputy minister, with the exception of a pension where subsection (4) applies.

Compensation for the Seniors' Advocate is defined in the *Seniors' Advocate Act* as follows:

Salary, pension and benefits

10. (1) The advocate shall be paid a salary fixed by the Lieutenant-Governor in Council after consultation with the House of Assembly Management Commission.

(2) The salary of the advocate shall not be reduced except on resolution of the House of Assembly.

(3) The advocate is subject to the *Public Service Pensions Act, 1991* where he or she was subject to that Act before his or her appointment as advocate.

(4) Where the advocate was not subject to the *Public Service Pensions Act, 1991* before his or her appointment as advocate, he or she shall be paid, for contribution to a registered retirement savings plan, an amount equivalent to the amount which he or she would have contributed to the Public Service Pension Plan were the circumstances in subsection (3) applicable.

(5) The advocate is eligible to receive the same benefits as a deputy minister, with the exception of a pension where subsection (4) applies.

Compensation for the Information and Privacy Commissioner is defined in the *Access to Information and Protection of Privacy Act, 2015*, as follows:

Salary, pension and benefits

90. (1) The commissioner shall be paid a salary fixed by the Lieutenant-Governor in Council after consultation with the House of Assembly Management Commission.

(2) The salary of the commissioner shall not be reduced except on resolution of the House of Assembly.

(3) The commissioner is subject to the *Public Service Pensions Act, 2019* where he or she was subject to that Act prior to his or her appointment as commissioner.

(4) Where the commissioner is not subject to the *Public Service Pensions Act, 2019* prior to his or her appointment as commissioner, he or she shall be paid, for contribution to a registered retirement savings plan, an amount equivalent to the amount which he or she would have contributed to the Public Service Pension Plan were the circumstances in subsection (3) applicable.

(5) The commissioner is eligible to receive the same benefits as a deputy minister, with the exception of a pension where subsection (4) applies.

Regarding discipline or removal from office,

we strongly urge caution in this regard. The executive branch must not be unduly empowered to silence a Statutory Officer whose legitimate work is irritating for the government in office. It must not be provided with defences or excuses that would allow it to improperly muzzle a Statutory Officer of the House in the guise of taking disciplinary action.

Currently, provisions for the disciplining (suspension) and removal from office of a Statutory Officer require the matter to be brought before the House of Assembly (eventually) for an open debate and a vote of Members. Although a majority government would still have the power to enforce its will, the transparency of an open debate in the House would serve as a check on forceful overreach. People would see what is going on.

To quote Mr. Justice Green, a Statutory Officer is “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.”⁹¹

Below are the relevant provisions regarding the Statutory Officers under the current review.

Regarding the Commissioner for Legislative Standards, the provisions are in the *House of Assembly Act*:

34. (6) 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 commissioner from office because of an incapacity to act or for misconduct, cause or neglect of duty.

(7) When the House of Assembly is not sitting, the Lieutenant-Governor in Council may suspend the commissioner because of an incapacity to act or for misconduct, cause or neglect of duty but the suspension shall not continue in force beyond the end of the next sitting of the House of Assembly.

(8) The Lieutenant-Governor in Council may, on the recommendation of the House of Assembly Management Commission, appoint an acting commissioner if

- (a) the commissioner is temporarily unable to perform his or her duties;
- (b) the office of the commissioner becomes vacant or the commissioner is suspended when the House of Assembly is not sitting; or
- (c) the office of the commissioner becomes vacant or the commissioner is suspended when the House of Assembly is sitting, but the House of Assembly does not pass a resolution to appoint a commissioner before the end of that sitting.

(9) Where the office of the commissioner becomes vacant and an acting commissioner is appointed under paragraph (8)(b) or (c), the term of the acting commissioner shall not extend beyond the end of the next sitting of the House of Assembly.

(10) An acting commissioner holds office until

- (a) the commissioner returns to his or her duties after a temporary inability to perform;
- (b) the suspension of the commissioner ends or is dealt with in the House of Assembly; or
- (c) a person is appointed as commissioner under subsection (1).

Regarding the Chief Electoral Officer, the provisions are in the *Elections Act, 1991*:

Removal or suspension

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.

Suspension when House of Assembly not sitting

5.4 When the House of Assembly is not sitting, the Lieutenant-Governor in Council may suspend the Chief Electoral Officer because of an incapacity to act or for misconduct, cause or neglect of duty but the suspension shall not continue in force beyond the end of the next sitting of the House of Assembly.

Acting Chief Electoral Officer

5.5 (1) The Lieutenant-Governor in Council may, on the recommendation of the House of Assembly Management Commission, appoint an acting Chief Electoral Officer if

- (a) the Chief Electoral Officer is temporarily unable to perform his or her duties;

⁹¹ See Page 20 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

- (b) the office of the Chief Electoral Officer becomes vacant or the Chief Electoral Officer is suspended when the House of Assembly is not sitting; or
 - (c) the office of the Chief Electoral Officer becomes vacant or the Chief Electoral Officer is suspended when the House of Assembly is sitting, but the House of Assembly does not pass a resolution to appoint a Chief Electoral Officer before the end of that sitting.
- (2) Where the office of the Chief Electoral Officer becomes vacant and an acting Chief Electoral Officer is appointed under paragraph (1)(b) or (c), the term of the acting Chief Electoral Officer shall not extend beyond the end of the next sitting of the House of Assembly.
- (3) An acting Chief Electoral Officer holds office until
 - (a) the Chief Electoral Officer returns to his or her duties after a temporary inability to perform;
 - (b) the suspension of the Chief Electoral Officer ends or is dealt with in the House of Assembly; or
 - (c) a person is appointed as Chief Electoral Officer under section 4.

Regarding the Child and Youth Advocate, the provisions are in the *Child and Youth Advocate Act*:

Removal or suspension

7. 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 advocate from office because of an incapacity to act or for misconduct, cause or neglect of duty.

Suspension when House of Assembly not sitting

8. When the House of Assembly is not sitting, the Lieutenant-Governor in Council may suspend the advocate because of an incapacity to act or for misconduct, cause or neglect of duty but the suspension shall not continue in force beyond the end of the next sitting of the House of Assembly.

Acting advocate

8.1 (1) The Lieutenant-Governor in Council may, on the recommendation of the House of Assembly Management Commission, appoint an acting advocate if

- (a) the advocate is temporarily unable to perform the advocate's duties;
 - (b) the office of the advocate becomes vacant or the advocate is suspended when the House of Assembly is not sitting; or
 - (c) the office of the advocate becomes vacant or the advocate is suspended when the House of Assembly is sitting, but the House of Assembly does not pass a resolution to appoint an advocate before the end of that sitting.
- (2) [Rep. by 2022 c18 s2]
- (3) An acting advocate holds office until
- (a) the advocate returns to the advocate's duties after a temporary inability to perform;
 - (b) the suspension of the advocate ends or is dealt with in the House of Assembly; or
 - (c) a person is appointed as advocate under section 4.

Regarding the Citizens' Representative, the provisions are in the *Citizens' Representative Act*:

Removal or suspension

6. 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 Citizens' Representative from office because of an incapacity to act or for misconduct, cause or neglect of duty.

Suspension when House of Assembly not sitting

7. When the House of Assembly is not sitting, the Lieutenant-Governor in Council may suspend the Citizens' Representative because of an incapacity to act or for misconduct, cause or neglect of duty but the suspension shall not continue in force beyond the end of the next sitting of the House of Assembly.

Acting Citizens' Representative

7.1 (1) The Lieutenant-Governor in Council may, on the recommendation of the House of Assembly Management Commission, appoint an acting Citizens' Representative if

- (a) the Citizens' Representative is temporarily unable to perform his or her duties;
- (b) the office of the Citizens' Representative becomes vacant or the Citizens' Representative is suspended when the House of Assembly is not sitting; or
- (c) the office of the Citizens' Representative becomes vacant or the Citizens' Representative is suspended when the House of Assembly is sitting, but the House of Assembly does not pass a resolution to appoint a Citizens' Representative before the end of that sitting.

(2) Where the office of the Citizens' Representative becomes vacant and an acting Citizens' Representative is appointed under paragraph (1)(b) or (c), the term of the acting Citizens' Representative shall not extend beyond the end of the next sitting of the House of Assembly.

- (3) An acting Citizens' Representative holds office until
 - (a) the Citizens' Representative returns to his or her duties after a temporary inability to perform;
 - (b) the suspension of the Citizens' Representative ends or is dealt with in the House of Assembly; or
 - (c) a person is appointed as Citizens' Representative under section 3.

Regarding the Seniors' Advocate, the provisions are in the *Seniors' Advocate Act*:

Removal or suspension

7. 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 advocate from office because of an incapacity to act or for misconduct, cause or neglect of duty.

Suspension when House of Assembly not sitting

8. When the House of Assembly is not sitting, the Lieutenant-Governor in Council may suspend the advocate because of an incapacity to act or for misconduct, cause or neglect of duty but the suspension shall not continue in force beyond the end of the next sitting of the House of Assembly.

Acting advocate

9. (1) The Lieutenant-Governor in Council may, on the recommendation of the House of Assembly Management Commission, appoint an acting advocate if

- (a) the advocate is temporarily unable to perform his or her duties;
 - (b) the office of the advocate becomes vacant or the advocate is suspended when the House of Assembly is not sitting; or
 - (c) the office of the advocate becomes vacant or the advocate is suspended when the House of Assembly is sitting, but the House of Assembly does not pass a resolution to appoint an advocate before the end of that sitting.
- (2) Where the office of the advocate becomes vacant and an acting advocate is appointed under paragraph (1)(b) or (c), the term of the acting advocate shall not extend beyond the end of the next sitting of the House of Assembly.
- (3) An acting advocate holds office until
- (a) the advocate returns to his or her duties after a temporary inability to perform;
 - (b) the suspension of the advocate ends or is dealt with in the House of Assembly; or
 - (c) a person is appointed as an advocate under section 4.

Regarding the Information and Privacy Commissioner, the provisions are in the *Access to Information and Protection of Privacy Act, 2015*:

Removal or suspension

88. (1) The Lieutenant-Governor in Council, on a resolution of the House of Assembly passed by a majority vote of the members of the House of Assembly actually voting, may remove the commissioner from office or suspend him or her because of an incapacity to act, or for neglect of duty or for misconduct.

(2) When the House of Assembly is not in session, the Lieutenant-Governor in Council may suspend the commissioner because of an incapacity to act, or for neglect of duty or for misconduct, but the suspension shall not continue in force beyond the end of the next sitting of the House of Assembly.

Acting commissioner

89. (1) The Lieutenant-Governor in Council may, on the recommendation of the House of Assembly Management Commission, appoint an acting commissioner if

- (a) the commissioner is temporarily unable to perform his or her duties;
 - (b) the office of the commissioner becomes vacant or the commissioner is suspended when the House of Assembly is not in session; or
 - (c) the office of the commissioner becomes vacant or the commissioner is suspended when the House of Assembly is in session, but the House of Assembly does not pass a resolution to fill the office of the commissioner before the end of the session.
- (2) Where the office of the commissioner becomes vacant and an acting commissioner is appointed under paragraph (1)(b) or (c), the term of the acting commissioner shall not extend beyond the end of the next sitting of the House of Assembly.
- (3) An acting commissioner holds office until
- (a) the commissioner returns to his or her duties after a temporary inability to perform;
 - (b) the suspension of the commissioner ends or is dealt with in the House of Assembly; or
 - (c) a person is appointed as a commissioner under section 85.

As these provisions demonstrate, the processes for suspending or removing Statutory Offices are essentially the same for all six Statutory Officers under the current review.

There are no provisions for "disciplining" a Statutory Officer other than "suspending" a Statutory Officer, nor should there be. The appropriate responses to neglect of duty or misconduct should be suspension or removal.

In his 2022 review of the report of the Citizens' Representative on the Chief Electoral Officer, Green provided a thought-provoking analysis of the significance of section 5.3 of the *Elections Act, 1991*, with respect to the removal of one of the Statutory Officers under the current review. He wrote: "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. 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.⁹² The importance of the final phrase should not be diminished. Opportunities for the government to use the threat of removal from office as a means of exerting influence over any Statutory Officer must be minimized if not eliminated. It may be in the government's interest to silence its critics, but it is in the people's best interest that the security of tenure of these critics of the government – these Statutory Officers of the people's House – should be made as secure as possible.

Therefore, we propose two changes to the processes for suspending or removing Statutory Officers, and would apply these changes to all six officers.

First, to ensure the executive branch does not unfairly remove a Statutory Officer whose work proves politically troublesome for the government in office, we propose a change that is similar to the provisions currently in place for reappointing the Information and Privacy Commissioner, as defined in subsection 87(2) of the *Access to Information and Protection of Privacy Act, 2015*, which states: "The Lieutenant-Governor in Council may, with the approval of a majority of the members on the government side of the House of Assembly and separate approval of a majority of the members on the opposition side of the House of Assembly, re-appoint the [Information and Privacy] commissioner for one further term of 6 years." We propose that any decision by the House to remove or suspend a Statutory Officer must have a double majority – a majority of the members on the government side and a separate majority of the members on the opposition side. **The amended provisions regarding each Statutory Officer should read essentially as follows: "The Lieutenant-Governor in Council shall [rather than "may"], on a resolution of the House of Assembly passed with the approval of a majority of the members on the government side of the House of Assembly and separate approval of a majority of the members on the opposition side of the House of Assembly, remove the [Statutory Officer] from office or suspend the [Statutory Officer] because of an incapacity to act, or for neglect of duty or for misconduct."**

Second, all six pieces of legislation currently have a provision that: "When the House of Assembly is not in session, the Lieutenant-Governor in Council may suspend the [Statutory Officer] because of an incapacity to act, or for neglect of duty or for misconduct, but the suspension shall not continue in force beyond the end of the next sitting of the House of Assembly." It is understandable that it would be onerous to require the entire House to reconvene to make such a decision. Nevertheless, the decision to suspend a Statutory Officer is a rare and important one that cannot be taken lightly. As the Statutory Officer is an officer of the legislative branch whose status and work should be protected from overreach by the executive branch, we propose that the House of Assembly Management Commission should be the body making the decision on the suspension of a Statutory Officer. This would place the decision in the hands of the rightful branch of government and serve to protect the independence of our Statutory Officers. **The amended provisions regarding each Statutory Officer should read essentially as follows: "When the House of Assembly is not in session, the Lieutenant-Governor in Council shall [rather than "may"], on the recommendation of a majority vote of the House of Assembly Management Commission, suspend the [Statutory Officer] because of an incapacity to act, or for neglect of duty or for misconduct, but the suspension shall not continue in force beyond the end of the next sitting of the House of Assembly."**

⁹² Page 153 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

Bullet #5: Managing Conflicts

Bullet #5 regards: "How to manage conflicts which arise between Statutory Offices, who should investigate alleged misconduct of a statutory officer, and how that investigation should be conducted (internally, externally, independent ADR etc.)."

There will not often be conflicts between Statutory Offices. Four circumstances that could give rise to conflicts are these:

- Statutory Officers interpret similar powers and duties differently;
- Two Statutory Officers are investigating the same matter independently of one another;
- One Statutory Officer intends to refer a matter to another Statutory Officer;
- One Statutory Officer is commissioned to investigate another Statutory Officer because of a whistleblower disclosure, a harassment complaint or another reason.

Varying Interpretations of Powers and Duties

The powers and duties of certain Statutory Officers are in some respects very similar. Some of the language in their respective pieces of legislation is virtually identical. One Statutory Officer's interpretation of the scope of those powers and duties will have implications for others. Some Statutory Officers will be more vocal in the public forum than others. Some will be more combative than others. In contrast, others might appear to be meek, compliant or ineffective, merely because of differences in personality and approach. There are also contrasting approaches for current and past holders of the same Statutory Office. These differences may invite unfair comparisons and could be a source of conflict. It is not clear whether there is, or ought to be, a forum in which such matters could be discussed and resolved.

Duplicate Investigations

Statutory Officers may have issues of concern or investigations that overlap. They may not be aware of the investigations the other Statutory Offices are conducting, or they may become aware later. They may be investigating the same matter knowingly or unknowingly. They may be unable to discuss the matters among themselves or share information. They may reach dissimilar conclusions, which could lead to public conflict. Some Statutory Officers have open-ended opportunities to discontinue an investigation under the legislation that binds them, and they may wish to do this if they are concerned about a duplication of effort. They may prefer to continue with their investigation regardless. They may wish to have the other office step back. It is not clear whether there is a forum in which such matters could be discussed and resolved.

Referrals Among Offices

Examples of Statutory Officers having the power to refer matters to other Statutory Officers are as follows. The first is from the *Seniors' Advocate Act*.

Referral to Citizens' Representative

17. Where the advocate becomes aware of a matter relating to a senior, the advocate may refer that senior to the Citizens' Representative for investigation of that matter.

The second set is from the *Public Interest Disclosure and Whistleblower Protection Act* (emphasis added).

When investigation not required

15. (1) The citizens' representative is not required to investigate a disclosure and the citizens' representative may cease an investigation if he or she is of the opinion that

- (a) the subject matter of the disclosure would more appropriately be dealt with, initially or completely, according to a procedure provided for under another Act;
- (b) the disclosure is frivolous or vexatious, or has not been made in good faith or does not deal with a sufficiently serious subject matter;

- (c) so much time has elapsed between the date when the subject matter of the disclosure arose and the date when the disclosure was made that investigating it would not serve a useful purpose;
- (d) the disclosure does not provide adequate particulars about the wrongdoing as required by section 8; or
- (e) there is another valid reason for not investigating the disclosure.

(2) Where the citizens' representative believes that a disclosure made to the citizens' representative would be dealt with more appropriately by

(a) the auditor general, the citizens' representative may refer the matter to the auditor general to be dealt with in accordance with the *Auditor General Act, 2021*; or

(b) the commissioner for legislative standards, the citizens' representative may refer the matter to the commissioner for legislative standards to be dealt with in accordance with this Act.

(3) Where a matter is referred to the auditor general under subsection (2), the reprisal protections set out in this Act apply to the employee or former employee who made the disclosure to the citizens' representative.

(4) Where a matter is referred to the commissioner for legislative standards under subsection (2), the commissioner for legislative standards has and shall exercise the powers and duties of the citizens' representative under this Act.

(5) Where the citizens' representative does not investigate a disclosure, ceases an investigation or refers a disclosure to the auditor general or the commissioner for legislative standards under this section, the citizens' representative shall report on the matter to the employee who made the disclosure in the manner and at the time the citizens' representative considers appropriate.

There are similar provisions in the *House of Assembly Accountability, Integrity and Administration Act*. Although they are not technically referrals, they may have the same effect. (emphasis added)

Harassment

42.2 (1) Notwithstanding sections 36 to 42, where a matter relates to a complaint of harassment against a member, that matter shall not be dealt with under sections 36 to 42, but shall be investigated and reported upon by the citizens' representative in accordance with the policy.

(2) Notwithstanding subsection (1), where a complaint has been made to the citizens' representative under the policy **but the citizens' representative is of the opinion that the matter does not fall within his or her jurisdiction, a complainant who is a member may make a request for an opinion to the commissioner** under section 36.

(3) Where a request for an opinion has been made to the commissioner under section 36 **but the commissioner is of the opinion that the matter does not fall within his or her jurisdiction under sections 36 to 42, a complainant is not prohibited from making a complaint on the matter in accordance with the policy.**

(4) Where a matter has been referred to either the commissioner or the citizens' representative under this Act or the policy and the commissioner or the citizens' representative, as appropriate, has issued a report or discontinued an investigation of that matter, the decision of the commissioner or citizens' representative, as appropriate, is final and the matter may not be subsequently referred to the statutory officer who has not yet heard it.

One Statutory Officer might disagree about the decision of the other Statutory Officer to pass the matter along. It is not clear whether there is a forum in which such matters could be discussed and resolved.

One Officer Investigating Another

In what circumstances would one Statutory Officer investigate another Statutory Officer? This would arise when a person makes a whistleblower disclosure about a Statutory Officer under the *Public Interest Disclosure and Whistleblower Protection Act*, and the Citizens' Representative, the Auditor General or the Commissioner for Legislative Standards is tasked with conducting an investigation under sections 14 or 15 of the Act.

The matter that gave rise to the current review was an investigation by one Statutory Officer of another Statutory Officer in light of whistleblower disclosures. Green's review of the report on that investigation should inform the recommendations on managing such conflicts. Green's recommendations are of enormous value, but not absolutely definitive, because he acknowledges that the conflict between whistleblower protection and procedural fairness protection is unresolved. He wrote that "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."⁹³

⁹³ Page 169 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

Green offered recommendations for a particular way of handling such investigations, which favours procedural fairness. Green is right to insist on this. The *Public Interest Disclosure and Whistleblower Protection Act* makes clear:

Investigation by citizens' representative

14. (3) The citizens' representative shall ensure that the right to procedural fairness and natural justice of all persons involved in an investigation is respected, including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings.

Procedural fairness means the accused should have a full and fair opportunity to mount a defence to the accusations. Whistleblower protections may compromise that opportunity. Green wrote:

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.⁹⁴

Green wrote: "A high level of procedural fairness would ordinarily be required to suspend or dismiss a statutory officer with security of tenure."⁹⁵

It would not be enough for the Citizens' Representative to present only the accusations with an opinion on whether they are factual. Green wrote: "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."⁹⁶

The investigative report should not be viewed as an initial report that can be followed up on by other reports later. Rather, "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."⁹⁷

For the investigative report to be reliable, it must "distinguish evidence, fact, normative conclusions, and law" so the reasons do not resist "independent analysis, creating a risk that the conclusions would be adopted blindly."⁹⁸ Green wrote: "I recommend that future reports draw a clearer distinction between evidence, fact, norm, and law."⁹⁹ A report to be placed before the House to help reach a disciplinary decision "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."¹⁰⁰

Allegations must be testable. In some cases, there are "real concerns about witnesses' perception, memory, sincerity, and narration", about motivations of ill will, about co-workers unconsciously influencing others' perceptions, about the possibility of collusion, about confident opinions being based on media coverage of events rather than personal knowledge, and about blaming another to exculpate oneself. The accused cannot mount a proper defence without knowing who said what and having the opportunity to test their credibility and respond. An accused may be "able to formulate more persuasive answers with better knowledge of the case to meet".¹⁰¹

⁹⁴ Page 64 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

⁹⁵ Page 67 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

⁹⁶ Page 69 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

⁹⁷ Page 67 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

⁹⁸ Page 71 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

⁹⁹ Page 72 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

¹⁰⁰ Page 79 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

¹⁰¹ Pages 69-70 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

For allegations involving harassment, Green noted that his attention had been drawn to the fact that “had this matter been referred for resolution to the executive’s Harassment Free Workplace Policy, it would have afforded the [accused] greater procedural rights, including the right to be presented with the complaint, to know his accuser and to respond to the specifics.”¹⁰²

Green noted that: “In *Marchand v. Public Sector Integrity Commissioner*, a former senior civil servant challenging findings of gross mismanagement (misappropriation of funds) was granted access to the whole investigation 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.”¹⁰³

If the investigator insists on protecting the identity of the whistleblower, giving reasons for accepting the word of the whistleblower in the absence of verifiable evidence, then “with no supporting record, these reasons must be held to a stricter standard.”¹⁰⁴ “While a whistleblower regime depends vitally on confidentiality, it must also be able to create credible records that allow reliable and procedurally fair results.”¹⁰⁵

In an investigation, there are not only whistleblowers, but also witnesses who are not whistleblowers. Ideally, the testimony of a whistleblower should be corroborated by multiple witnesses. Green wrote:

Although whistleblowers’ confidentiality is protected under Part VI only when it is “consistent with the need to conduct a proper investigation,” 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 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. Further, reprisals are forbidden by the legislation and proceedings can be instituted if reprisals did occur following disclosure.¹⁰⁶

The investigator should strive to provide the House with a report it can rely on to make its own decision fairly.

While the House of Assembly may be informed by an investigative report and recommendations of one Statutory Officer about another, the House is not bound by those recommendations and can make a decision even if the report is flawed. The House is master of its domain and its decisions will not be overruled by the courts. Nonetheless, as Green states:

Although the House operates under the protective veil of parliamentary privilege which shields its deliberations from judicial scrutiny in many respects, the House nevertheless has a duty to proceed fairly and lawfully.¹⁰⁷

Members need to ask themselves whether they can have confidence in the reliability of the investigative report they have received “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 accused.¹⁰⁸

Since there is little opportunity for the accused to appeal the decision of the House, “this suggests that relatively generous participation rights should be provided.”¹⁰⁹

¹⁰² Page 84 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

¹⁰³ Pages 67-68 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

¹⁰⁴ Page 72 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

¹⁰⁵ Page 74 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

¹⁰⁶ Pages 72-73 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

¹⁰⁷ Page 37 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

¹⁰⁸ Pages 77-78 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

¹⁰⁹ Page 66 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

However, the final decision, following a resolution of the House, rests with Cabinet. The language of the Act uses the permissive “may”. Cabinet is not a rubber stamp; it makes its own choice. Unlike the House, the Cabinet is not protected by parliamentary privilege. In that light, Green adds an interesting comment on page 149:

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.¹¹⁰

All the more reason to ensure the investigative process respects the right of the accused to procedural fairness.

Since whistleblowers are protected from reprisals, should their testimony be available to the accused? Should the accused have the right to know who they are and to question their credibility? Should witnesses also be protected from reprisals? How do we draw the line between exposing wrongdoing through whistleblower protections and protecting Statutory Officers from unfair attacks?

We recommend ensuring the Statutory Officers who conduct such investigations should have the resources and obligation to hire lawyers well versed in such matters, so their investigative reports are as reliable as possible and procedural fairness is assured.

We recommend that whistleblowers and witnesses be protected from reprisals, but their testimony must be substantially disclosed, tested and open to challenge, as procedural fairness demands.

We recommend the advice of Green be followed to the greatest extent possible. Terms such as poor management, mismanagement and gross mismanagement should be well defined and the process for establishing them should be rigorous. Pages 144-157 and 167-168 of Green’s report ought to be studied in particular detail.

We recommend isolating allegations of harassment and dealing with them under the Harassment Free Workplace Policy.

We recommend that Codes of Conduct be defined more directly and thoroughly, with less aspirational language that is wide open to interpretation.

¹¹⁰ Page 149 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

Bullet #6: Quality Assurance and Performance

Bullet #6 regards: "Whether and how quality assurance and performance of each statutory officer/Statutory Office should be measured and overseen."

The executive branch of government has no business measuring and overseeing the performance and quality of the work of the Statutory Officers and their offices.

If there are allegations about the neglect of duty or misconduct of a Statutory Officer, they can be dealt with under the legislative provisions in place for these purposes, as highlighted above.

But it is the responsibility of Members to appoint Statutory Officers who are capable of running these offices, and these Officers should be trusted to do their work.

One should never be confused that the government – the executive branch – is superior in its competence and therefore in a position to bring oversight to the workings of the legislative branch.

Not infrequently, governments challenge the findings and recommendations of Statutory Offices, just as they challenge the statements of opposition Members and the reports of journalists. This does not mean opposition Members, the journalists or the Statutory Offices are wrong in what they find, state, report or recommend. Sometimes they are right, and it is the government that is wrong.

All offices should be permitted to do their work and lay out the evidence for the cases they make, and the people of the province and their elected Members can then make their own judgments based on what they see. Or the courts can judge, if a matter comes before them. Generally, the matters of the legislative branch do not come before the courts because of parliamentary privilege. It is therefore incumbent on the legislative branch to ensure the quality of its own work. But this does not mean divesting its responsibility to the executive branch. That is something the legislative branch cannot and should not attempt to do.

The executive branch ought to respect the role of the legislative branch and not show contempt for its offices. At times in recent years, the provincial government has worked to impede the proper functioning of Statutory Offices, with serious implications for their performance and the completeness and quality of their work.

Although the Office of the Auditor General is not the subject of the current review, the first example serves to help make this point.

- In the Auditor General's report on physical mitigation of Muskrat Falls reservoir wetlands, it stated on page 24: "The senior management at the current Office of Indigenous Affairs and Reconciliation did not accept the criteria of our audit as suitable. The senior management also did not acknowledge their responsibility for the audit subject matter and the terms of the audit, including audit objective, scope, and approach. The senior management of the current Office of Indigenous Affairs and Reconciliation also did not confirm that they had provided the Office of the Auditor General with all information of which they were aware that had been requested or that could significantly affect the findings or conclusions of the audit report. Furthermore, the Deputy Minister of the Office of Indigenous Affairs and Reconciliation noted that "[the Public Accounts Committee] cannot confer on the [Auditor General] authority to conduct a review which is not within the ambit of the statute".¹¹¹ The government took this response even though section 25 of the Auditor General Act states: "Notwithstanding any other Act or law, a department, an agency of the Crown or a Crown controlled corporation shall, where required by the auditor general, provide ... access to all books, accounts, financial records, reports, electronic data records, explanations, files and all other documents or property belonging to or in use by the department, agency of the Crown or Crown controlled corporation necessary for the performance of the duties of the auditor general under this Act" and: "The auditor general shall

¹¹¹ Link: https://www.aq.gov.nl.ca/files/Physical_Mitigation_of_Muskrat_Falls_Reservoir_Wetlands_Audit_report.pdf

have access to any information that the auditor general considers necessary to fulfill the duties relating to an audit.”

- Paragraphs [11] through [22] of an August 2, 2022 report of the Information and Privacy Commissioner document the obstructionist response of the government to a request for information. “Prior to providing an assessment on the Department of Finance’s application of the exceptions noted above, it is necessary to first address the Department’s reluctance to provide the responsive records to this office for review during our investigation. ... As mentioned, the Department ultimately did provide the records for our review at our offices, but the notion expressed during our discussions about this matter - that we did not need to see them at all - is why this commentary is warranted. This idea is one that has been a feature of government responses by other departments in recent months, as discussed in A-2022-010 and A-2022-011. In these instances, the Department of Justice and Public Safety and the Office of Women and Gender Equality, respectively, declined to provide records for our review where they had claimed the solicitor-client exception in section 30.”¹¹²
- A June 30, 2022 report of the Information and Privacy Commissioner also documented obstruction from the provincial government’s Office of Women and Gender Equality. “During the complaint investigation, the Public Body refused to provide the withheld information to the Commissioner for review, and declined to take part in an alternative process of providing a description of the information and an explanation of how the exception applied. The Commissioner concluded that the Public Body had not met the burden of proving that section 30 applied, and recommended that the withheld information be provided to the Complainant.”¹¹³
- Another June 30, 2022 report of the Information and Privacy Commissioner documented the refusal of the Department of Justice and Public Safety to comply with a request for information. “During the complaint investigation, the Department refused to provide all information withheld under section 30 (legal advice) to the Commissioner for review, but did otherwise release a small portion of the responsive records to the Commissioner’s Office. The Commissioner recommended that the Department continue to withhold some information under sections 27, 29, 34, and 40. However, the Commissioner concluded the Department had not met the burden of proving that section 30 applied, nor had the Department met the burden for any of the sections claimed that overlapped with section 30 information, and the Commissioner recommended that this withheld information be provided to the Complainant. ... As JPS has failed to provide alternative evidence sufficient to ground its claim of solicitor-client privilege and as there is evidence that solicitor-client privilege was incorrectly asserted, I must find that JPS has failed to meet its evidentiary burden under section 43 for the application of sections 30(1)(a) and 30(1)(b). I must therefore recommend these records be released.”¹¹⁴
- In April 2022, the provincial government took the Information and Privacy Commissioner to court to block access to documents it had deemed to be protected under the claim of solicitor-client privilege.¹¹⁵ The Commissioner was quoted as follows: “Rather than attempting to tear down access to information through the courts, I call on the government to eliminate the unnecessary cost of this appeal, including the time and frustration of citizens seeking information,” Harvey said. “Amend the statute to provide even greater certainty that government is not above the law, thereby reassuring the public of its commitment to transparency and accountability.” In his media release, the commissioner accused the government of doing through the courts something that would be politically unpalatable to do through the legislature — shielding itself from accountability.
- In May 2023, the provincial government went to court to stop the Information and Privacy Commissioner from investigating the 2021 cyberattack that exposed the private data of

¹¹² Link: <https://www.oipc.nl.ca/pdfs/A-2022-014.pdf>

¹¹³ Link: <https://www.oipc.nl.ca/pdfs/A-2022-011.pdf>

¹¹⁴ Link: <https://www.oipc.nl.ca/pdfs/A-2022-010.pdf>

¹¹⁵ Link: <https://www.cbc.ca/1.6409195>

thousands of people after the government ignored a warning it had received revealing significant data insecurity.¹¹⁶

A government that refuses to cooperate with the investigations of Statutory Officers is in a poor position to comment on the work quality and performance of the Statutory Officers and their offices. When the government impedes the work of Statutory Offices by withholding documents and refusing to cooperate, it is affecting the performance of those Offices. Those Offices are right to call the government out on its actions through their reporting mechanisms. It is the Statutory Offices that ought to provide oversight of the work quality and performance of the executive branch, not the other way around.

Statutory Offices should be provided with sufficient resources to hire and engage the services of professionals with expertise in matters relevant to their work, including lawyers, forensic accountants and so forth.

If the Statutory Officers believe they lack the resources to do their work properly, they have opportunities to make this known to the Speaker and the House of Assembly Management Commission.

If the House of Assembly Management Commission has reason to believe a Statutory Office is not performing at a level that is appropriate, it can address these issues with the Statutory Officers. The Management Commission has considerable powers and responsibilities in this regard under section 20 of the *House of Assembly Accountability, Integrity and Administration Act*.

If the Management Commission is advised that its oversight powers are insufficient, then the legislation ought to be amended to clarify its responsibility for ensuring the proper operation of the Statutory Offices.

If any Member believes a Statutory Office or Officer is performing poorly or producing work of an inferior quality, the Member or the Member's Caucus may bring a resolution to the House of Assembly to debate. The House of Assembly by resolution or the Management Commission by decision should be empowered to review a report of a Statutory Officer on a case-by-case basis if Members deem this to be appropriate.

In these ways, Statutory Offices are properly overseen by the elected Members of the House of Assembly.

Questions About a 2022 Report of the Citizens' Representative

Questions about the work quality and performance of the Citizens' Representative were raised in light of the Green review of the March 15, 2022 report of the Citizens' Representative on Public Interest Disclosures Regarding the Chief Electoral Officer for Newfoundland and Labrador. In his review entitled "Fairness, Reliability, and Justification: Accountability Based On Public Interest Disclosures: Review Of The Citizen's Representative's Report Respecting The Chief Electoral Officer"¹¹⁷, Green raised concerns about the report of the Citizens' Representative, concluding the 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 concerns 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."

Some might see this as a reason to doubt the performance and quality of the work of the Citizens' Representative and use the review to justify imposing external mechanisms for the oversight and assessment of the work of this and other Statutory Officers.

However, it is necessary to read the entire Green review to get a full and fair assessment of the work of the Citizens' Representative and avoid leaping to the wrong conclusion. Below are some excerpts from the Green review that must be taken into account.

¹¹⁶ Link: <https://www.cbc.ca/1.6783655>

¹¹⁷ Link: <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

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.

... 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.¹¹⁸

This tension inherent in whistleblower regimes is at the heart of Green's conclusions. There is an inherent conflict between ensuring procedural fairness and protecting the confidentiality of whistleblowers – between protecting the confidentiality of whistleblowers and enabling those accused of wrongdoing to know and question those accusing them. The Citizens' Representative chose to protect the identify of the whistleblowers, even when Green requested access to the recordings of evidence in order to conduct his review. Green disagreed with this approach, but nevertheless described the reaction of the Citizens' Representative as a "principled approach". Green wrote:

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. 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 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.¹¹⁹

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.

¹¹⁸ Pages 168-169 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

¹¹⁹ Pages 25-26 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

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, 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.¹²⁰

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.¹²¹

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.¹²²

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".

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. Conversely, conclusions that seem plausible within the context of the report may prove to be flawed once the underlying evidence is examined. 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.¹²³

In summary, we find no justification in the Green review to impose external mechanisms to ensure the quality of the work and performance of Statutory Officers. The House of Assembly and the Management Commission have the capacity to order work reviews on a case-by-case basis. This is a necessary and sufficient mechanism to provide oversight for the work of the Statutory Offices. It is for the legislative branch to provide oversight for the legislative branch, and no other branch of government should have that role.

¹²⁰ Pages 40-41 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

¹²¹ Page 72 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

¹²² Page 73 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

¹²³ Page 76 of <https://www.assembly.nl.ca/About/ReportsPublications/pdfs/FairnessReliabilityandJustification-FullReport.pdf>

Bullet #7: Administrative Oversight

Bullet #7 regards: "What is an appropriate administrative oversight model for the Statutory Offices, inclusive of financial management, human resources management, information management, procurement, and any other "back office" functions; structure."

Why is this issue included in the current review of Statutory Offices? Who added this item as a subject for inquiry and recommendation – the Statutory Offices themselves and other offices of the legislative branch, or the executive branch that has commissioned the current review?

We have no issue with the way the Statutory Offices are currently overseen from an administrative perspective.

We also have no issue with the Speaker's Office, the Clerk, House services and the six (or seven, or fewer) Statutory Offices collaboratively developing an administrative oversight model for the Statutory Offices, inclusive of financial management, human resources management, information management, procurement, and any other "back office" functions and structure – if that is something they believe is warranted, and driven by their own initiative for their own reasons.

However, we strongly believe the executive branch of government must not have a role in the oversight of Statutory Offices, as this would compromise the independence of the legislative branch and threaten the proper work of the Statutory Offices to provide scrutiny of the executive branch.

The legislative branch answers to the House and the Management Commission, not to the executive branch. While there is some overlap between the two branches (i.e., Cabinet Ministers operate in both spheres), the branches are not the same and should not be treated as such. The Statutory Offices are not agencies of the executive branch, subject to executive administration or daily monitoring in ways that would compromise the independence of their work.

Note the following from the *House of Assembly Accountability, Integrity and Administration Act*. This is where administrative oversight of the Statutory Offices is properly defined and properly belongs.

Clerk

28. (1) The clerk is the chief officer of the House of Assembly with the status equivalent to a deputy minister in the public service and in that capacity the clerk is

- (a) the chief parliamentary advisor to the speaker; and
- (b) the chief administrative and financial officer of the House of Assembly responsible to the speaker and through the speaker to the commission for the management of the operations of the House of Assembly service and the administration of the statutory offices.
- (2) In his or her capacity as chief parliamentary advisor, the clerk is responsible for
 - (a) advising the speaker, deputy speaker, committee chairpersons and members on procedural matters concerning the rules, privileges and proceedings of the House of Assembly;
 - (b) directing and coordinating the provision of procedural services by the clerk assistant, sergeant-at-arms and other officers of the House of Assembly;
 - (c) coordinating all official parliamentary ceremonies and other events involving the House of Assembly;
 - (d) custody of and safe-keeping of the records of the House of Assembly and all bills, petitions and documents presented to or laid on the table of the House, and shall produce them when required by the speaker or by his or her order on motion of a member;
 - (e) recording and carrying out all recorded votes of the House of Assembly; and
 - (f) ensuring and controlling public access to the proceedings of the House of Assembly through the production and distribution of Hansard and the facilitation of electronic access to proceedings by the media.
- (3) In his or her capacity as chief administrative and financial officer, the clerk is responsible for

- (a) the provision of administrative, financial and other support services to the House of Assembly, its members, and statutory offices;
- (b) direction and supervision of the clerks, officers and staff employed in the House of Assembly service and for the establishment of general administrative policies of the statutory offices;
- (c) acting as secretary of the commission and has custody of all records and minutes of the commission;
- (d) ensuring that disclosure, as required by law, of the proceedings of the commission and the financial matters pertaining to members and the House of Assembly service is provided for;
- (e) the preparation of the estimates of the House of Assembly as required by section 26 and analysis and commentary, to the commission, on the budget submissions of the statutory offices and the office of the auditor general;
- (f) administration of all services and payments to members;
- (g) the orderly safekeeping of the records of the House of Assembly service;
- (h) authorizing and recording all financial commitments entered into on behalf of the House of Assembly and statutory offices;
- (i) reporting regularly to the commission and informing the secretary of the Treasury Board regarding the financial and budgetary performance of the House of Assembly and statutory offices;
- (j) reporting to the commission and the audit committee on the status of audits of the House of Assembly and the statutory offices and, specifically, reporting if in his or her opinion the audit is not being conducted on a timely basis;
- (k) maintaining and periodically assessing the effectiveness of internal controls in the House of Assembly and statutory offices and reporting on that assessment and effectiveness to the commission; and
- (l) certifying to the commission as required that the House of Assembly and statutory offices have in place appropriate systems of internal control and that those systems are operating effectively.

(4) Paragraph (3)(l) shall not come into force until August 31, 2008 .

Bullet #8: Sharing Space and Administration

Bullet #8 regards: "Whether physical space and administrative functions could be shared among Statutory Offices."

We urge caution in this regard.

As we have recently seen, sometimes one Statutory Office is charged with investigating another.

Also, there are strong privacy and confidentiality considerations in the work of the various Statutory Offices that obligate these Offices to restrict the flow and exposure of information.

The mandates of the Statutory Offices often require them to work independently, not just of the executive branch, but of one another.

The sharing of physical space and administrative functions could compromise the privacy and confidentiality of a Statutory Office vis-à-vis other Statutory Offices, unless the shared physical space includes robust physical subdivisions and security barriers, enforced by effective (and no doubt costly) internal security measures and personnel. This could create needlessly uncomfortable working environments.

Shared administrative functions could, similarly, expose confidential files and information to those not eligible to access them, unless such materials are at all times securely quarantined to restrict access. In a common office environment with shared administrative functions, systems and personnel, this may be impractical to achieve. Privacy and confidentiality might be compromised.

Any decision to share physical space and administration functions among Statutory Offices must be made independently of the executive branch, and must be driven collaboratively by the offices of the legislative branch, with a full view and understanding of the implications in terms of security, privacy, confidentiality and workability.

Perhaps legislative amendments would be required to address privacy and confidentiality concerns, and that would raise other considerations. Currently, the legislation that binds and protects the personnel of a Statutory Office is exclusive to that Statutory Office for the purposes of the Acts it operates under.

Why is this bullet included in the current review? Is the purpose to cut costs? Is the risk of cost-cutting that the operations of Statutory Offices might be compromised? Is the risk worth any savings that might be achieved? Would there be any savings at all, when security provisions are accounted for? Who is driving the debate on this issue – the Statutory Offices themselves and other offices of the legislative branch, or the executive branch that has commissioned the current review? Answers to these questions would inform any recommendations on this bullet.

Bullet #9: Reporting to Whom

Bullet #9 regards: "Where reports from each Statutory Office should be directed, such as whether any of the reports of the Statutory Offices should go to a standing or select committee of the House of Assembly for review and analysis."

Note the following general protocol, as stated in the *House of Assembly Act*:

Reports to the House of Assembly

19.1 (1) Notwithstanding another Act, where a report or other document that an officer of the House of Assembly is required to submit to the House of Assembly is submitted to the Speaker or the Clerk of the House of Assembly when the assembly is not in session, the speaker or the clerk shall provide a copy to each member and make it available for inspection by the public immediately after the report or other document is submitted.

(2) A report or other document is considered to have been tabled before the House of Assembly when it is submitted to the speaker or clerk under subsection (1).

The various Statutory Offices have a host of reporting protocols.

The general protocol defined above has worked well for the vast majority of reports from Statutory Offices.

Reports that could be handled differently are ones that require further decisions and actions by the House of a disciplinary nature – reports on alleged wrongdoing. Some of these may be submitted to the House of Assembly Management Commission.

The report that recently was the source of great controversy was the report of the Citizens' Representative on the Chief Electoral Officer in light of whistleblower disclosures. It is important to ensure such a report is properly directed and properly acted upon, in one way or another, expeditiously. Perhaps such reports should be directed to the House of Assembly Management Commission, which may then be empowered to direct the report for a review by a standing or select committee or by an external reviewer, as was eventually done in the circumstances in question.

With respect to other reports, it is worth considering the wide range of reports that can be generated by the various Statutory Officers in the course of their work.

In the pages that follow, the reporting protocols for each Statutory Officer are described using highlighted excerpts from various pieces of legislation governing them. These excerpts are not necessarily exhaustive, and they include actions that are not reports in the usual sense, but might include referrals or disclosures or actions to provide information and such. These are included in an effort to be thorough, and to help inform any decision about changing the way information and recommendations are provided or routed.

The Management Commission and the House itself ought to be free to decide where a report will be directed on a case-by-case basis if something about the report requires special consideration. Such decisions are made following debates of Members, where the options are weighed for the particular cases at hand. This approach may be preferable to a formulaic approach that orders reviews of reports when they may not be warranted.

Child and Youth Advocate

For this Statutory Office, reporting protocols are defined in the *Child and Youth Advocate Act*:

Minister may restrict investigation

15.2 (1) Where the Minister of Justice and Public Safety certifies in writing to the advocate that the investigation of a matter would be contrary to the public interest under the circumstances, the advocate shall not investigate the matter, or, where the advocate has commenced an investigation of the matter, the advocate shall discontinue the investigation.

(2) Where a certificate is given under subsection (1), the advocate shall include that fact and a brief description of the circumstances of the matter **in the advocate's next annual report to the House of Assembly.**

Reference by Lieutenant-Governor in Council

16. The Lieutenant-Governor in Council or a minister may refer to the advocate, for review, investigation and report, a matter relating to the interests and well-being of children and youth and the advocate shall,

- (a) subject to a special direction of the Lieutenant-Governor in Council, investigate or review the matter to the extent that it is within the advocate's jurisdiction; and
- (b) **make a report to the Lieutenant-Governor in Council or minister that the advocate considers appropriate.**

Report to advocate required

16.1 (1) For the purpose of this section,

- (a) "critical injury" means an injury, including a physical or psychological injury, which may result in the death of a child or youth or may cause serious or long-term impairment of the health of a child or youth; and
- (b) "designated services" means the following services provided directly to a child or youth:
 - (i) services provided by the Department of Children, Seniors and Social Development under its protective intervention, kinship, in care, youth services and community youth corrections programs, and
 - (ii) services provided by the Department of Justice and Public Safety to children or youth in custody at the Newfoundland and Labrador Youth Centre or a designated youth holding facility or to children or youth temporarily held in adult correction facilities administered by Corrections and Community Services or a successor division of the Department of Justice and Public Safety.

(2) Where a child or youth dies or experiences a critical injury while receiving a designated service or within 12 months of receiving a designated service, the deputy minister of a department, or the deputy minister's designate, shall report the death or critical injury to the advocate.

(3) The report required by subsection (2) shall be made as soon as practicable after the deputy minister or the deputy minister's designate becomes aware of the death or critical injury.

(4) An action does not lie against a person for anything the person may do or report or say in the course of the exercise or performance, or the intended exercise or performance, of a duty under this section unless it is shown the person acted in bad faith.

Report of refusal to investigate

19. Where the advocate decides not to review or investigate or to cease reviewing or investigating a complaint, the advocate shall inform the complainant, and other interested persons, of the decision and shall provide to them reasons for the decision.

Restrictions on disclosure

21.1 Where the Minister of Justice and Public Safety certifies that the giving of information or the answering of a question or the production of a document, paper or thing might involve the disclosure of

- (a) the deliberations of the Executive Council or a committee of the Executive Council;
- (b) proceedings of the Executive Council, or a committee of the Executive Council, relating to matters of a secret or confidential nature and would be injurious to the public interest; or
- (c) interfere with or impede the investigation or detection of an offence,

the advocate shall not require the information or answer to be given or the document, paper or thing to be produced, **but shall report the giving of the certificate to the House of Assembly.**

Notice of proposed steps

24. (1) Where, after conducting a review of a department's or an agency's services, or an investigation, the advocate makes a recommendation, the advocate may request the department or agency of the government to whom the recommendation is made to notify the advocate within a specified time of the steps that it has taken or proposes to take to give effect to the advocate's recommendations.

(2) Where, within a reasonable time after a request respecting recommendations is made under this section, no action is taken which seems to the advocate to be adequate and appropriate, the advocate, in the advocate's discretion, after considering the comments made by or on behalf of the department or agency of the government affected, **may report the matter, including a copy of the report containing the recommendations, to the Lieutenant-Governor in Council and may mention the report in the advocate's next annual report to the House of Assembly.**

(3) **A report made under subsection (2)** shall include any comments made by or on behalf of the department or agency of the government upon the opinion or recommendation of the advocate.

Report to complainant

25. Where the advocate conducts a review or an investigation on the basis of a complaint received, **the advocate shall report to the complainant,** in the manner and at the time that the advocate considers appropriate, the result of the investigation.

Proceedings against advocate prohibited

26. An action does not lie against the advocate or against a person employed under the advocate for anything the advocate or person may do **or report** or say in the course of the exercise or performance, or intended exercise or performance, of the advocate's or person's functions and duties under this Act, unless it is shown the advocate or person acted in bad faith.

Annual report to House of Assembly

28. The advocate shall report annually to the House of Assembly through the Speaker on the exercise and performance of the advocate's functions and duties under this Act.

Publication of reports

29. (1) In the interest of children and youth or in the public interest, or in the interest of a person, department or agency of the government, **the advocate may publish reports relating generally** to the exercise and performance of the advocate's functions and duties under this Act or to a particular case investigated by the advocate, whether or not the matters to be dealt with in the report have been the subject of the report made to the House of Assembly under this Act.

(2) The advocate shall not include the name of a child or youth in a report under subsection (1) unless the advocate has first obtained the consent of the child or youth and the child's or youth's parent or guardian.

Regulations

30. (1) The House of Assembly Management Commission may make regulations

- (a) for the guidance of the advocate in the exercise and performance of the advocate's functions and duties under this Act; and
- (b) generally, to give effect to the purpose of this Act.

(2) Except where regulations respecting it are made under subsection (1), the advocate may determine the advocate's procedure.

Seniors' Advocate

For this Statutory Office, reporting protocols are defined in the *Seniors' Advocate Act*:

Referral to Citizens' Representative

17. Where the advocate becomes aware of a matter relating to a senior, the advocate may refer that senior to the Citizens' Representative for investigation of that matter.

Annual report to House of Assembly

20. The advocate shall report annually to the House of Assembly through the Speaker on the exercise and performance of his or her powers and duties under this Act.

Publication of reports

21. Where it is in the public interest, or in the interest of a person, department or government agency, the advocate may publish reports relating generally to the exercise and performance of his or her powers and duties under this Act, whether or not the matters to be dealt with in the report have been the subject of the report made to the House of Assembly under this Act.

Chief Electoral Officer

For this Statutory Office, reporting protocols are defined in the *Elections Act, 1991*. Not all of the items listed here are reports of the Chief Electoral Officer, or reports in the usual sense of that term.

Duties of Chief Electoral Officer

5. (1) It is the duty of the Chief Electoral Officer
- 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;
 - to issue to election officers those instructions that he or she considers necessary to ensure effective execution of this Act; and
 - to perform all other duties that are imposed on him or her by or under this Act.
- (2) The Chief Electoral Officer shall report on his or her activities to the House of Assembly through the Speaker.

Budget

9. (1) The Chief Electoral Officer, through the speaker, shall submit annually to the House of Assembly Management Commission continued under section 18 of the *House of Assembly Accountability, Integrity and Administration Act* for its approval, estimates of the sums that will be required to be provided by the Legislature for the payment of the salaries, allowances and expenses of the office of the Chief Electoral Officer under this Act during the next fiscal year.
- (2) The commission shall review and may alter the estimates submitted under subsection (1) and, upon completion of the review, the Speaker of the House of Assembly shall submit the estimates as approved by the commission to the House of Assembly for the purpose of inclusion in the estimates of the province for approval by the Legislature.

Adaption of Part I

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.
- (2) Notwithstanding subsection (1), the Chief Electoral Officer may not
- permit a nomination paper to be received by a returning officer on nomination day after the time provided for it to be received under this Part in respect of that day; or
 - permit a vote to be cast before or after the hours fixed in this Part for the opening and closing of the poll on an ordinary polling day or on the days on which an advance poll is held.
- (3) The Chief Electoral Officer shall, within 30 days of polling day, report to the speaker instructions issued under subsection (1).
- (4) The speaker shall lay before the House of Assembly a report made under subsection (3) within 5 days after receiving it or if the House of Assembly is not then sitting within 5 days after the House of Assembly resumes sitting.

Publication of returning officers

13. The Chief Electoral Officer shall, as he or she considers appropriate, publish or announce in a newspaper, magazine or other print, visual, audio or electronic media accessible in an electoral district or on a website established for the purpose, a list of the names and addresses of the returning officers for that electoral district.

Withdrawal of writ

62. (1) Where a returning officer to whom a writ of election has been directed refuses or is unable to act or is disqualified from acting or is removed and there is no one able under Division A to act in place of that returning officer, that writ may be withdrawn by the Chief Electoral Officer and another writ of election may be issued which shall be directed to the person in the electoral district concerned that the Chief Electoral Officer may designate.
- (2) The person to whom another writ of election has been directed under subsection (1) is then the returning officer for the electoral district to which the writ relates.
- (3) Where a writ of election has been withdrawn a notice of withdrawal in the prescribed form shall be published in a special or ordinary issue of the *Gazette*.

Return of nominations

75. The returning officer shall report on the nomination proceedings held before him or her to the Chief Electoral Officer, listing the names of the candidates nominated and the names of persons rejected for non-compliance with this Part.

Who may enter polling station

97. (1) No person shall enter a polling station except an elector whose polling station it is, an election officer, a candidate for the electoral district in which the polling station is located and a scrutineer.
- (1.1) Notwithstanding subsection (1), a deputy returning officer may permit a member of the news media to enter a polling station for the purpose of reporting on the activities taking place there on terms and conditions approved in advance by the returning officer.
- (2) No person other than the deputy returning officer, the poll clerk, the candidates for the district and their scrutineers shall remain in a polling station.
- (3) As soon as he or she is admitted to the polling station a scrutineer shall deliver his or her written appointment to the deputy returning officer.

(4) Each of the scrutineers of the candidates, before being permitted to remain in the polling station shall swear an oath in the form prescribed to keep secret the name of the candidate for whom an elector has marked his or her ballot in the scrutineer's presence.

(5) The oath sworn by a scrutineer under subsection (4) shall refer to the polling station for which the scrutineer is appointed and a scrutineer shall not be present at a polling station for which he or she has not been sworn.

(6) Only 1 scrutineer for each candidate may be present at a polling station at a time and the scrutineer present at the close of the poll may remain there until the votes have been counted.

(7) Notwithstanding subsections (1) and (6), a scrutineer may provide another person who is working on behalf of a candidate with the names of persons who have voted at the polling station to which the scrutineer has been admitted.

Notice of polling station

126. (1) Where an advance poll is ordered to be held, the returning officer subject to the approval of the Chief Electoral Officer shall designate a suitable polling station for the purpose and shall give notice of the places where, the days on and the hours during which it will be held.

(2) A notice under subsection (1) shall be published

- (a) by advertisement in a newspaper circulating in the electoral district concerned or by other appropriate means; and
- (b) if the Chief Electoral Officer considers it necessary, by those other means that he or she may direct.

No publishing results

149. (1) A person in attendance at a poll or at the counting of the votes shall not publish a result of the counting at the poll until the conclusion of the count on polling day.

(2) Nothing in subsection (1) prevents the publication of the results of the count by the Chief Electoral Officer or another person designated by the Chief Electoral Officer for the purpose.

Missing ballot box

159. (1) Where a ballot box has been destroyed or lost, or, for another reason has not been received by the returning officer on the day appointed, the returning officer shall

- (a) ascertain the cause of the disappearance of the ballot box; and
- (b) obtain from the deputy returning officer whose ballot box is missing, or from another person having it, a copy of the statement of the poll given to the scrutineers as required by this Part, the whole of which shall be verified on oath.

(2) When the official statement of the poll, or copies of it, cannot be obtained, the returning officer shall ascertain, by the evidence available, the total number of votes cast for each candidate, and to that end, may summon a deputy returning officer, his or her poll clerk, or another person, to appear before him or her at a time set by the officer, and to bring all necessary papers and documents with him or her.

(3) A candidate shall be given notice of the time of the intended proceedings.

(4) The returning officer may examine under an oath the deputy returning officer or poll clerk or another person whom he or she has summoned respecting the matter in question.

(5) In case of an adjournment by reason of a deputy returning officer not having placed the official statement of the poll in the ballot box the returning officer shall, in the meantime, make all reasonable efforts to ascertain the exact number of votes cast for each candidate in the polling station of that deputy returning officer, and for that purpose he or she has all the powers set out in subsections (2) and (3).

(6) In a case arising under this section, the returning officer shall

- (a) declare the name of the candidate appearing to have obtained the largest number of votes; and
- (b) mention specially in a report to be sent to the Chief Electoral Officer the circumstances accompanying the disappearance of the ballot boxes, or the absence of a statement, and the means by which he or she ascertained the number of votes given to each candidate.

Documents sent to CEO

163. (1) The returning officer, 12 clear days following the date upon which he or she has completed the official addition of the votes, unless before that time the returning officer has received notice that he or she is required to appear before a judge for the purpose of a recount, and if there has been a recount, then immediately afterward, shall send, in the manner directed by the Chief Electoral Officer to the Chief Electoral Officer,

- (a) a copy of the declaration of election referred to in subsection 156(2);
- (b) the writ of election, with his or her return in the prescribed form endorsed on it that the candidate entitled to be elected is declared to be elected;
- (c) a report of his or her proceedings, in the form directed by the Chief Electoral Officer containing those observations that the returning officer thinks proper respecting the state of the election papers received from his or her deputy returning officers, together with his or her record book and his or her recapitulation sheets showing, in respect of each polling station, the number of votes cast for each candidate, the number of rejected ballots and the number of cancelled ballots;
- (d) the official statements of the poll from which the official addition of the votes was made; and
- (e) the nomination papers of each candidate together with the affidavits of attestation of the nomination.

(2) The returning officer shall also send all the documents sealed in the ballot boxes as provided for by section 155, including the poll book and the ballots unused, cancelled, rejected and counted for each candidate and the stubs of used ballots, still intact in the sealed ballot boxes, together with all other ballot boxes in his or her custody to and in the manner directed by the Chief Electoral Officer.

(3) The Chief Electoral Officer shall

- (a) on receiving the return of a member elected to serve in the House of Assembly, enter it, in alphabetical order in a book to be kept for that purpose; and
- (b) give notice, when the Chief Electoral Officer considers it appropriate to do so, in an ordinary or special edition of the *Gazette* of the names of the candidates elected.

(4) Where the Chief Electoral Officer is satisfied that a deposit taken in relation to the candidacy of a person should be returned, the Chief Electoral Officer shall return it.

Published returns

164. The Chief Electoral Officer shall, immediately after each election, publish a report giving, by electoral districts,

- (a) the number of votes cast for each candidate;
- (b) [Rep. by 1995 c21 s36]
- (c) the number of cancelled ballots;
- (d) the number of rejected ballots; and
- (e) the number of names on the list of electors,

together with other information that he or she considers appropriate to include.

Inspection of instructions

187. All

- (a) reports or statements received from election officers, other than election documents and election papers contained in the sealed box or removed in accordance with subsection 185(2);
- (b) copies of instructions issued by the Chief Electoral Officer; and
- (c) copies of decisions made by the Chief Electoral Officer under this Part,

are, while in the care and custody of the Chief Electoral Officer, public records and may be inspected during office hours by any person upon request.

Compiling statistics

214. The Chief Electoral Officer shall publish within 9 months after each general election and each by-election a book containing pertinent statistics of the election, including poll-by-poll results of each electoral district.

Existing trust funds

271. Where on October 1, 1993 funds were held in trust for the purpose of a political party or the future candidacy of a person at an election or a future election campaign of a person, the trustees of each trust

- (a) shall report in writing to the Chief Electoral Officer the existence of the trust and the total amount of the funds in it;
- (b) shall maintain the funds in the trust on deposit with a financial institution that is lawfully entitled to accept deposits or in investments authorized for trust money by the *Trustee Act*;
- (c) shall not permit funds or other property to be added to the trust other than interest on the amounts on deposit or the income from the investments referred to in paragraph (b);
- (d) shall file with the Chief Electoral Officer before May 1 in each year a report of the expenditures from the trust during the previous year and their declaration that they have complied with the provisions of paragraphs (b) and (c); and
- (e) where the trust is terminated, shall immediately notify the Chief Electoral Officer.

Duties of CEO

273. (1) The Chief Electoral Officer, in addition to his or her other powers and duties under this Act, shall

- (a) assist registered parties and candidates in the preparation of returns required under this Part;
- (b) ensure that every registered party and candidate has appropriate auditing services in order to properly comply with this Part;
- (c) examine all financial returns filed with him or her;
- (d) reimburse candidates for election expenses in accordance with section 312;
- (e) prescribe forms and the contents of forms for use under this Part and provide for their use;
- (f) prepare, print and distribute forms for use under this Part;
- (g) provide those guidelines that he or she considers necessary for the guidance of auditors, registered parties and candidates and their officers; and
- (h) publish a report of the election receipts, expenses and subsidy of each registered party and candidate in the *Gazette*.

(2) The Chief Electoral Officer shall conduct periodic investigations and examinations of the financial affairs and records of registered parties and candidates in relation to elections and may conduct an audit of the accounts of a registered party or candidate where he or she considers it necessary to do so.

(3) The Chief Electoral Officer shall report annually to the speaker upon the affairs of the office of the Chief Electoral Officer under this Part and the report shall be laid before the House of Assembly at the first convenient opportunity.

Consequential deregistration

281. (1) Where a political party is deregistered for failure to comply with section 303 or 304, it is not eligible to apply for registration until the financial statements required by section 303 or 304 together with the auditor's report required by subsection 302(6) that were not filed have been filed with the Chief Electoral Officer.

(2) Where a political party is deregistered, all funds of the political party not required to pay outstanding debts shall be paid over to the Chief Electoral Officer and held by him or her in trust for the political party.

(3) Where the political party does not again become registered under this Part within a period of 2 years following its deregistration, its funds are forfeited to the Crown and shall be remitted by the Chief Electoral Officer to the Consolidated Revenue Fund.

(4) Notwithstanding its deregistration, the provisions of this Part continue to apply to a political party until the Chief Electoral Officer is satisfied that the party has satisfied all of its liability and obligations incurred while it was registered under this Part.

Report contributions

293. An unincorporated association or organization recording amounts under section 292 shall forward a copy of its records relating to the amounts to the Chief Electoral Officer and to the political party or candidate that received those contributions.

Chief financial officer

298. (1) A political party that is applying for registration under this Part shall, before filing its application with the Chief Electoral Officer, appoint a chief financial officer.

(2) Every candidate shall appoint a chief financial officer for the purpose of this Part.

(3) Where a chief financial officer appointed under subsection (1) or (2) ceases to hold office, the registered party or candidate shall immediately appoint another chief financial officer.

(4) The chief financial officer of a registered party or candidate, in relation to the affairs of the party or candidate who or that appointed him or her, shall ensure

(a) that proper records are kept of all money received and expenditures;

(b) that contributions are placed in the appropriate depository;

(c) that proper receipts are completed and dealt with in accordance with this Part;

(d) that the financial statement as required by sections 303 and 304 together with the auditor's report on them are filed with the Chief Electoral Officer in accordance with this Part; and

(e) that contributions consisting of goods or services are valued and recorded in accordance with this Part.

Borrowing

300. (1) A registered party or candidate shall not borrow except from a chartered bank or other recognized lending institution or from a federal political party registered under the *Canada Elections Act* or a provincial political party recognized by the Chief Electoral Officer in the appropriate province.

(2) All loans referred to in subsection (1) and the terms of the loans shall be recorded by the political party or candidate and reported by it or him or her to the Chief Electoral Officer.

Appointment of auditor

302. (1) A candidate, on nomination day, and a registered party within 30 days after becoming registered under this Part, shall appoint an auditor licensed as a public accountant under the *Chartered Professional Accountants and Public Accountants Act* or a firm whose partners are licensed as public accountants under that Act.

(2) Where an auditor appointed under subsection (1),

(a) ceases for any reason, including resignation, to hold office;

(b) ceases to be qualified as provided in subsection (1); or

(c) becomes ineligible as provided in subsection (3),

the registered party or candidate, shall immediately appoint another auditor licensed as a public accountant under the *Chartered Professional Accountants and Public Accountants Act* or a firm whose partners are licensed as public accountants under that Act.

(3) A returning officer, deputy returning officer, an election clerk, a candidate, or an official agent or a chief financial officer of a candidate or registered party may not act as the auditor for a registered party or candidate.

(4) Where a candidate is unable to obtain the services of an auditor licensed as a public accountant under the *Chartered Professional Accountants and Public Accountants Act*, the Chief Electoral Officer may approve the appointment of another person who he or she is satisfied is competent to fulfill the role of auditor.

(5) Nothing in subsection (3) makes ineligible the partners or firm with which a returning officer, deputy returning officer, election clerk, candidate, official agent or chief financial officer of a registered party or candidate is associated from acting as an auditor for a registered party or candidate.

(6) The auditor appointed under subsection (1) or (2) shall make a report to the chief financial officer of a registered party or candidate that appointed him or her in respect of the financial statements, as required by sections 303 or 304, and shall make an examination according to generally accepted accounting principles that will enable him or her to state in his or her report whether in his or her opinion the financial statement presents fairly the information contained in the accounting records on which the financial statement is based.

(7) An auditor, in his or her report under subsection (6), shall make those statements that he or she considers necessary in any case where

(a) he or she has not received from the chief financial officer all the information and explanation that he or she has required; or

(b) proper accounting records have not been kept by the chief financial officer so far as appears from his or her examination.

(8) An auditor appointed under subsection (1) or (2) shall upon request have access at all reasonable times to all records, documents, books, accounts and vouchers of the registered party or candidate that appointed him or her and is entitled to require from his or her or its chief financial officer the information and explanation that in his or her opinion is necessary to enable him or her to report as required by subsection (6).

(9) The Chief Electoral Officer shall subsidize the cost of auditor services for candidates by paying to the auditor of a candidate in respect of an audit for the candidate under section 304 the lesser of \$500 and the amount of the auditor's account to the candidate.

Annual filing of audit

303. The chief financial officer of a registered party shall, on or before April 1 in each year, file with the Chief Electoral Officer financial statements, prepared in accordance with generally accepted accounting principles, of assets and liabilities and of income and expenses for the previous year of the registered party for which he or she acts, together with the auditor's report as required by subsection 302(6).

Filing financial statement

304. (1) The chief financial officer of every registered party or candidate shall, within 4 months after polling day, file with the Chief Electoral Officer a financial statement of income and expenses of the party or candidate for which he or she acts relating to the election, **together with the auditor's report** as required by subsection 302(6).

(2) In relation to a by-election, subsection (1) applies only to registered parties that received contributions or made expenditures in relation to the by-election and to candidates at the by-election.

Reimbursement of expenses

312. (1) A candidate who receives at least 15% of the popular vote or who is elected by acclamation is entitled to be reimbursed by the Chief Electoral Officer for 1/3 of his or her actual campaign expenses to a maximum of 1/3 of the expense limit.

(2) A candidate is not entitled to be reimbursed for expenses under subsection (1) unless his or her chief financial officer has filed a financial statement of receipts and expenses as required by section 304, **together with the auditor's report** as required by subsection 302(6), and the Chief Electoral Officer certifies in writing that the statement meets the requirements of this Part.

(3) Where a candidate's financial statement shows a deficit and he or she is entitled to be reimbursed for expenses under subsection (1), the money payable to his or her chief financial officer shall be first applied by the chief financial officer to discharge the debts creating the deficit, and to the extent the money is not sufficient to pay all the debts, the debts shall be ratably reduced.

Duties of committee

337. (1) The advisory committee shall advise the Chief Electoral Officer on the functioning of this Act and in particular on the functioning of the provisions relating to the financing of the political process.

(2) The Chief Electoral Officer shall consult the advisory committee periodically with regard to the application of this Act.

(3) **The advisory committee may make the results of its work public.**

Future amendments

340. Unless expressly otherwise provided in it, no provision of an Act that amends Part I is applicable to an election for which a writ of election is issued within 3 months of the commencement of the provision, unless, before the issue of the writ of election, **the Chief Electoral Officer has published in the *Gazette* a notice** that the provision can be applied in an election following the date of that notice.

Commissioner for Legislative Standards / Ethics Commissioner

For this Statutory Office, reporting protocols are defined in the *House of Assembly Act*, the *House of Assembly Accountability, Integrity and Administration Act*, and the *Public Interest Disclosure and Whistleblower Protection Act*.

House of Assembly Act

Definitions

20. In this Part

(a.2) "commissioner" means the Commissioner for Legislative Standards referred to in section 34

Annual report

35. (1) The commissioner shall report annually upon the affairs of his or her office to the Speaker of the Assembly who shall present the report to the House of Assembly within 15 sitting days of receiving it and, if the assembly is not in session, within 15 sitting days of the beginning of the next session.

(2) The commissioner may from time to time issue summaries of advice given, where it is possible to summarize the advice without disclosing information of a confidential nature or identifying the individual concerned.

(3) In each annual report made under this section the commissioner shall take every reasonable precaution to avoid revealing information likely to identify a member or a member's family.

Commissioner's opinion and advice

40. (1) A member may, by application in writing, request that the commissioner give an opinion and make recommendations on a matter respecting the obligations of the member under this Part or of a code of conduct .

(2) The commissioner may make whatever inquiries that the commissioner considers appropriate and provide the member with a written opinion and recommendations.

(3) The opinion and recommendations of the commissioner are privileged, but may be released by the member or with the consent of the member in writing.

(4) Notwithstanding subsection (3), a copy of any advice or opinion given under this section shall be given by the commissioner to the Premier, where the advice or certificate relates to a minister, or relates to that member's family.

Commissioner to destroy documents

41. The commissioner shall retain all documents in the possession of the commissioner that relate to a member or the member's family for a period of 12 months after a member ceases to be a member, after which the commissioner shall destroy all documents in his or her possession that relate to the member or the member's family, unless there is an inquiry current under this part or a charge has been laid against the member or the member's family under the *Criminal Code* to which the documents relate or may relate.

Commissioner's opinion on referred question

42. (1) A member who has reasonable grounds to believe that another member is in contravention of this Part or a code of conduct may, by application in writing setting out the grounds for the belief and the nature of the contravention alleged, request that the commissioner give an opinion respecting the compliance of the other member with the provisions of this Part or a code of conduct.

(2) The commissioner, on his or her own initiative, may conduct an inquiry to determine whether a member has failed to fulfil an obligation under this Part or a code of conduct when in the opinion of the commissioner it is in the public interest to do so.

(3) The House of Assembly may, by resolution, request that the commissioner give an opinion on a matter respecting the compliance of a member with the provisions of this Part or a code of conduct.

(4) The Premier may request that the commissioner give an opinion on a matter respecting the compliance of a minister with the provisions of this Part or a code of conduct.

(5) Where a matter has been referred to the commissioner under subsection (1) or (3), the House of Assembly or a committee of the House of Assembly shall not conduct an inquiry into the matter.

Inquiry

43. (1) Upon receiving a request under subsection 42(1), (3) or (4), or where the commissioner decides to conduct an inquiry under subsection 42(2), and on giving the member concerned reasonable notice, the commissioner may conduct an inquiry.

(2) Where the commissioner conducts an inquiry under subsection (1), the commissioner shall give the member to whom the inquiry relates a copy of the request and at all appropriate stages throughout the inquiry the commissioner shall give the member reasonable opportunity to be present and to make representations to the commissioner in writing or in person or by counsel or other representative.

(3) Where the commissioner decides to conduct an inquiry under subsection (1), the commissioner has all the powers of a commissioner under the *Public Enquiries Act*.

(4) Where the commissioner determines that the subject-matter of an inquiry conducted by him or her is under investigation by police or is the subject-matter of criminal proceedings, the commissioner shall hold the inquiry in abeyance pending final disposition of that investigation or those proceedings.

(5) Where during the course of an inquiry the commissioner determines that there are reasonable grounds to believe that an offence contrary to an Act of the province or the Parliament of Canada has been committed, the commissioner shall

immediately refer the matter to the appropriate authorities and hold the inquiry in abeyance pending final disposition of a resulting investigation and proceedings.

Report

44. (1) Where the request for an opinion is made under subsection 42(1) or (3), or where the commissioner conducts an inquiry under subsection 42(2), the commissioner shall report his or her opinion to the Speaker of the Assembly who shall present the report to the House of Assembly within 15 sitting days of receiving it if it is in session or, if not, within 15 sitting days of the beginning of the next session.

(2) Where the request for an opinion is made under subsection 42(4), the commissioner shall report his or her opinion to the Premier.

(3) In all cases, the commissioner shall report the results of an inquiry to the member concerned.

(4) The commissioner shall report the results of an inquiry as soon as possible, and in any event no later than 90 days after beginning the inquiry.

Penalties

45. (1) Where the commissioner determines that a member has failed to fulfil an obligation under this Part or a code of conduct, the commissioner may recommend in the report under section 44

(a) that the member be reprimanded;

(b) that the member make restitution or pay compensation;

(c) that the member be suspended from the House of Assembly, with or without pay, for a period specified in the report; or

(d) that the member's seat be declared vacant.

Concurrence of House of Assembly

46. (1) A recommendation in a report of the commissioner shall not take effect unless the report is sent to the Speaker under subsection 44(1) and concurred in by resolution of the House of Assembly.

(2) A report tabled in the House of Assembly under subsection 44(1) shall be taken up and disposed of within 15 sitting days after the day on which it was tabled or within a longer period, not to exceed 6 months, that the House of Assembly may determine.

Suit for compensation allowed

47. (1) Where a report to the House of Assembly under section 46 is adopted and the report recommends the payment of compensation or restitution the House may, in an Act passed for the purpose, order the payment of compensation or restitution.

(2) Compensation ordered to be paid under subsection (1) is a debt due to the person identified in the report as having suffered damage and may be recovered from the member to whom the report relates by that person in a court.

Examination of member

48. (1) Where, after considering a matter under section 43, the commissioner concludes that, having regard to all the circumstances, there was no failure without reasonable justification in the member's fulfilment of an obligation under this Part or a code of conduct, then the commissioner shall, without providing further information, so certify to the member in writing and shall give a copy of the certificate

(a) to the Premier, where the inquiry was begun as a result of a request under subsection 42(4); or

(b) to the Speaker of the House of Assembly where the inquiry was conducted as a result of a request under subsection 42(1) or (3) or by the commissioner under subsection 42(2).

(2) Where the commissioner gives a copy of a certificate to a member under this section, the commissioner shall, on the request of the member, provide the member with the information and explanations in support of the conclusion referred to in subsection (1) that the commissioner considers appropriate in the circumstances, and the member may publish or otherwise deal with information and explanations so provided as the member sees fit.

Action doesn't lie

51. (1) No action lies against the commissioner in respect of any advice, certificate, opinion or report made by the commissioner within the authority given the commissioner under this Part.

(2) Neither the commissioner nor an officer or employee of the office of the commissioner is a competent or compellable witness in a proceeding in a court arising out of or in relation to any advice, certificate, opinion, or report made by the commissioner, except in relation to a question whether the commissioner acted within the authority given him or her under this Part.

House of Assembly Accountability, Integrity and Administration Act

Definitions

2. In this Act

(g) "commissioner", unless the context indicates otherwise, means the Commissioner for Legislative Standards appointed under the *House of Assembly Act*

Codes of conduct

35. (1) The speaker shall, immediately after the coming into force of this Act, refer to the standing committee of the House of Assembly on Privileges and Elections the responsibility of developing and proposing to the House of Assembly the adoption, by resolution, of a code of conduct for members to assist members in the discharge of their obligations to the House of Assembly, their constituents and the public at large that

(a) provides guidance on the standards of conduct expected of members in discharging their legislative and public duties; and

- (b) provides the openness and accountability necessary to reinforce public confidence in the manner in which members perform those duties.
- (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 and by the public; and
 - (b) in addition to other standards of duty and responsibility imposed on members by this Act and any other law.
- (3) The commission shall, within 90 days of the coming into force of this Act, develop and adopt a code of conduct applicable to the officers and other persons employed in the House of Assembly service and in the statutory offices.
- (4) Before February 1 in a year, a member shall file with the clerk a declaration reaffirming the member's commitment to follow the code of conduct for members.

Request for opinion

36. (1) A member who has reasonable grounds to believe that another member is in contravention of the code of conduct adopted under subsection 35 (1) may, by application in writing setting out the grounds for the belief and the nature of the alleged contravention, request that the commissioner give an opinion respecting the compliance of the other member with the provisions of the code of conduct.

(2) The commissioner, on his or her own initiative, may conduct an inquiry to determine whether a member has failed to fulfil an obligation under the code of conduct where in the opinion of the commissioner it is in the public interest to do so.

(3) The House of Assembly may, by resolution, request that the commissioner give an opinion on a matter respecting the compliance of a member with the code of conduct.

(4) [Rep. by 2020 c2 s3]

(5) Where a matter has been referred to the commissioner under subsection (1) or (3), the House of Assembly or a committee of the House of Assembly shall not conduct an inquiry into the matter until the commissioner has completed his or her work.

Inquiry

37. (1) Upon receiving a request under subsection 36 (1), (3) or (4), or where the commissioner decides to conduct an inquiry under subsection 36 (2), and on giving the member concerned reasonable notice, the commissioner may conduct an inquiry.

(2) Where the commissioner conducts an inquiry under subsection (1), he or she shall give the member to whom the inquiry relates a copy of the request and at all appropriate stages throughout the inquiry the commissioner shall give the member reasonable opportunity to be present and to make representations to the commissioner in writing or in person or by counsel or other representative.

(3) Where the commissioner conducts an inquiry under subsection (1), he or she has all the powers of a commissioner under the *Public Inquiries Act, 2006*.

(4) Where the commissioner determines that the subject-matter of an inquiry conducted by him or her is under investigation by police or is the subject-matter of criminal proceedings, the commissioner shall hold the inquiry in abeyance pending final disposition of that investigation or those proceedings if, in his or her opinion, the continuation of the inquiry would inappropriately interfere with the investigation or proceeding.

(5) Where during the course of an inquiry the commissioner determines that there are reasonable grounds to believe that an offence contrary to an Act of the province or the Parliament of Canada has been committed, the commissioner shall immediately refer the matter to the appropriate authorities and hold the inquiry in abeyance pending final disposition of a resulting investigation and proceedings.

Report

38. (1) Where a request for an opinion is made under subsection 36 (1) or (3), or where the commissioner conducts an inquiry under subsection 36 (2), he or she shall report his or her opinion to the commission which shall present the report to the House of Assembly within 15 sitting days of receiving it if it is in session or, if not, within 15 sitting days of the beginning of the next session.

(2) [Rep. by 2020 c2 s4]

(3) In all cases, the commissioner shall report the results of an inquiry to the member concerned.

(4) The commissioner shall report the results of an inquiry as soon as possible, and in any event no later than 90 days after beginning the inquiry.

Penalties

39. Where the commissioner determines that a member has failed to fulfil an obligation under the code of conduct, he or she may recommend in the report under section 38

(a) that the member be reprimanded;

(b) that the member make restitution or pay compensation;

(c) that the member be suspended from the House of Assembly, with or without pay, for a period specified in the report; or

(d) that the member's seat be declared vacant.

Concurrence of House of Assembly

40. (1) A recommendation in a report of the commissioner shall not take effect unless the report is sent to the commission under subsection 38 (1) and concurred in by resolution of the House of Assembly.

(2) A report tabled in the House of Assembly under subsection 38 (1) shall be taken up and disposed of within 15 sitting days after the day on which it was tabled or within a longer period, not to exceed 6 months, that the House of Assembly may determine.

Confidentiality of identity

40.1 The identity of a person requesting an opinion under section 36 shall be kept confidential to the extent permitted by law and consistent with the need to conduct a proper investigation and the requirements of procedural fairness.

Suit for compensation allowed

41. (1) Where a report to the House of Assembly under section 38 is adopted and the report recommends the payment of compensation or restitution, the House of Assembly may, in an Act passed for the purpose, order the payment of compensation or restitution.

(2) Compensation ordered to be paid under subsection (1) is a debt due to the person identified in the report as having suffered damage and may be recovered from the member to whom the report relates by that person in a court.

Examination of member

42. (1) Where, after considering a matter under section 37, the commissioner concludes that, having regard to all the circumstances, there was no failure without reasonable justification in the member's fulfilment of an obligation under the code of conduct, then he or she, without providing further information, shall certify to the member in writing and shall give a copy of the certificate to the commission where the inquiry was conducted as a result of a request under subsection 36 (1) or (3) or by the commissioner under subsection 36 (2).

(2) Where the commissioner gives a copy of a certificate to a member under this section, he or she shall, on the request of the member, provide the member with the information and explanations in support of the conclusion referred to in subsection (1) that the commissioner considers appropriate in the circumstances, and the member may publish or otherwise deal with information and explanations so provided as the member sees fit.

Definitions

42.1 In sections 42.2 to 42.11,

- (a) "harassment" means harassment as defined in the policy; and
- (b) "policy" means the Harassment-free Workplace Policy Applicable to Complaints Against Members of the House of Assembly recommended by the Privileges and Elections Committee and concurred in by the House of Assembly, and includes any amendments to it.

Harassment

42.2 (1) Notwithstanding sections 36 to 42, where a matter relates to a complaint of harassment against a member, that matter shall not be dealt with under sections 36 to 42, but shall be investigated and reported upon by the citizens' representative in accordance with the policy.

(2) Notwithstanding subsection (1), where a complaint has been made to the citizens' representative under the policy but the citizens' representative is of the opinion that the matter does not fall within his or her jurisdiction, a complainant who is a member may make a request for an opinion to the commissioner under section 36.

(3) Where a request for an opinion has been made to the commissioner under section 36 but the commissioner is of the opinion that the matter does not fall within his or her jurisdiction under sections 36 to 42, a complainant is not prohibited from making a complaint on the matter in accordance with the policy.

(4) Where a matter has been referred to either the commissioner or the citizens' representative under this Act or the policy and the commissioner or the citizens' representative, as appropriate, has issued a report or discontinued an investigation of that matter, the decision of the commissioner or citizens' representative, as appropriate, is final and the matter may not be subsequently referred to the statutory officer who has not yet heard it.

Authority

42.3 (1) The citizens' representative shall conduct an investigation of an allegation made in a complaint under the policy in accordance with the policy.

(2) The investigation of an allegation made in a complaint under the policy shall be conducted as informally and expeditiously as possible in accordance with the policy.

(3) The citizens' representative shall ensure that the right to procedural fairness of all persons involved in an investigation is respected, including the complainant and the respondent.

Report

42.4 The citizens' representative shall report his or her findings to the Privileges and Elections Committee in accordance with the policy.

Roles of Privileges and Elections Committee

42.5 The Privileges and Elections Committee may do those things and exercise those powers assigned to it under the policy, and nothing in the policy, this section or sections 42.1 to 42.11 shall be taken to derogate from the powers, privileges and immunities of the House of Assembly, of its members or of the Privileges and Elections Committee under this or under any other law.

Penalties

42.6 (1) Where, in a report under section 42.4, the citizens' representative determines that a complaint against a member is substantiated, the Privileges and Elections Committee may recommend to the House of Assembly that

- (a) the member be reprimanded;
- (b) the member make restitution or pay compensation;
- (c) the member be suspended from the House of Assembly, with or without pay, for a period specified in the report; or
- (d) the member's seat be declared vacant.

(2) Before making a recommendation under subsection (1), the Privileges and Elections Committee shall, in accordance with the policy, provide the complainant and respondent with an opportunity to appear before the committee or to make a written submission to it respecting the sanction, if any, that the committee may recommend to the House of Assembly.

Concurrence of House of Assembly

42.7 (1) A report of the Privileges and Elections Committee under the policy shall be taken up and disposed of by the House of Assembly within 6 months of its being tabled, or a longer period that the House of Assembly may determine.

(2) A recommendation of the Privileges and Elections Committee shall not take effect unless it is concurred in by resolution of the House of Assembly.

Confidentiality of identity

42.8 The identity of a person making a complaint and any witness to the matter to which the complaint relates shall be kept confidential to the extent permitted by law and consistent with the need to conduct a proper investigation and the requirements of procedural fairness.

Where complainant is citizens' representative

42.9 Where the person making a complaint under the policy is the citizens' representative, the commissioner may exercise the powers of the citizens' representative under the policy and sections 42.1 to 42.8 as if the commissioner were the citizens' representative.

Rules

64. (1) The commission may make rules

- (a) respecting allowances, reimbursements, allowable expenses and other resources available to members;
- (b) establishing distinctions between member constituencies with respect to amounts and entitlement;
- (c) establishing limits and restrictions on amounts related to living, constituency and other expenses, including distance traveled, daily rates, meal rates and other rates payable by way of reimbursement or with respect to a claim of a member;
- (d) respecting reimbursement and payment of member expenses and claims;
- (e) respecting the preparation and circulation of manuals, agendas, codes, briefing and other materials;
- (f) respecting the forms and manner in which reimbursement of claims may be made;
- (g) respecting policies and procedures for proper financial management;
- (h) respecting purposes, presumptions and principles underlying rules enacted by the commission;
- (i) respecting member responsibility for finances, expenses, claims, liability and reimbursements;
- (j) respecting records to be maintained and reports required of members, the commission, speaker, clerk and staff of the House of Assembly service and the statutory offices;
- (k) respecting forms, receipts and other documentation required for monitoring claims, expenses, reimbursements and other payments;
- (l) respecting eligibility for and prohibitions and restrictions related to expenses, claims, reimbursements and other payments;
- (m) respecting allocations of resources for office, employee, administrative and other services for members;
- (n) respecting the manner of engaging, regulating and paying for constituency assistants; and
- (o) respecting another matter that the commission considers necessary or advisable to give effect to the purpose of this Act.

(2) Rules made under this Act are subordinate legislation within the meaning of the *Statutes and Subordinate Legislation Act*.

Public Interest Disclosure and Whistleblower Protection Act

When investigation not required

15. (1) The citizens' representative is not required to investigate a disclosure and the citizens' representative may cease an investigation if he or she is of the opinion that

- (a) the subject matter of the disclosure would more appropriately be dealt with, initially or completely, according to a procedure provided for under another Act;
- (b) the disclosure is frivolous or vexatious, or has not been made in good faith or does not deal with a sufficiently serious subject matter;
- (c) so much time has elapsed between the date when the subject matter of the disclosure arose and the date when the disclosure was made that investigating it would not serve a useful purpose;
- (d) the disclosure does not provide adequate particulars about the wrongdoing as required by section 8 ; or
- (e) there is another valid reason for not investigating the disclosure.

(2) Where the citizens' representative believes that a disclosure made to the citizens' representative would be dealt with more appropriately by

- (a) the auditor general, the citizens' representative may refer the matter to the auditor general to be dealt with in accordance with the *Auditor General Act, 2021* ; or
- (b) the commissioner for legislative standards, the citizens' representative may refer the matter to the commissioner for legislative standards to be dealt with in accordance with this Act.

(3) Where a matter is referred to the auditor general under subsection (2), the reprisal protections set out in this Act apply to the employee or former employee who made the disclosure to the citizens' representative.

(4) Where a matter is referred to the commissioner for legislative standards under subsection (2), the commissioner for legislative standards has and shall exercise the powers and duties of the citizens' representative under this Act.

(5) Where the citizens' representative does not investigate a disclosure, ceases an investigation or refers a disclosure to the auditor general or the commissioner for legislative standards under this section, the citizens' representative shall report on the matter to the employee who made the disclosure in the manner and at the time the citizens' representative considers appropriate.

Citizens' representative's report re investigation

18. (1) Upon completing an investigation, the citizens' representative shall **prepare a report** containing his or her findings and any recommendations about the disclosure and the wrongdoing.

(2) The citizens' representative shall **give a copy of the report** to the chief executive of the appropriate department or public body.

(3) Notwithstanding subsection (2), where the matter being investigated involves the chief executive, the citizens' representative shall **give a copy of the report**,

(a) in the case of a department, to the minister responsible; or

(b) in the case of a public body, to the board of directors and the minister responsible.

(4) The citizens' representative shall report on the result of his or her investigation to the employee whose disclosure initiated the investigation in the manner and at the time the citizens' representative considers appropriate.

Notification by department or public body

19. (1) When making recommendations, the citizens' representative may request the appropriate department or public body to notify him or her, within a specified time, of the steps it has taken or proposes to take to give effect to the recommendations.

(2) Where the citizens' representative believes that the department or public body has not appropriately followed up on his or her recommendations, or did not cooperate in the citizens' representative's investigation under this Act, the citizens' representative **may make a report** on the matter

(a) in the case of a department, to the minister responsible; or

(b) in the case of a public body, to the board of directors and the minister responsible.

Citizens' Representative

For this Statutory Office, reporting protocols are defined in the *Citizens' Representative Act*, the *House of Assembly Accountability, Integrity and Administration Act*, the *Public Interest Disclosure and Whistleblower Protection Act*, and the *Harassment-Free Workplace Policy Applicable to Complaints Against Members of the House of Assembly*.

Citizens' Representative Act

Secrecy

13. (1) The Citizens' Representative and every person employed under him or her shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their duties or functions under this Act.

(2) Notwithstanding subsection (1) or an oath taken or affirmation made under this Act, the Citizens' Representative may disclose in a report made by him or her under this Act those matters which he or she considers necessary to disclose in order to establish grounds for his or her conclusions and recommendations.

Delegation

14. (1) The Citizens' Representative may in writing delegate to another person his or her powers under this Act except the power to make a report under this Act.

(2) A person purporting to exercise the power of the Citizens' Representative by virtue of the delegation under subsection (1) shall produce evidence of his or her authority to exercise that power when required to do so.

Reference by Lieutenant-Governor in Council

16. The Lieutenant-Governor in Council may refer to the Citizens' Representative, for investigation and report by him or her, a matter relating to administration in or by a department or agency of the government, or by an officer, employee or member of it, and the Citizens' Representative shall,

- (a) subject to a special direction of the Lieutenant-Governor in Council, investigate the matter referred to him or her so far as it is within his or her jurisdiction; and
- (b) make a report to the Lieutenant-Governor in Council that he or she considers appropriate.

Reference by House of Assembly

17. The House of Assembly may refer to the Citizens' Representative, for investigation and report by him or her, any petition that is presented to it for consideration or any matter to which the petition relates, and, in that case, the Citizens' Representative shall,

- (a) subject to special directions of the House of Assembly, investigate the matters referred to him or her as far as it is within his or her jurisdiction; and
- (b) make a report to the House of Assembly that he or she considers appropriate,

but nothing in section 24, 25 or 39 applies in respect of an investigation or report made under this section.

Restriction on investigation by minister

20. (1) Where the Minister of Justice certifies in writing to the Citizens' Representative that the investigation of a matter would be contrary to the public interest under the circumstances, the Citizens' Representative shall not investigate the matter, or, where the Citizens' Representative has commenced an investigation of the matter, he or she shall discontinue the investigation.

(2) Where a certificate is given under subsection (1), the Citizens' Representative shall include that fact and a brief description of the circumstances of the matter in his or her next annual report to the House of Assembly.

Refusal to investigate

24. (1) The Citizens' Representative, in his or her discretion, may refuse to investigate or may cease to investigate a complaint where

- (a) it relates to a decision, recommendation, act or omission of which the complainant has had knowledge for more than one year before the complaint is received by the Citizens' Representative;
- (b) in his or her opinion it is frivolous or vexatious or not made in good faith or concerns a trivial matter;
- (c) the complainant does not have a sufficient personal interest in the subject matter of the complaint;
- (d) in his or her opinion it should not be investigated or the investigation should not be continued because the public interest outweighs the interest of the person aggrieved;
- (e) in his or her opinion the circumstances of the case do not require investigation; or
- (f) the law, or existing administrative procedure provides an adequate remedy in the circumstances for the person aggrieved and, where the person aggrieved has not availed himself or herself of the remedy, there is no reasonable justification for his or her failure to do so.

(2) Where, in the course of or after an investigation of a decision, act or omission, done or omitted by a department or agency of the government, or an officer or employee of it in the exercise of a discretion vested in that department, agency, officer, or employee, the Citizens' Representative is satisfied that the decision, act or omission is not clearly wrong or unreasonable, the Citizens' Representative shall make no further investigation of the matter and shall report to the complainant that he or she is so satisfied.

Report of refusal to investigate

25. Where the Citizens' Representative decides not to investigate or to cease investigating a complaint, he or she shall inform the complainant, and other interested persons, of his or her decision and shall provide to them reasons for his or her decision.

Notice of investigation

26. Before investigating a complaint, the Citizens' Representative shall inform the deputy minister, or the administrative head of the department or agency of the government affected, of his or her intention to make the investigation.

Right to be heard

29. The Citizens' Representative is not required to hold a hearing and a person is not entitled, as of right, to be heard by the Citizens' Representative, but, where it appears to the Citizens' Representative that there is sufficient grounds for his or her making a report or recommendation in respect of a matter that may adversely affect a department, agency of the government, or person, he or she shall give to the department, agency, or person, an opportunity to make representations in respect of the matter, and the department, agency, or person may make representations in respect of the matter by counsel.

Restrictions on disclosure

32. Where the Minister of Justice certifies that the giving of any information or the answering of any questions or the production of any document, paper or thing might involve the disclosure of

- (a) the deliberations of the Executive Council or a committee of the Executive Council;
- (b) proceedings of the Executive Council, or committee of the Executive Council, relating to matters of a secret or confidential nature and would be injurious to the public interest; or
- (c) interfere with or impede the investigation or detection of an offence,

the Citizens' Representative shall not require the information or answer to be given or the document, paper or thing to be produced, but shall report the giving of the certificate to the House of Assembly.

Report on investigation

37. (1) Where, after making an investigation under this Act, the Citizens' Representative is of the opinion

- (a) that a decision, recommendation, act or omission that is the subject matter of the investigation appears to be
 - (i) contrary to law,
 - (ii) unreasonable,
 - (iii) unjust,
 - (iv) oppressive,
 - (v) improperly discriminatory,
 - (vi) in accordance with a practice or procedure that is or may be unreasonable, unjust, oppressive, or improperly discriminatory,
 - (vii) based wholly or partly on a mistake of law or fact, or
 - (viii) wrong;
- (b) that in making a decision or recommendation, or in doing or omitting an act, a power or right has been exercised
 - (i) for an improper purpose,
 - (ii) on irrelevant grounds, or
 - (iii) on the taking into account of irrelevant considerations; or
- (c) that reasons should have been given for a decision, recommendation, act or omission that was the subject matter of the investigation,

the Citizens' Representative shall report his or her opinion and his or her reasons and may make those recommendations that he or she considers appropriate to the appropriate minister and to the department or agency of the government concerned.

- (2) In making a report under subsection (1), the Citizens' Representative may recommend
 - (a) that a matter should be referred to the appropriate authority for further consideration;
 - (b) that an omission should be rectified;
 - (c) that a decision should be cancelled or varied;
 - (d) that a practice on which a decision, recommendation, act or omission was based should be altered or reviewed;
 - (e) that a law on which a decision, recommendation, act or omission was based should be reconsidered;
 - (f) that reasons should be given for a decision, recommendation, act or omission; or
 - (g) that other steps should be taken.

Notice of proposed steps

38. (1) Where the Citizens' Representative makes a recommendation under section 37, he or she may request the department or agency of the government to notify him or her within a specified time of the action it has taken or proposes to take to give effect to his or her recommendations.

(2) Where within a reasonable time after a request respecting recommendations is made under this section, no action is taken which seems to the Citizens' Representative to be adequate and appropriate, the Citizens' Representative, in his or her discretion, after considering the comments made by or on behalf of the department or agency of the government affected, may report the matter, including a copy of the report containing the recommendations, to the Lieutenant-Governor in Council and may mention the report in the Citizens' Representative's next annual report to the House of Assembly.

(3) A report made under subsection (2) shall include comments made by or on behalf of the department or agency of the government upon the opinion or recommendation of the Citizens' Representative.

Report to complainant

39. Where the Citizens' Representative makes an investigation on the basis of a complaint received by him or her, he or she shall report to the complainant, in the manner and at the time that he or she considers appropriate, the result of the investigation.

Annual report to House of Assembly

43. The Citizens' Representative shall report annually to the House of Assembly through the Speaker on the exercise and performance of his or her functions and duties under this Act.

Publication of reports

44. Where it is in the public interest, or in the interest of a person, department or agency of the government, the Citizens' Representative may publish reports relating generally to the exercise and performance of his or her functions and duties under this Act or to a particular case investigated by him or her, whether or not the matters to be dealt with in the report have been the subject of the report made to the House of Assembly under this Act.

Rules

45. (1) The House of Assembly Management Commission may make rules for the guidance of the Citizens' Representative in the exercise and performance of his or her functions and duties under this Act.

(2) Except where rules respecting it are made under subsection (1), the Citizens' Representative may determine his or her procedure.

House of Assembly Accountability, Integrity and Administration Act

Definitions

42.1 In sections 42.2 to 42.11,

- (a) "harassment" means harassment as defined in the policy; and
- (b) "policy" means the Harassment-free Workplace Policy Applicable to Complaints Against Members of the House of Assembly recommended by the Privileges and Elections Committee and concurred in by the House of Assembly, and includes any amendments to it.

Harassment

42.2 (1) Notwithstanding sections 36 to 42, where a matter relates to a complaint of harassment against a member, that matter shall not be dealt with under sections 36 to 42, but shall be investigated **and reported upon by the citizens' representative** in accordance with the policy.

(2) Notwithstanding subsection (1), where a complaint has been made to the citizens' representative under the policy but the citizens' representative is of the opinion that the matter does not fall within his or her jurisdiction, **a complainant who is a member may make a request for an opinion to the commissioner under section 36.**

(3) Where a request for an opinion has been made to the commissioner under section 36 but the commissioner is of the opinion that the matter does not fall within his or her jurisdiction under sections 36 to 42, a complainant is not prohibited from making a complaint on the matter in accordance with the policy.

(4) Where a matter has been referred to either the commissioner or the citizens' representative under this Act or the policy **and the commissioner or the citizens' representative, as appropriate, has issued a report** or discontinued an investigation of that matter, the decision of the commissioner or citizens' representative, as appropriate, is final and the matter may not be subsequently referred to the statutory officer who has not yet heard it.

Authority

42.3 (1) The citizens' representative shall conduct an investigation of an allegation made in a complaint under the policy in accordance with the policy.

(2) The investigation of an allegation made in a complaint under the policy shall be conducted as informally and expeditiously as possible in accordance with the policy.

(3) The citizens' representative shall ensure that the right to procedural fairness of all persons involved in an investigation is respected, including the complainant and the respondent.

Report

42.4 The citizens' representative shall report his or her findings to the Privileges and Elections Committee in accordance with the policy.

Roles of Privileges and Elections Committee

42.5 The Privileges and Elections Committee may do those things and exercise those powers assigned to it under the policy, and nothing in the policy, this section or sections 42.1 to 42.11 shall be taken to derogate from the powers, privileges and immunities of the House of Assembly, of its members or of the Privileges and Elections Committee under this or under any other law.

Penalties

42.6 (1) Where, in a report under section 42.4, the citizens' representative determines that a complaint against a member is substantiated, the Privileges and Elections Committee may recommend to the House of Assembly that

- (a) the member be reprimanded;
- (b) the member make restitution or pay compensation;
- (c) the member be suspended from the House of Assembly, with or without pay, for a period specified in the report; or
- (d) the member's seat be declared vacant.

(2) Before making a recommendation under subsection (1), the Privileges and Elections Committee shall, in accordance with the policy, provide the complainant and respondent with an opportunity to appear before the committee or to make a written submission to it respecting the sanction, if any, that the committee may recommend to the House of Assembly.

Concurrence of House of Assembly

42.7 (1) A report of the Privileges and Elections Committee under the policy shall be taken up and disposed of by the House of Assembly within 6 months of its being tabled, or a longer period that the House of Assembly may determine.

(2) A recommendation of the Privileges and Elections Committee shall not take effect unless it is concurred in by resolution of the House of Assembly.

Confidentiality of identity

42.8 The identity of a person making a complaint and any witness to the matter to which the complaint relates shall be kept confidential to the extent permitted by law and consistent with the need to conduct a proper investigation and the requirements of procedural fairness.

Where complainant is citizens' representative

42.9 Where the person making a complaint under the policy is the citizens' representative, the commissioner may exercise the powers of the citizens' representative under the policy and sections 42.1 to 42.8 as if the commissioner were the citizens' representative.

Rules

64. (1) The commission may make rules

- (a) respecting allowances, reimbursements, allowable expenses and other resources available to members;
- (b) establishing distinctions between member constituencies with respect to amounts and entitlement;
- (c) establishing limits and restrictions on amounts related to living, constituency and other expenses, including distance traveled, daily rates, meal rates and other rates payable by way of reimbursement or with respect to a claim of a member;
- (d) respecting reimbursement and payment of member expenses and claims;
- (e) respecting the preparation and circulation of manuals, agendas, codes, briefing and other materials;
- (f) respecting the forms and manner in which reimbursement of claims may be made;
- (g) respecting policies and procedures for proper financial management;
- (h) respecting purposes, presumptions and principles underlying rules enacted by the commission;
- (i) respecting member responsibility for finances, expenses, claims, liability and reimbursements;
- (j) respecting records to be maintained and reports required of members, the commission, speaker, clerk and staff of the House of Assembly service and the statutory offices;
- (k) respecting forms, receipts and other documentation required for monitoring claims, expenses, reimbursements and other payments;
- (l) respecting eligibility for and prohibitions and restrictions related to expenses, claims, reimbursements and other payments;
- (m) respecting allocations of resources for office, employee, administrative and other services for members;
- (n) respecting the manner of engaging, regulating and paying for constituency assistants; and
- (o) respecting another matter that the commission considers necessary or advisable to give effect to the purpose of this Act.

(2) Rules made under this Act are subordinate legislation within the meaning of the *Statutes and Subordinate Legislation Act*.

Public Interest Disclosure and Whistleblower Protection Act

Purpose of investigation

13. The purpose of an investigation by the citizens' representative into a disclosure of wrongdoing is to bring the wrongdoing to the attention of the chief executive of the appropriate department or public body and to recommend the corrective measures that should be taken, when appropriate.

Investigation by citizens' representative

14. (1) The citizens' representative is responsible for investigating disclosures that he or she receives under this Act.

(2) An investigation shall be conducted as informally and expeditiously as possible.

(3) The citizens' representative shall ensure that the right to procedural fairness and natural justice of all persons involved in an investigation is respected, including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings.

(4) Notwithstanding another provision of this Act, the citizens' representative shall not investigate a decision, recommendation, act or omission made or done by an individual in the course of acting as a solicitor or Crown prosecutor in the public service.

When investigation not required

15. (1) The citizens' representative is not required to investigate a disclosure and the citizens' representative may cease an investigation if he or she is of the opinion that

- (a) the subject matter of the disclosure would more appropriately be dealt with, initially or completely, according to a procedure provided for under another Act;
- (b) the disclosure is frivolous or vexatious, or has not been made in good faith or does not deal with a sufficiently serious subject matter;
- (c) so much time has elapsed between the date when the subject matter of the disclosure arose and the date when the disclosure was made that investigating it would not serve a useful purpose;
- (d) the disclosure does not provide adequate particulars about the wrongdoing as required by section 8; or

- (e) there is another valid reason for not investigating the disclosure.
- (2) Where the citizens' representative believes that a disclosure made to the citizens' representative would be dealt with more appropriately by
 - (a) the auditor general, the citizens' representative may refer the matter to the auditor general to be dealt with in accordance with the *Auditor General Act, 2021* ; or
 - (b) the commissioner for legislative standards, the citizens' representative may refer the matter to the commissioner for legislative standards to be dealt with in accordance with this Act.
- (3) Where a matter is referred to the auditor general under subsection (2), the reprisal protections set out in this Act apply to the employee or former employee who made the disclosure to the citizens' representative.
- (4) Where a matter is referred to the commissioner for legislative standards under subsection (2), the commissioner for legislative standards has and shall exercise the powers and duties of the citizens' representative under this Act.
- (5) Where the citizens' representative does not investigate a disclosure, ceases an investigation or refers a disclosure to the auditor general or the commissioner for legislative standards under this section, the citizens' representative shall report on the matter to the employee who made the disclosure in the manner and at the time the citizens' representative considers appropriate.

Conducting an investigation

- 16.** (1) The citizens' representative and persons employed under the citizens' representative have the powers and protections provided for in the *Citizens' Representative Act* when conducting an investigation of a disclosure under this Act.
- (2) Sections 13, 14, 25 to 36 and 40 to 42 of the *Citizens' Representative Act* apply to the conduct of an investigation, with the necessary changes.

Investigating other wrongdoings

- 17.** Where, during an investigation, the citizens' representative has reason to believe that another wrongdoing has been committed, the citizens' representative may investigate that wrongdoing in accordance with this Act.

Citizens' representative's report re investigation

- 18.** (1) Upon completing an investigation, the citizens' representative shall prepare a report containing his or her findings and any recommendations about the disclosure and the wrongdoing.
- (2) The citizens' representative shall give a copy of the report to the chief executive of the appropriate department or public body.
- (3) Notwithstanding subsection (2), where the matter being investigated involves the chief executive, the citizens' representative shall give a copy of the report,
 - (a) in the case of a department, to the minister responsible; or
 - (b) in the case of a public body, to the board of directors and the minister responsible.
- (4) The citizens' representative shall report on the result of his or her investigation to the employee whose disclosure initiated the investigation in the manner and at the time the citizens' representative considers appropriate.

Notification by department or public body

- 19.** (1) When making recommendations, the citizens' representative may request the appropriate department or public body to notify him or her, within a specified time, of the steps it has taken or proposes to take to give effect to the recommendations.
- (2) Where the citizens' representative believes that the department or public body has not appropriately followed up on his or her recommendations, or did not cooperate in the citizens' representative's investigation under this Act, the citizens' representative may make a report on the matter
 - (a) in the case of a department, to the minister responsible; or
 - (b) in the case of a public body, to the board of directors and the minister responsible.

Annual report

- 20.** (1) The citizens' representative shall make an annual report to the House of Assembly on the exercise and performance of his or her functions and duties under this Act, setting out
 - (a) the number of inquiries relating to this Act;
 - (b) the number of disclosures received and the number acted on and not acted on;
 - (c) the number of investigations commenced under this Act;
 - (d) the number of recommendations the citizens' representative has made and whether the department or public body has complied with the recommendations;
 - (e) whether, in the opinion of the citizens' representative, there are any systemic problems that give rise to wrongdoings; and
 - (f) the recommendations for improvement that the citizens' representative considers appropriate.
- (2) The report shall be given to the Speaker, who shall table a copy of it in the House of Assembly within 15 days after receiving it if the Assembly is sitting or, if it is not, the Speaker shall give a copy of the report to the Clerk of the House of Assembly and after 15 days after receipt of that report by the Clerk it shall be considered to have been tabled in the House.
- (3) Where it is in the public interest to do so, the citizens' representative may publish a special report relating to a matter within the scope of the citizens' representative's functions and duties under this Act, including a report referring to and commenting on a particular matter investigated by the citizens' representative.

Harassment-Free Workplace Policy Applicable to Complaints Against Members of the House of Assembly¹²⁴

5.6 Citizens' Representative

It is the responsibility of the Citizens' Representative to:

- Identify and retain the services required to establish the position of Independent Support Advisor;
- Oversee the work of the Intake Officer, and ensure the incumbent has the necessary skills, knowledge, and training to receive and provide advice on complaints of harassment;
- Review complaints with the Intake Officer to identify whether allegations are within scope of the Policy;
- Conduct investigations if/when a complaint proceeds to the formal resolution stage. In that regard, the Citizens' Representative has a responsibility to:
 - Inform the complainant, respondent, witnesses, and support persons of the process that will be followed and their roles in the investigation, including the process for disclosure of statements/evidence in accordance with the principles of procedural fairness;
 - Conduct the investigation in a fair and impartial manner;
 - Respect confidentiality at all times;
 - Interview the parties and witnesses and prepare written statements;
 - Review all statements and evidence collected in the investigation;
 - Prepare an investigative report that provides an analysis of the evidence gathered and findings as to whether harassment has occurred in accordance with the Policy;
 - Provide written notification to the complainant and respondent on the status of the investigation processes throughout the course of the investigation.
- Submit the final investigative report to the Standing Committee on Privileges and Elections, and be available to that Committee as necessary to discuss the report and its findings;
- Notify the complainant of any decision voted on in the House of Assembly under the Policy;
- Develop and administer documentation to support the Policy;
- Provide interpretation and guidance regarding the Policy;
- Act as a subject matter resource for the development of orientation, training, and information programs with respect to the policy; and
- Respect the confidentiality of all processes under the Policy.

5.7 Standing Committee on Privileges and Elections

It is the responsibility of the Standing Committee on Privileges and Elections to:

- Receive investigative reports from the Citizens' Representative;
- Review investigative reports and findings, and determine a recommendation for sanction (if applicable) against the respondent MHA;
- Prepare a report for the House of Assembly outlining the recommended sanction of the respondent MHA (if applicable), and any details of the final investigative report to provide rationale for the recommendation. Note: While the respondent MHA will be named, the identity of the complainant and witnesses will not be disclosed in the report to the House of Assembly – see Section 9.2 for further details.
- Provide an opportunity for the complainant and/or respondent to be heard by the Committee with respect to a recommendation for sanction;
- Table the report in the House of Assembly and provide notice of the proposed motion in the report with respect to a sanction recommendation (through the Chair);
- Conduct a review of the Harassment-Free Workplace Policy Applicable to Complaints Against Members of the House of Assembly once each general assembly (or as necessary), and make recommendations to the House of Assembly on revisions to the Policy as required; and
- Respect the confidentiality of all processes under the Policy.

9.3 Referral of Final Investigative Report to Privileges and Elections Committee

Once the final investigative report is completed, the Citizens' Representative refers it to the Standing Committee on Privileges and Elections (PEC).

In the event the complainant or respondent is a member of the PEC, the Citizens' Representative will notify the Speaker, who in turn will notify the Government House Leader requesting the Committee member (who is either the complainant or respondent) be replaced with another Member of the House of Assembly within 5 days. The replacement is for the purpose of dealing with the report only.

The final investigative report of the Citizens' Representative is a report prepared for a Committee of the House. Parliamentary privilege extends to Committees of the House; therefore releasing the final investigative report publicly by any individual provided with a copy of the report in accordance with the Policy may be considered a violation of that privilege.

¹²⁴ Link: <https://www.assembly.nl.ca/pdfs/HFWPApplicableToComplaintsAgainstMHAsConcurredDec2-2019EffectiveApr1-20.pdf>

9.4 Referral to House of Assembly

Once the final report of the Standing Committee on Privileges and Elections is ready for presentation to the House of Assembly, the Chair tables the report and gives notice of the proposed motion in the report. If the House is sitting, the report must be tabled and notice of the motion given within 5 days. If the House is not sitting, it must be tabled and notice of motion given within 5 days of the beginning of the next sitting.

Once notice of the motion is given, the House must deal with/dispose of the matter within six months.

Statements in debate regarding a matter related to the Policy must respect the confidentiality of processes under the Policy, as well as the privacy of the complainant and witnesses.

Once the House of Assembly has voted on a matter related to the Policy, the Speaker of the House of Assembly shall immediately notify the Citizens' Representative who will then notify the complainant and respondent of the decision of the House.

10.0 CONFIDENTIALITY

Respect for privacy is an important aspect of a respectful work environment, and any person directly or indirectly involved in a situation governed by this Policy must adhere to the principle of confidentiality.

However, the obligation to maintain confidentiality to which the Policy refers is not absolute. For example:

- People with responsibility for processing the files may disclose information if necessary in that context and in accordance with the provisions of the Policy; and
- Complainants, respondents, and witnesses called as part of the complaint process have the right to consult the support person of their choice. Although disclosure is permitted under the Policy, it must occur with the greatest possible discretion, respect, and without unjustly tarnishing people's reputations.

Information about a complaint, including the identities of the complainant, respondent, and witnesses, must be kept confidential by all parties, including those involved in the complaint process. The complainant, respondent, and witnesses must sign a confidentiality agreement at the beginning of the process.

The final investigative report of the Citizens' Representative is a report prepared for a Committee of the House. Committees of the House are subject to parliamentary privilege; therefore releasing the final investigative report publicly by any individual provided with a copy of the report in accordance with the Policy may be considered a violation of that privilege.

The final report of the Standing Committee on Privileges and Elections to the House of Assembly is also subject to parliamentary privilege; therefore releasing the final report publicly before it is tabled in the House may be considered a violation of that privilege.

10.1 Breaches in Confidentiality

Members of the House of Assembly and employees who breach confidentiality throughout a process under the Policy may be subject to disciplinary action.

If it is determined that confidentiality has been breached by an MHA during the investigation process, the Citizens' Representative will immediately notify the Standing Committee on Privileges and Elections. If it is determined that confidentiality has been breached by an MHA during another process under the Policy, it should be brought to the attention of the Speaker of the House of Assembly, who will immediately notify the Standing Committee on Privileges and Elections. In either case, the Committee will review the matter and recommend any sanction (if necessary) available to the House of Assembly to be brought forward in a report to the House for debate and vote.

If it is determined that confidentiality has been breached by an employee during the investigation process, the Citizens' Representative will immediately notify either the Clerk of the House of Assembly (if the employee is from the Legislative Branch); or Clerk of the Executive Council (if the employee is from the Executive Branch). If it is determined that confidentiality has been breached by an employee during another process under the Policy, it should be brought to the attention of the Speaker of the House of Assembly, who will immediately notify either the Clerk of the House of Assembly or the Clerk of the Executive Council. The applicable Clerk will engage human Resources and the employee's supervisor/manager to review the matter and determine appropriate disciplinary action (if necessary) for the employee.

... Any of the procedural steps of the Policy may be postponed during a period of dissolution at the discretion of the Citizens' Representative. The Chair of the Standing Committee on Privileges and Elections cannot be presented with an investigative report during a period of dissolution. Dissolution will not affect the standing of any case under the Policy if the respondent is re-elected to the House of Assembly.

Information and Privacy Commissioner

For this Statutory Office, reporting protocols are defined in the *Access to Information and Protection of Privacy Act, 2015* and the *Personal Health Information Act*.

Access to Information and Protection of Privacy Act, 2015

Definitions

2. In this Act

- (d) "commissioner" means the Information and Privacy Commissioner appointed under section 85

Time limit for formal investigation

46. (1) The commissioner shall complete a formal investigation and make a report under section 48 within 65 business days of receiving the complaint, whether or not the time for the informal resolution process has been extended.

(2) The commissioner may, in extraordinary circumstances, apply to a judge of the Trial Division for an order to extend the period of time under subsection (1).

Report

48. (1) On completing an investigation, the commissioner shall

- (a) prepare a report containing the commissioner's findings and, where appropriate, his or her recommendations and the reasons for those recommendations; and
(b) send a copy of the report to the person who filed the complaint, the head of the public body concerned and a third party who was notified under section 44 .

(2) The report shall include information respecting the obligation of the head of the public body to notify the parties of the head's response to the recommendation of the commissioner within 10 business days of receipt of the recommendation.

Response of public body

49. (1) The head of a public body shall, not later than 10 business days after receiving a recommendation of the commissioner,

- (a) decide whether or not to comply with the recommendation in whole or in part; and
(b) give written notice of his or her decision to the commissioner and a person who was sent a copy of the report.

(2) Where the head of the public body does not give written notice within the time required by subsection (1), the head of the public body is considered to have agreed to comply with the recommendation of the commissioner.

- (3) The written notice shall include notice of the right
(a) of an applicant or third party to appeal under section 54 to the Trial Division and of the time limit for an appeal; or
(b) of the commissioner to file an order with the Trial Division in one of the circumstances referred to in subsection 51 (1).

Head of public body seeks declaration in court

50. (1) This section applies to a recommendation of the commissioner under section 47 that the head of the public body

- (a) grant the applicant access to the record or part of the record; or
(b) make the requested correction to personal information.

(2) Where the head of the public body decides not to comply with a recommendation of the commissioner referred to in subsection (1) in whole or in part, the head shall, not later than 10 business days after receipt of that recommendation, apply to the Trial Division for a declaration that the public body is not required to comply with that recommendation because

- (a) the head of the public body is authorized under this Part to refuse access to the record or part of the record, and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception;
(b) the head of the public body is required under this Part to refuse access to the record or part of the record; or
(c) the decision of the head of the public body not to make the requested correction to personal information is in accordance with this Act or the regulations.

(3) The head shall, within the time frame referred to in subsection (2), serve a copy of the application for a declaration on the commissioner, the minister responsible for the administration of this Act, and a person who was sent a copy of the commissioner's report.

(4) The commissioner, the minister responsible for this Act, or a person who was sent a copy of the commissioner's report may intervene in an application for a declaration by filing a notice to that effect with the Trial Division.

(5) Sections 57 to 60 apply, with the necessary modifications, to an application by the head of a public body to the Trial Division for a declaration.

Filing an order with the Trial Division

51. (1) The commissioner may prepare and file an order with the Trial Division where

- (a) the head of the public body agrees or is considered to have agreed under section 49 to comply with a recommendation of the commissioner referred to in subsection 50 (1) in whole or in part but fails to do so within 15 business days after receipt of the commissioner's recommendation; or
(b) the head of the public body fails to apply under section 50 to the Trial Division for a declaration.

(2) The order shall be limited to a direction to the head of the public body either

- (a) to grant the applicant access to the record or part of the record; or
(b) to make the requested correction to personal information.

(3) An order shall not be filed with the Trial Division until the later of the time periods referred to in paragraph (1)(a) and section 54 has passed.

(4) An order shall not be filed with the Trial Division under this section if the applicant or third party has commenced an appeal in the Trial Division under section 54 .

(5) Where an order is filed with the Trial Division, it is enforceable against the public body as if it were a judgment or order made by the court.

Investigation – privacy complaint

74. (1) The commissioner may take the steps that he or she considers appropriate to resolve a privacy complaint informally to the satisfaction of the parties and in a manner consistent with this Act.

(2) Where the commissioner is unable to informally resolve a privacy complaint within a reasonable period of time, the commissioner shall conduct a formal investigation of the subject matter of the privacy complaint where he or she is satisfied that there are reasonable grounds to do so.

(3) The commissioner shall complete a formal investigation and **make a report** under section 77 within a time that is as expeditious as possible in the circumstances.

(4) Where the commissioner has 5 active privacy complaints from the same person that deal with similar or related records, the commissioner may hold an additional complaint in abeyance and not commence an investigation until one of the 5 active complaints is resolved.

Report – privacy complaint

77. (1) On completing an investigation of a privacy complaint, the commissioner shall

(a) **prepare a report** containing the commissioner's findings and, where appropriate, his or her recommendations and the reasons for those recommendations; and

(b) **send a copy of the report to the person who filed the privacy complaint and the head of the public body concerned.**

(2) **The report shall include information respecting the obligation of the head of the public body to notify the person who filed the privacy complaint of the head's response to the recommendation of the commissioner within 10 business days of receipt of the recommendation.**

Response of public body – privacy complaint

78. (1) The head of a public body shall, not later than 10 business days after receiving a recommendation of the commissioner,

(a) decide whether or not to comply with the recommendation in whole or in part; and

(b) give written notice of his or her decision to the commissioner and a person who was sent a copy of the report.

(2) Where the head of the public body does not give written notice within the time required by subsection (1), the head of the public body is considered to have agreed to comply with the recommendation of the commissioner.

Head of public body seeks declaration in court

79. (1) Where the head of the public body decides under section 78 not to comply with a recommendation of the commissioner under subsection 76 (1) in whole or in part, the head shall, not later than 10 business days after receipt of that recommendation,

(a) apply to the Trial Division for a declaration that the public body is not required to comply with that recommendation because the collection, use or disclosure of the personal information is not in contravention of this Act, and

(b) serve a copy of the application for a declaration on the commissioner, the minister responsible for the administration of this Act, and a person who was sent a copy of the commissioner's report.

(2) The commissioner or the minister responsible for this Act may intervene in an application for a declaration by filing a notice to that effect with the Trial Division.

Filing an order with the Trial Division

80. (1) **The commissioner may prepare and file an order with the Trial Division** where

(a) the head of the public body agrees or is considered to have agreed under section 78 to comply with a recommendation of the commissioner under subsection 76 (1) in whole or in part but fails to do so within one year after receipt of the commissioner's recommendation; or

(b) the head of the public body fails to apply under section 79 to the Trial Division for a declaration.

(2) The order shall be limited to a direction to the head of the public body to do one or more of the following:

(a) stop collecting, using or disclosing personal information in contravention of this Act; or

(b) destroy personal information collected in contravention of this Act.

(3) An order shall not be filed with the Trial Division until the time period referred to in paragraph (1)(a) has passed.

(4) Where an order is filed with the Trial Division, it is enforceable against the public body as if it were a judgment or order made by the court.

Disclosure of information

102. (1) The commissioner and a person acting for or under the direction of the commissioner, shall not disclose information obtained in performing duties or exercising powers under this Act, except as provided in subsections (2) to (5).

(2) **The commissioner may disclose, or may authorize a person acting for or under his or her direction to disclose, information that is necessary to**

(a) perform a duty or exercise a power of the commissioner under this Act; or

(b) establish the grounds for findings and recommendations contained in a report under this Act.

(3) In conducting an investigation and in performing a duty or exercising a power under this Act, the commissioner and a person acting for or under his or her direction, shall take reasonable precautions to avoid disclosing and shall not disclose

(a) any information or other material if the nature of the information or material could justify a refusal by a head of a public body to give access to a record or part of a record;

- (b) the existence of information, where the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 17 (2);
- (c) any information contained in a report or notice made under section 4 or 7 of the *Patient Safety Act*; or
- (d) any information, including a record, that is prepared for the use of, or collected, compiled or prepared by, a committee referred to in subsection 8.1(1) of the *Evidence Act* for the purpose of carrying out its duties.
- (4) **The commissioner may disclose to the Attorney General** information relating to the commission of an offence under this or another Act of the province or Canada, where the commissioner has reason to believe an offence has been committed.
- (5) **The commissioner may disclose, or may authorize a person acting for or under his or her direction to disclose, information in the course of a prosecution or another matter before a court referred to in subsection 99 (1).**

Annual report

- 105.** **The commissioner shall report annually to the House of Assembly through the Speaker** on
- (a) the exercise and performance of his or her duties and functions under this Act;
 - (b) a time analysis of the functions and procedures in matters involving the commissioner in a complaint, from the date of receipt of the request for access or correction by the public body to the date of informal resolution, the issuing of the commissioner's report, or the withdrawal or abandonment of the complaint, as applicable;
 - (c) persistent failures of public bodies to fulfil the duty to assist applicants, including persistent failures to respond to requests in a timely manner;
 - (d) the commissioner's recommendations and whether public bodies have complied with the recommendations;
 - (e) the administration of this Act by public bodies and the minister responsible for this Act; and
 - (f) other matters about access to information and protection of privacy that the commissioner considers appropriate.

Special report

- 106.** **The commissioner may at any time make a special report to the House of Assembly through the Speaker** relating to
- (a) the resources of the office of the commissioner;
 - (b) another matter affecting the operations of this Act; or
 - (c) a matter within the scope of the powers and duties of the commissioner under this Act.

Report – investigation or audit

- 107.** **On completing an investigation under paragraph 95 (1)(a) or an audit under paragraph 95 (1)(b), the commissioner**
- (a) shall prepare a report containing the commissioner's findings and, where appropriate, his or her recommendations and the reasons for those recommendations;
 - (b) shall send a copy of the report to the head of the public body concerned; and
 - (c) may make the report public.

Report of minister responsible

- 113.** The minister responsible for this Act shall report annually to the House of Assembly on the administration of this Act and shall include information about
- (a) the number of requests for access and whether they were granted or denied;
 - (b) the specific provisions of this Act used to refuse access;
 - (c) the number of requests for correction of personal information;
 - (d) the costs charged for access to records; and
 - (e) systemic and other issues raised by the commissioner in the annual reports of the commissioner.

Regulations

- 116.** The Lieutenant-Governor in Council may make regulations
- (a) designating a body as a public body, educational body, health care body or local government body under this Act;
 - (b) designating a person or group of persons as the head of a public body;
 - (c) prescribing procedures to be followed in making, transferring and responding to requests under this Act;
 - (d) permitting prescribed categories of applicants to make requests under this Act orally instead of in writing;
 - (e) limiting the costs that different categories of persons may be charged under this Act;
 - (f) authorizing, for the purposes of section 28, a local public body to hold meetings of its elected officials, or of its governing body or a committee of the governing body, to consider specified matters in the absence of the public unless another Act
 - (i) expressly authorizes the local public body to hold meetings in the absence of the public, and
 - (ii) specifies the matters that may be discussed at those meetings;
 - (g) prescribing for the purposes of section 36 the categories of sites that are considered to have heritage or anthropological value;
 - (h) authorizing the disclosure of information relating to the mental or physical health of individuals to medical or other experts to determine, for the purposes of section 37, if disclosure of that information could reasonably be expected to result in grave and immediate harm to the safety of or the mental or physical health of those individuals;
 - (i) prescribing procedures to be followed or restrictions considered necessary with respect to the disclosure and examination of information referred to in paragraph (h);
 - (j) prescribing special procedures for giving individuals access to personal information about their mental or physical health;
 - (k) prescribing, for the purposes of section 68, a body to whom personal information may be disclosed for audit purposes;
 - (l) prescribing the public bodies that are required to comply with all or part of section 111;
 - (m) requiring public bodies to provide to the minister responsible for this Act information that relates to its administration or is required for preparing the minister's annual report;
 - (n) providing for the retention and disposal of records by a public body if the *Management of Information Act* does not apply to the public body;

- (o) exempting any class of public body from a regulation made under this section; and
- (p) **generally to give effect to this Act.**

Review

117. (1) After the expiration of not more than 5 years after the coming into force of this Act or part of it and every 5 years thereafter, the minister responsible for this Act shall refer it to a committee for the purpose of undertaking a comprehensive review of the provisions and operation of this Act or part of it.

(2) The committee shall review the list of provisions in Schedule A to determine the necessity for their continued inclusion in Schedule A.

Personal Health Information Act

Interpretation

2. (1) In this Act

- (e) "commissioner" means the Information and Privacy Commissioner appointed under the *Access to Information and Protection of Privacy Act, 2015*

PART VI

REVIEW BY COMMISSIONER

Interpretation

65. For the purpose of this Part, "complainant" means an individual requesting a review by the commissioner of

- (a) a denial by a custodian of a request for access or correction; or
- (b) an alleged breach of a provision of this Act or the regulations,

and "complaint" has a corresponding meaning.

Complaint to commissioner

66. (1) Where a custodian has refused the request of an individual for access under subsection 53(1) or for correction under subsection 60(1), the affected individual may file a complaint with the commissioner.

(2) A complaint under subsection (1) shall be in writing and shall be filed with the commissioner within 60 days from the date

- (a) that the individual receives notice of the custodian's refusal under section 56 or paragraph 62(1)(b) or a longer time period permitted by the commissioner; or
- (b) that the custodian is considered to have refused the request under subsection 56(2) or 62(2) or a longer time period as permitted by the commissioner.

(3) Where an individual believes on reasonable grounds that a custodian has contravened or is about to contravene a provision of this Act or the regulations in respect of his or her personal health information or the personal health information of another, he or she may file a complaint with the commissioner.

- (4) A complaint made under subsection (3) shall be in writing and shall be filed with the commissioner within
- (a) one year after the subject-matter of the complaint first came to the attention of the complainant or should reasonably have come to the attention of the complainant; or

- (b) a longer period of time as permitted by the commissioner where he or she is satisfied that it will not result in prejudice to another person.

(5) **The commissioner shall provide a copy of the complaint to the custodian whose decision or action is the subject matter of the complaint.**

(6) A complaint to the commissioner under this Part may not be made by an individual who has appealed a decision of a custodian directly to the Trial Division under Part VII .

Informal resolution

67. (1) The commissioner may take steps that he or she considers appropriate to resolve a complaint under section 66 informally to the satisfaction of the complainant and the custodian, and in a manner consistent with this Act.

(2) Where the commissioner is unable to achieve an informal resolution of the complaint within 60 days of receipt of the complaint, the commissioner shall conduct a review of the subject matter of the complaint if he or she is satisfied that there are reasonable grounds to do so.

(3) The commissioner may decide not to conduct a review where he or she is satisfied that

- (a) the custodian has responded adequately to the complaint;
- (b) the complaint has been or could be more appropriately dealt with by a procedure or proceeding other than a complaint under this Act;

(c) the length of time that has elapsed between the date when the subject-matter of the complaint arose and the date when the complaint was filed is such that a review under this Part would be likely to result in undue prejudice to a person or that a report would not serve a useful purpose; or

(d) the complaint is trivial, frivolous, vexatious or is made in bad faith.

(4) **Where the commissioner decides not to conduct a review, he or she shall give notice of that decision, together with reasons, to the complainant and the affected custodian and advise the complainant of his or her right to appeal the refusal of the custodian to grant access or make a correction to the Trial Division under section 83 and the time limit for the commencement of an appeal provided in that section.**

(5) Section 8.1 of the *Evidence Act* does not apply to a review conducted by the commissioner under this Part.

Conduct of review

68. (1) In conducting a review, the commissioner has the powers, privileges and immunities that may be conferred on a commissioner under the *Public Inquiries Act, 2006* except as otherwise provided in this Part.

(2) A review shall be conducted in private and the burden of proof in respect of the subject-matter of the complaint is on the custodian.

(3) In conducting a review the commissioner may receive and accept any evidence and other information that the commissioner sees fit, whether on oath or by affidavit or otherwise, and whether or not it is or would be admissible in a court of law.

(4) The complainant and the affected custodian shall be given an opportunity to make representations to the commissioner during the review, either in person or by counsel or agent, but neither is entitled to be present during, to have access to, or to comment on representations made to the commissioner by the other.

(5) The commissioner may decide whether representations are to be made orally or in writing.

Investigative powers

69. (1) In conducting a review, the commissioner may

(a) demand from the custodian a copy of a book, record or document or extract from a book, record or document relevant to the subject-matter of the review;

(b) inquire into all information, records, information practices of the custodian and other matters that are relevant to the subject-matter of the review; and

(c) use a data storage, processing or retrieval device or system belonging to the custodian under investigation in order to produce a record in readable form of a book, record or other document relevant to the subject-matter of the review.

(2) A demand by the commissioner for a copy of information under paragraph (1)(a) shall be in writing and shall include a statement of the nature of the things that are required to be produced.

(3) Except as otherwise provided under subsection (4), a custodian shall produce to the commissioner a copy of the information demanded under paragraph (1)(a) within 14 days of receipt of the demand, notwithstanding another Act or regulations or a privilege under the law of evidence.

(4) Where it is not practicable to make a copy of a record required under this section, the custodian may require the commissioner to examine the original at its site.

Entry onto premises

70. (1) In conducting a review, and notwithstanding another Act or regulation or a privilege under the law of evidence, the commissioner may, where he or she reasonably believes that the premises contains a book, record or other document relevant to the subject-matter of the review, without a warrant or court order,

(a) enter a premises to view or inspect the premises;

(b) demand the production of records, documents, including documents or records maintained in electronic form, or another thing relating to the subject-matter of the review for the purposes of examination or copying; and

(c) make inquiries of a person on the premises into all matters relating to the subject-matter of the review.

(2) The commissioner shall exercise the power to enter premises under subsection (1) only during reasonable hours for the premises and only in such a manner so as not to interfere with health care that is being provided to an individual on the premises at the time of entry.

(3) Notwithstanding subsection (1), where

(a) the commissioner is refused or denied entry;

(b) the premises to be entered are used as a dwelling in whole or in part; or

(c) the entry is to occur outside normal business hours,

the commissioner shall not exercise his or her power of entry except under the authority of a warrant issued under subsection (4).

(4) Where a judge is satisfied by evidence upon oath or affirmation that there are reasonable grounds to believe that it is necessary to enter premises to facilitate a review and that the commissioner cannot exercise his powers under subsection (1) without a warrant for a reason referred to in subsection (3), he or she may issue a warrant authorizing entry by the commissioner or other person named in the warrant in accordance with any conditions contained in the warrant.

Power to inspect records

71. Notwithstanding sections 69 and 70, the commissioner shall not examine or copy or inquire into a record of personal health information without the consent of the individual to whom the record relates except where

(a) the commissioner first determines that it is reasonably necessary to do so in order to carry out the review and that the public interest in carrying out the review justifies dispensing with obtaining the individual's consent in the circumstances; and

(b) the commissioner provides a statement to the custodian having custody or control of the record to be examined or copied or the evidence or information to be inquired into, setting out the commissioner's determination under paragraph (a), together with written reasons for the determination.

Commissioner's recommendation

72. (1) The commissioner shall conclude his or her review within 120 days of receiving a complaint under section 66.

(2) As a result of his or her review, the commissioner may make one of the following recommendations:

(a) where the review relates to a complaint respecting a refusal of access to a record of personal health information, recommend that the custodian grant the individual access to the requested record;

(b) where the review relates to a complaint respecting a refusal to correct a record of personal health information, recommend that the custodian make the requested correction;

(c) where the review relates to a complaint under subsection 66(3), that a custodian has contravened or is about to contravene a provision of this Act or the regulations, recommend that the custodian

(i) cease collecting, using or disclosing personal health information where the commissioner determines that the custodian is collecting, using or disclosing the information contrary to the Act or regulations or an agreement entered into under the Act,

- (ii) dispose of records of personal health information that the commissioner determines the custodian collected, used or disclosed in contravention of this Act, the regulations or an agreement entered into under this Act,
 - (iii) modify, cease or not commence an information practice, policy or procedure identified in the report of the commissioner where the commissioner determines that the information practice, policy or procedure contravenes this Act or the regulations, or
 - (iv) that the custodian implement an information practice identified by the commissioner where the commissioner determines that the information practice is reasonably necessary to achieve compliance with this Act or the regulations; and
- (d) a recommendation on the privacy aspect of the matter that is the subject of the review.
- (3) Where the commissioner does not make a recommendation under paragraph (2)(a) or (b), he or she shall be considered to have confirmed the decision of a custodian to refuse to grant access or make a correction, as the context requires.

Commissioner's report

73. (1) After concluding his or her review, the commissioner shall prepare a report setting out his or her findings and recommendations and, where the commissioner does not make a recommendation under paragraph 72(2)(a) or (b), the report shall also contain reasons for not making a recommendation and advise the complainant of his or her right to appeal the refusal of the custodian to grant access or make a correction to the Trial Division under section 83 and the time limit for the commencement of an appeal provided in that section.

(2) The commissioner shall provide a copy of his or her report to the complainant and the affected custodian.

Response of custodian

74. (1) Within 15 days after receiving a report of the commissioner that contains a recommendation under subsection 72(2), the custodian shall decide whether or not to comply with the recommendation in whole or in part and shall give written notice of his or her decision to the commissioner and to the complainant.

(2) Where a custodian decides not to comply with a recommendation of the commissioner under paragraph 72(2)(a) or (b), in whole or in part, in addition to the matters referred to in subsection (1), the notice of the custodian shall also advise the complainant of his or her right to appeal to the Trial Division under section 83 and the time limit for commencement of an appeal provided in that section.

(3) Where the custodian does not give notice of his or her decision to the complainant and the commissioner within the time required by subsection (1), the custodian shall be considered to have refused to comply with the recommendation of the commissioner.

Obligation to assist

75. (1) Where the commissioner makes a demand under paragraph 69(1)(a) or 70(1)(b), the person having custody of the record, book or document shall make a copy and produce it to the commissioner and shall, on the request of the commissioner, provide whatever assistance is reasonably necessary, including using any data storage, processing or retrieval device to produce a record in readable form.

(2) A person shall not obstruct the commissioner who is exercising powers under this Part or provide the commissioner with false or misleading information.

Admissibility of evidence

76. (1) A statement made, or answer or evidence given by a person in the course of a review by the commissioner under this Act is not admissible in evidence against a person in a court or at an inquiry or in another proceeding, and no evidence respecting a review by the commissioner shall be given against a person except

- (a) in a prosecution for perjury in respect of sworn testimony;
- (b) in a prosecution for an offence under this Act; or
- (c) in an appeal to the Trial Division under this Act, where the commissioner is a party to the appeal.

(2) The commissioner, and a person acting for or under the direction of the commissioner, shall not be required to give evidence in a court or in a proceeding about information that comes to the knowledge of the commissioner in performing duties or exercising powers under this Act.

Privileged information

77. Where a person speaks to, supplies information to or produces a copy of a record during an investigation by the commissioner under this Act, what he or she says, the information supplied and the copy of the record produced is privileged in the same manner as if it were said, supplied or produced in a proceeding in a court.

Disclosure by commissioner

78. (1) The commissioner and a person acting for or under the direction of the commissioner shall not disclose information obtained in performing duties or exercising powers under this Act, except as provided in subsections (2) to (5).

(2) The commissioner may disclose, or may authorize a person acting for or under his or her direction to disclose, information that is necessary to

- (a) perform a duty or exercise a power of the commissioner under this Act; or
- (b) establish the grounds for findings and recommendations contained in a report under this Act, except as otherwise provided under subsection (3).

(3) In conducting a review and in performing a duty or exercising a power under this Act, the commissioner and a person acting for or under his or her direction, shall take reasonable precautions to avoid disclosing and shall not disclose

- (a) information that a custodian is authorized to refuse to disclose under Part IV;
- (b) information, including a record, that is prepared for the use of, or collected, compiled or prepared by, a committee referred to in subsection 8.1(1) of the *Evidence Act* for the purpose of carrying out its duties; or
- (c) information contained in a report or notice made under section 4 or 7 of the *Patient Safety Act*.

(4) The commissioner may disclose to the Attorney General information relating to the commission of an offence under this or another Act of the province or of Canada, where the commissioner has reason to believe an offence has been committed.

(5) The commissioner may disclose, or may authorize a person acting for or under his or her direction to disclose information in the course of prosecution or an appeal referred to in paragraph 76 (1)(c).

Additional powers of commissioner

- 79.** In addition to the commissioner's powers and duties respecting requests for review, the commissioner may
- (a) make recommendations to ensure compliance with this Act;
 - (b) inform the public about this Act;
 - (c) receive comments from the public about matters concerning the confidentiality of personal health information or access to that information;
 - (d) comment on the implications for access to or confidentiality of personal health information of proposed legislative schemes or programs or practices of custodians;
 - (e) comment on the implications for the confidentiality of personal health information of
 - (i) using or disclosing personal health information for record linkage, or
 - (ii) using information technology in the collection, storage, use or transfer of personal health information; and
 - (f) consult with any person with experience or expertise in any matter related to the purposes of this Act.

Delegation by commissioner

80. The commissioner may delegate to a person on his or her staff a duty or power under this Act.

Immunity from suit

81. An action does not lie against the commissioner, his or her delegate or a person employed under him or her for anything he or she may do or report or say in the course of the exercise or performance, or intended exercise or performance, of his or her functions and duties under this Act, unless it is shown he or she acted in bad faith.

Annual report of commissioner

- 82.** The commissioner shall report annually to the House of Assembly through the Speaker on
- (a) the exercise and performance of his or her duties and functions under this Act;
 - (b) the commissioner's recommendations and whether custodians have complied with the recommendations; and
 - (c) other matters about access to and protection of personal health information that the commissioner considers appropriate.

Appeal by individual

83. (1) Where an individual has made a request to a custodian for access to or correction of personal health information under this Act and

- (a) has not requested a review by the commissioner under Part VI; or
- (b) has requested a review by the commissioner under Part VI and
 - (i) the commissioner has not conducted a review or, where a review has been conducted, has not made a recommendation under paragraph 72(2)(a) or (b), or
 - (ii) the commissioner has made a recommendation under paragraph 72(2)(a) or (b) and the custodian has decided not to comply with the recommendation either in whole or in part,

the individual may appeal the decision of the custodian refusing to grant access to or make a correction of a record of personal health information.

(2) An appeal shall be commenced as follows:

- (a) an appeal under paragraph (1)(a) shall be made within 30 days following receipt of a notice of refusal under paragraph 56(1)(b) or (c) or paragraph 62(1)(b) or, where the custodian has not provided notice, within 30 days of the date on which notice should have been provided under subsection 56(2) or 62(2);
- (b) an appeal under subparagraph (1)(b)(i) shall be made within 30 days of receipt of
 - (i) the notice of the commissioner referred to in subsection 67(4) where the commissioner has refused to conduct a review, or
 - (ii) the report of the commissioner referred to in section 73 where the commissioner has conducted a review but has not made a recommendation under paragraph 72(2)(a) or (b); and
- (c) an appeal under subparagraph (1)(b)(ii) shall be made within 30 days of the receipt of the notice of the custodian under subsection 74(1) or, where the custodian has not provided notice, within 30 days of the date on which notice should have been provided.

(3) An appeal under this section may be made by filing a notice of appeal, naming the custodian as the respondent, with the Trial Division and a copy of the notice of appeal shall be served by the appellant on the minister and the commissioner.

(4) The minister may become a party to an appeal under this section by filing a notice to that effect with the Trial Division.

(5) The record for an appeal under this section shall be prepared by the custodian named as the respondent in the appeal.

Regulations

- 90.** (1) The Lieutenant-Governor in Council may make regulations
- (a) designating a health care facility for the purpose of paragraph 2(1)(i);
 - (b) designating a person as a custodian for the purpose of paragraph 4(1)(p);
 - (c) designating a person as excluded from the meaning of "custodian" for the purpose of paragraph 4(2)(k);
 - (d) exempting a person or entity from the application of this Act;
 - (e) designating a provision of an Act or regulation that shall prevail over this Act or a regulation made under it for the purpose of subsection 11(2);
 - (f) prescribing what constitutes a material breach for the purpose of section 15;
 - (g) prescribing information that must be provided by a custodian at the time of collection of personal health information for the purpose of paragraph 20(1)(c);

- (h) respecting the form and content of an agreement between a custodian and an information manager under section 22 ;
 - (i) respecting the creation, retention, disposition and reproduction of records of personal health information in electronic form, including integrated records of personal health information;
 - (j) prescribing an entity for the purpose of paragraph 39(1)(h);
 - (k) designating an entity as an information network for the purpose of paragraph 39(4)(c);
 - (l) designating a custodian for the purpose of paragraph 39(4)(d);
 - (m) designating a person or body with whom the minister may enter into agreements with under subsection 45 (3);
 - (n) prescribing circumstances in which personal health information may be stored, transferred, used or disclosed outside the province;
 - (o) prescribing the form of a notice required under this Act;
 - (p) re-defining or further defining a word or expression defined in this Act;
 - (q) defining a word or expression used but not defined in this Act; and
 - (r) **generally to give effect to this Act.**
- (2) For the purpose of paragraphs (1)(h), (i) and (k), the regulations that may be made may include provisions respecting
- (a) the technology or process that shall be used to make or send an electronic record;
 - (b) the format of an electronic record, including the making and verification of an electronic signature;
 - (c) the place where an electronic record may be made or sent;
 - (d) the time and circumstances when an electronic document is to be considered to be sent or received and the place where it is considered to have been sent or received; and
 - (e) the procedure for responding to a request for access to **or disclosure of a record** of personal health information by a person outside the province.

The Reporting Process for the Current Review

The Terms of Reference are silent on the body to which the Consultant is to report at the conclusion of this review.

One might expect the report to be submitted to the body that commissioned it.

However, it would be more appropriate for a report on the structure of the Statutory Offices of the House – the legislative branch – to be submitted directly to the legislative branch – to the Speaker of the House and the House of Assembly Management Commission, for tabling directly in the House of Assembly.

A courtesy copy could also be provided to the Minister who announced its commissioning.



HOUSE OF ASSEMBLY
NEWFOUNDLAND AND LABRADOR
Official Opposition Caucus

May 2023

David Brazil, MHA, Conception Bay East - Bell Island, Leader of the Official Opposition

Barry Petten, MHA, Conception Bay South, Official Opposition House Leader

Craig Pardy, MHA, Bonavista, Official Opposition Deputy House Leader

Helen Conway Ottenheimer, MHA, Harbour Main

Paul Dinn, MHA, Topsail - Paradise

Jeff Dwyer, MHA, Placentia West - Bellevue

Pleaman Forsey, MHA, Exploits

Loyola O'Driscoll, MHA, Ferryland

Lloyd Parrott, MHA, Terra Nova

Chris Tibbs, MHA, Grand Falls-Windsor - Buchans

Tony Wakeham, MHA, Stephenville - Port au Port

Joedy Wall, MHA, Cape St. Francis



(L-R) Dinn, Petten, O'Driscoll, Dwyer, Conway Ottenheimer, Parrott, Brazil, Forsey, Wakeham, Wall, Pardy, Tibbs