



**OFFICE OF THE CITIZENS' REPRESENTATIVE**  
**HOUSE OF ASSEMBLY**

**A report regarding certain activities  
within the  
Newfoundland and Labrador Liquor Corporation  
(2015-17)**

**And**

**A call for amendment to Section 46 of the  
*Citizens' Representative Act***

**Issued in accordance with Section 44 of the  
*Citizens' Representative Act***

**December, 2020**

## **Introduction and Summary of Findings**

Under authority of section 44 of the **Citizens' Representative Act** (hereinafter "the Act"), this report of the Office of the Citizens' Representative ("OCR") is made in the public interest.

This investigation of the Newfoundland and Labrador Liquor Corporation ("NLC") was precipitated by findings made by the Office of the Auditor General of Newfoundland and Labrador ("OAG") in a report to the House of Assembly tabled February 13, 2020. The OAG report was related to the fine wine and Bordeaux Futures programs of the NLC.

This investigation was initiated on March 12, 2020 under the "own initiative" provisions of section 15 of the Act.

This report addresses allegations and conclusions made by the OAG regarding "misrepresentation of evidence" by the NLC to my predecessor in this Office, Barry Fleming QC, in an investigation undertaken by Mr. Fleming between November of 2015 and April of 2017.

This report concludes that evidence was misrepresented with respect to certain undisclosed contents of a former CEO's email account.

Charging the former CEO with a formal offence to seek a fine or term of imprisonment for his role in the matter under the Act is not an option due to the passage of time.

However, this report declares a misconduct on behalf of the former CEO pursuant to section 30(2) of the Act. The misconduct arises from the former CEO failing to disclose in excess of 600 pages of material evidence to the OCR. The misconduct took place between November 18, 2015 and April 6, 2017.

This material evidence revealed an intimate communication business nexus existed with his son<sup>1</sup>, at the time the OCR investigation commenced in 2015.

This investigation found no evidence that the Board, personal counsel to the former CEO, or external counsel to the NLC were involved in the misrepresentation of evidence to OCR.

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<sup>1</sup> The CEO's son was referred to in the OAG report as a "non-arms length agent" or NALA, and the same term, "NALA" is used in this report. The NALA was not the subject of this investigation.

This report calls on the House of Assembly for reform of the offence provisions contained in section 46 of the Act, specifically:

1. That fines for obstruction of the Citizens' Representative contained in the Act be raised from \$500 to \$10,000. This increase would make the fines equivalent to the obstruction provisions contained in provincial whistleblower programs established by the **Public Interest Disclosure and Whistleblower Protection Act**, and Part VI of the **House of Assembly Accountability, Integrity and Administration Act**; and,
2. That the House amend the Act to include discoverability language, giving the Citizens' Representative a period of two years from the date of the discovery of an offence to initiate prosecution of the alleged perpetrator(s) of the obstruction. Identical language exists in Section 115(3) of the **Access to Information and Protection of Privacy Act, 2015**.

The OCR respects confidentiality and heightened effort will be made to minimize the amount of personal information released in this report. However, it may be necessary to release certain information in order to establish the grounds for any conclusions and recommendations that may appear. This information is legally authorized to be released under authority of section 13 of the Act:

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.**

(Emphasis added)

## **Background**

This investigation was precipitated by reports issued by two previous incumbent Officers of the House of Assembly:

1. A 2015-17 investigation and final report under ss.15 and 37 of the Act by Barry Fleming QC, as Citizens' Representative, enumerated as investigation 534CF15.

One of the two prongs of 534CF15 was an allegation of conflict of interest against a former CEO of the NLC, Mr. Steve Winter. Specifically, that the former CEO was conveying a financial interest in wine purchases by the NLC to a company owned by the NALA, who was allegedly receiving commissions on sales to the NLC.

2. The report of Julia Mullaley, Auditor General of Newfoundland and Labrador, on the subject of the NLC, which was tabled in the House of Assembly on February 13, 2020.

The OAG report concluded, among other things, that "NLC misrepresented information provided to the Citizens' Representative in its defence of the conflict of interest allegations."

The following chronology will serve to assist.

## **Chronology**

### **1. OCR Investigation 534CF15**

In 2015 OCR received a complaint from a citizen who alleged unfair treatment by the NLC in respect of his contact with the NLC in the NLC's Bordeaux Futures program.<sup>2</sup>

Further, the citizen alleged that the former CEO was "using his position to benefit his family and friends," and was in a conflict of interest when the NLC contracted with a company owned by the NALA.

The complaint was reviewed internally by OCR for jurisdiction and merit in accordance with established OCR processes, and was accepted for investigation in November of 2015.

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<sup>2</sup> Now a defunct NLC program, Bordeaux Futures was a system whereby NLC would purchase aging French wine in the barrel for future shipment and customer sales in Newfoundland and Labrador.

Section 26 of the Act anticipates a written notice of intent to investigate which is provided to the responsible deputy minister, CEO or administrative head. Each notice of intent issued by OCR sets out allegations, compels a response from the respondent public body, and cites section 31(1) of the Act which states:

#### 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.

In the immediate case, Mr. Fleming wrote the former CEO on **November 18, 2015**. He outlined the allegations made by the citizen and lawfully compelled documents, stating:

Pursuant to Section 31(1) of the Citizens' Representative Act, we hereby request the disclosure of all documents, papers and things related to the aforementioned allegations and, generally, the complaint of (complainant). This includes all internal memoranda, **emails** and applicable policies. We would also request that the Corporation respond in detail to these allegations and provide any commentary it deems appropriate.

(Emphasis added).

On **December 8, 2015** Mr. Fleming received an acknowledgement letter signed by an NLC employee on behalf of the (then) Chairman of the NLC stating the notice of intent would be tabled at the next meeting of the Board of Directors and a response would follow.

On **December 21, 2015** Mr. Fleming received correspondence from an external legal counsel who had been retained by the NLC, and that disclosure was being compiled.

On **March 22, 2016** Mr. Fleming received correspondence from counsel attaching a bound and tabbed volume and a banker's box referred to as "all other disclosure." Counsel stated "we have endeavoured to be comprehensive in our response, however, if upon review you feel there may be something missing, please let us know."

Contained in the submission are the following statements:

(The former CEO) deals directly with negociants for this (Bordeaux Futures) purchasing, not local agents.

And later:

(The former CEO) is directly involved in NLC's purchases from the Futures Market. However, he deals directly with negociants; local agents are not involved.

On **February 28, 2017** Mr. Fleming issued a draft report to the Department of Finance and the NLC inviting commentary on the preliminary findings of the investigation. Seeing no evidence of any contact between the former CEO and the NALA, he ultimately concluded that the former CEO was technically compliant with the **Conflict of Interest Act, 1995** and the conflict provisions contained in section 11 of the **Liquor Corporation Act**. Further, the lack of evidence of contact led him to conclude that no misconduct had taken place.

The **Conflict of Interest Act, 1995** has reportedly come under review by the Government of Newfoundland and Labrador.

On **March 30, 2017** the NLC issued a response to the draft report via its counsel.

On **April 6, 2017** Mr. Fleming issued his final report under sections 37 and 39 of the Act. Using verbatim quotes, he drew heavily on the evidence and commentary provided in the NLC submission of March 22, 2016. Mr. Fleming concluded:

(Former CEO) does not have an interest in or received a benefit from, directly or indirectly, from (NALA's company) or (friend's company). When (his) son, (the NALA), became a wine agent in 2010, (he) advised the Board of Directors of the fact. The Board's minutes note the fact that (the NALA) would be dealing with the Marketing Department (now the Merchandising Department) and,

while the Board was glad that they had been made aware of the situation, they did not have a problem with it.

As will be discussed in more detail below under the section entitled: Wine Agents, agents such as (the NALA's company) or (another private company) deal with the NLC primarily as follows:

1. Submitting new listing applications either in response to scheduled calls for applications or as a result of a special promotion or allocation of a supplier.
2. Arranging and participating in promotional programs in relation to the products they represent.

Again, as will be detailed below, the above interactions are governed by published policies which have evolved and been formalized over time. The authority to purchase alcohol pursuant to Section 45(1) of the **Liquor Corporation Act**, has been delegated to the Vice President of Supply Chain, currently (NLC employee). Although the Supply Chain Department does all the ordering, agents deal directly with the NLC's Merchandising Department which includes the Director of Merchandising, currently (NLC employee), Category Managers and Promotions Coordinators. It is the Merchandising Department that makes decisions about what products NLC will list or delist. The process they follow is documented and published. For listing decisions, wines are rated and ranked on a number of criteria including taste, price, packaging and competing products.

The CEO is not involved in evaluations for listing or decisions on delisting. As the senior officer of NLC, **the CEO is ultimately accountable for all NLC's decisions and he has a duty to oversee all operations.** As such, he does give direction to the Merchandising Department from time to time. However, **does not interfere with day-to-day decision making of the Vice President of the Supply Chain or of the Merchandising Department.**

(Former CEO's) only involvement in wine purchasing is through the Futures Market. **(He) deals directly with negociants for purchasing, not local agents.** The community of wine agents and wine experts in Newfoundland and Labrador is not large. As noted, over the past five years, NLC has had dealings with approximately thirty different agents. NLC denies that (his) relationship to the owner of (NALA's company) (as father) or (other company) (as friend), creates a conflict of interest. The mere fact of a father/son relationship does not constitute a conflict of interest on the part of

the CEO or NLC. If NLC refused to deal with the CEO's son or one of his friends as legitimate wine agents for this reason alone, it would likely give rise to a legitimate complaint of unjustifiable discrimination from these two affected individuals. **Furthermore, NLC denies that (former CEO) has exerted, or attempted to exert, any influence over NLC's dealings with these or any other agents.** NLC has procedures and policies in place to ensure fair treatment for all agents. Decisions on the listing and delisting of products are made by others in NLC based on predetermined and specified criteria.

(Emphasis added)

Mr. Fleming reproduced text from the NLC Board of Directors minutes from October 25, 2010 in which the Board states:

The President advised the Board that his son, (the NALA) is a sales agent for wines in Newfoundland and Labrador and is having wines listed at the NLC. (The NALA) deals with the Marketing Department, i.e. (3 NLC employees).

...

(His) only involvement in wine purchasing is through the Futures Market. (He) deals directly with negociants for purchasing, not local agents.

In his conclusion, Mr. Fleming wrote:

We can make no findings as to whether the CEO directly or indirectly made decisions which benefited (NALA's company) at the expense of (the complainant) and other wine agents. That type of inquiry would engage an audit function beyond the mandate or capacity of this office. We are, however, of the opinion that (complainant) was treated unfairly when having to compete with the company owned and operated by the CEO's son. We believe that reasonable people, viewing the circumstances of this complaint objectively, would conclude that a conflict of interest exists...Currently the law of Newfoundland and Labrador and the policies of the Board of Directors of the NLC does not acknowledge and prohibit apparent conflicts of interest between public employees and their adult children.

On or about **May 8, 2017** counsel to the NLC provided a response to the findings in which it stated:



As you state in the Report, you have not made any finding that the CEO directly or indirectly made decisions which benefited (NALA's company) at the expense of (complainant) and other wine agents as that type of inquiry would engage an audit function beyond the mandate or capacity of your office...The NLC is confident that any such audit would reveal that the CEO has not engaged in any such decisions, directly or indirectly. The NLC submits that it and the CEO are compliant with the above-mentioned legislative provisions.

(Emphasis theirs)

In the wake of Mr. Fleming's report, the NLC drafted and passed an anti-nepotism policy.

## **2. The OAG Report of February 2020**

Also in the wake of Mr. Fleming's report, an audit of the NLC was performed by the OAG. The report on the audit was tabled in the House of Assembly on February 13, 2020.

The OAG found that the former CEO had in fact engaged in decisions affecting the NALA's company and stated he was in a conflict of interest.

Specifically, OAG auditors gained access to the email account of the former CEO and found certain evidence which led them to conclude, among other things:

- A conflict of interest relationship existed with respect to certain NLC acquisitions of specialty wines involving the former CEO and a close family member and
- The CEO did not take appropriate action to address this known conflict of interest risk.
- The CEO participated in decisions to purchase specialty wines which benefited the close family member at the expense of NLC and which influenced the performance of the CEO's duties as a public office holder. As a result, the CEO breached the NLC's Code of Conduct and may have breached his fiduciary duty to NLC.
- NLC misrepresented information in its response to the Office of the Citizens' Representative related to an investigation in 2016-17 of conflict of interest allegations involving the former CEO and the close family member.

At page 17 of the report, the Auditor General states:

Allegations of conflict of interest in relation to the former CEO and NALA were the subject of a report issued by the Office of the Citizens' Representative (Citizens' Representative) in April 2017 and is referred to throughout this section of our report. The Citizens' Representative concluded, among other things, that they could make no findings as to whether the CEO, directly or indirectly, made decisions which benefited the NALA at the expense of other wine agents, as that type of inquiry would engage an audit function beyond the mandate or capacity of that office.

We completed additional audit procedures on acquisitions of specialty wines in view of the conflict of interest allegations and in view of the observations outlined in earlier sections of our report...

...

These audit procedures included email analysis on select accounts to assess whether we could identify any records between the former CEO and local agents regarding the various interactions and possible nepotism involving the former CEO and the NALA. Further, we identified that NLC misrepresented information provided to the Citizens' Representative in its response to the conflict of interest allegations.

Further, at page 19:

...We also confirmed that the former CEO did make decisions that conferred a benefit upon the NALA and were not in the best interests of the NLC.

In particular, with respect to the Futures program:

- There was three-way communication through emails among the CEO, the NALA and negociants relating to various product offers for Futures. Thus, contrary to NLC's position, the CEO had knowledge that certain Bordeaux negociants were represented by the NALA without the NALA being officially recorded in NLC's

system as the local agent of record. This also contradicted NLC's position that the NALA, as a local agent, dealt directly with the Merchandising Division.

- Many of these three-way emails were offers for Futures originating from the negociant to the NALA. The NALA then forwarded them directly to the CEO, for what appeared to be for the purposes of influencing the purchasing decisions of Futures by the CEO (e.g. "you have to buy some of these", "good prices", "I scored this wine pretty high", etc.). In a number of instances, we were able to confirm that the CEO purchased these specific products after receiving this communication from the NALA. This further contradicted NLC's position that the CEO dealt directly with the negociants and local agents were not involved in the Futures Market and did not play any role in NLC's purchases from a particular negociant.
- Acknowledgement orders and invoices from negociants, used by NLC to process payment for Futures and maintained in NLC's accounting records, identified the NALA, as well as other agents representing negociants, directly on those documents. This again weakens NLC's position that for Futures, it had no knowledge of details of any contractual relationship between wine suppliers and agents and local agents were not involved in NLC's purchases from the Futures Market.

At page 20:

- In response to our audit confirmation request to negociants regarding a number of select purchases of Futures, one negociant represented by the NALA confirmed that the NALA received fees on these purchases. Other negociants confirmed that other local agents in Newfoundland and Labrador who represented them received in the range of a one to 3.4 per cent commission which was included in the NLC's purchase price for these transactions. Also, in an email thread among a negociant, the NALA and CEO regarding offers for Futures during the En Primeur campaign, the negociant confirmed that "...with primeur, we will give you [the NALA] two per cent on all." These examples provided additional evidence that local agents were involved in the Futures Market and also confirmed the existence of a benefit being received by local agents who represent negociants in the Futures Market.

Finally, at page 21:

With respect to specialty wines, other than Futures:

- There were numerous examples of three-way communication through emails among the former CEO, the NALA and various negociants or suppliers regarding these various specialty wine offerings. These communications contradict NLC's position to the Citizens' Representative, as well as the former CEO's position to the NLC's Board of Directors, that for all products other than Futures, agents deal directly with NLC's Merchandising Division and the CEO is not involved.
- Further, NLC officials advised that, in addition to Futures, the CEO often directed the purchase of other specialty wines. While this direction was generally not documented, NLC was able to provide some documentation and we confirmed numerous such examples. In most of these examples, the NALA was the local agent.

Again, this contradicts the NLC's position to the Citizens' Representative, as well as the CEO's position to NLC's Board, that the CEO's only involvement in wine purchasing is in Futures and for all other wines, agents deal directly with NLC's Merchandising Division, acquisitions follow published formal policies, and the CEO is not involved with, nor does the CEO interfere with, the day-to-day decision making of that Division. Such examples of the CEO directing purchases of other specialty wines and thus, conferring a financial benefit upon the NALA in the form of commission....

The OAG goes on through pp. 22-24 citing examples of direct and triangular contacts between the CEO, the NALA and negociants.

On **February 13, 2020** the OAG report was tabled and the final conclusions of the OAG were made public.

On **February 26, 2020** I attended at the OAG to discuss the matter and review certain evidence collected during the audit.

## **The 2020 OCR Investigation**

This latest OCR investigation of the NLC (#102CF20) was commissioned by the undersigned in the wake of the OAG findings, and was focused on establishing whether a concealment had taken place. That is to say, the investigation sought to confirm or disprove the findings of the OAG, and to answer the question of what exactly existed in terms of evidence (of a conflict) which would have been in the possession and control of the CEO at the time Mr. Fleming commenced 534CF15 in November of 2015.

As an Ombudsman office, the OCR's internal test for relevancy is low, and defaults to the question of whether the evidence has any tendency to make the proposition for which it is tendered more probable than that proposition would be without the evidence.

The evidence alluded to by OAG, if proven to exist, was required to be provided to Mr. Fleming under law. Any concealment of, or failure to disclose this evidence may constitute an offence under Section 46 of the Act which speaks to misleading, hindering or obstructing the Citizens' Representative or a person employed under him or her. The offence is punishable on summary conviction by a fine of up to \$500, a term of imprisonment up to three months, or both.

Statutory notice of intent to investigate this matter, as required by section 26 of the Act, was hand delivered to the (then) CEO Sharon Sparkes at NLC headquarters on Kenmount Road on March 12, 2020.

Preliminary documentary disclosure from NLC to OCR began in earnest in May of 2020.

A simultaneous review of our internal file showed that my predecessor had, pursuant to the evidence collection provisions of the Act, requested all documents, papers, and things, (including email) that spoke to the allegations in the complaint, including the conflict of interest allegations involving the CEO.

The internal OCR file review found 67 pages from the CEO's email account relating to communications involving the complainant in Mr. Fleming's investigation.

There were no emails disclosed to my predecessor that involved the NALA or his company.

On July 14 2020, with the assistance of NLC IT and the Office of the Chief Information Officer, I assumed control of the former CEO's dormant email account. Contents of incoming, outgoing and deleted mailboxes were searched using key words, phrases and names of various companies and known wine

agents, with a focus on information that would have existed in the former CEO's account at the commencement of 534CF15 (November 18, 2015).

609 pages of relevant emails were identified and printed that, when cross referenced with the disclosure of the former CEOs email account, were relevant and found not to have been turned over to OCR in investigation 534CF15. This does not include a large number of irrelevant personal / family emails involving the NALA, which were excluded from printing.

The substance of this large body of evidence revealed that an intimate business nexus existed between the CEO and the NALA at the time Mr. Fleming commenced his investigation in November of 2015. This intimate business nexus was not disclosed and was denied outright to my predecessor.

These emails showed:

- Proof of multiple three way communications between the CEO, the NALA and wine negociants in France.
- Voluminous direct communications between the CEO and the NALA on the subject of Bordeaux and other specialty wine.
- Proof of Orders and invoices from negociants which identified the NALA as an agent.
- Proof of commission being paid to the NALA, and,
- Proof that local agents were involved in the wine futures market including benefits being received by agents who represent French wineries.

For expediency and operational reasons, on **July 21, 2020** I delivered a summons to the Auditor General, issued pursuant to section 31(2) of the Act requesting:

- Orders and invoices from negociants, used by NLC to process payment for Bordeaux Futures Market wines, which identify the NALA, as well as other agents representing negociants.
- Proof that local agents were involved in the Futures Market, including benefit(s) being received by local agents who represent negociants in the Bordeaux Futures Market.

These were two points the NLC denied in its response to Mr. Fleming in 534CF15, which were shown to be false in the OAG report.

The Acting Auditor General cooperated and made 110 pages available. 25 of those I deemed relevant.

These undisclosed communications with the NALA, covering the period between November 22, 2010 to November 18, 2015, overwhelmingly show the unfettered access and proximity the NALA had to the CEO, versus fractional or non-existent contact with other known agents in the market.

When viewed globally, the 609 pages of information obtained would lead a reasonable person to believe the NALA was provided with a competitive business advantage as a result of an intimate business nexus. Two previous investigations by independent Officers of the House of Assembly have already expressed this opinion. To reiterate, only 67 pages of email were disclosed to the OCR under section 31 of the Act, and none of these documents were emails to, from, or copied to the NALA.

This misrepresentation of material fact obstructed Mr. Fleming's ability to weigh evidence, which in the eyes of any reasonable person would hold probative value with respect to the initial conflict of interest allegations.

The discovery of these undisclosed communications raised serious concerns for the OCR.

On or about **August 4, 2020** I met with, and laid a report before the Director of Public Prosecutions ("DPP") with the Department of Justice and Public Safety to request his opinion on the viability of charging the former CEO with an offence under section 46 of the Act.

The request for prosecution was subsequently rejected by the DPP on technical grounds of a twelve month limitation which the DPP believes expired in 2017.

On **September 22 2020**, in the interest of procedural fairness and in keeping with Section 29 of the Act, I had both the former CEO and NALA personally served with correspondence outlining these findings, together with an offer to appear before me, with counsel if so desired, to give recorded evidence under oath in this matter, with a two week deadline of October 2<sup>nd</sup>, 2020. After some initial discussion, and consideration of the scope of the investigation and his role in it (as a private citizen he was never the subject of investigation), the NALA declined the offer. No response was received from the former CEO by the deadline, or since the deadline.

## Observations and Analysis

A 2019 decision out of the Nova Scotia Court of Appeal<sup>3</sup> reiterated much of what the Supreme Court of Canada<sup>4</sup> had already said about the role of the Ombudsman in 1984:

The Court conducted a comprehensive historical and statutory analysis of the various statutes implicated by this dispute. The Office of Ombudsman occupies a special, unique and important role in Canada's constitutional democracy. In terms of statutory interpretation, the Ombudsman Act receives special treatment because it represents the paradigm of remedial legislation. The Ombudsman has sweeping powers to investigate how government departments or municipal units administer the law in ways that are, for example, unlawful, mistaken, erroneous, oppressive, discriminatory, unreasonable, unjust, irrelevant or improper. Those powers are to be given a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil. The authority of the Ombudsman to investigate and report on the actions or inactions of elected or unelected government officials serves as a potent tool for citizens with reasons to doubt the claims of "transparency" and "accountability" from those whose hands control the levers of power. Exposing such untruths and failures to follow the law is a laudable objective in ensuring good government. The Ombudsman's statutory jurisdiction acts as a watchdog over the operations of government by providing an impartial and independent review with broad authority to investigate, subpoena, question under oath and, if necessary, publicly censure government misconduct.

The Ombudsman's oversight reminds both government and its bureaucracy that they – like the citizens they serve – are bound by the Rule of Law and will be held to account for its breach.

The notice of intent letter sent to the former CEO in November of 2015, by my predecessor, is clear and unequivocal. The former CEO was fully aware that the issues under investigation in 534CF15 included his personal relationship with the NALA and his company.

It is plausible that the contents of the new evidence still may not have led Mr. Fleming to conclude a technical legal conflict existed given the lacuna that exists in Section 2(d)(ii) of the **Conflict of Interest Act, 1995** regarding the definition of family members, including a "minor child." This lacuna in the law still requires attention in 2020.

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<sup>3</sup> *Nova Scotia (Office of the Ombudsman) v Nova Scotia (Attorney General)*, 2019 NSCA 51 (CanLII).

<sup>4</sup> *British Columbia Development Corporation v. Friedmann (Ombudsman)*, 1984 2 SCR 447



Notwithstanding the concerns my predecessor had with the **Conflict of Interest Act, 1995**, based on my review, the undisclosed evidence, (had Mr. Fleming been privy to it), would have unquestionably breached Section 30(2) of the Act which speaks to misconduct and breach of duty, which the Citizens' Representative is free to detect and report on during, or after, an investigation.

Based on the results of the OAG audit, and subsequent internal OCR investigation, I believe there are reasonable grounds to conclude the former CEO, as administrative head of the NLC, and who was the subject of the initial OCR investigation, was:

- (a) primarily responsible for instructing external counsel;
- (b) primarily responsible for quarterbacking the NLC response to the notice of intent; and,
- (c) primarily responsible for (or at least complicit in) the selection and transmission of evidence from his own NLC email account.

Due to the passage of time and a limitation on summary conviction action, it cannot be said that the former CEO has committed an offence in this case. This is the sole domain of a judge.

There are no statutory time limitations however, on the Citizens' Representative declaring misconduct by officers or employees of government and its various agencies in respect of their duties and performance while they are serving the public.

In sum, I cannot but conclude that in failing to disclose all documents, papers and things, including email, the former CEO impeded the performance of my predecessor's functions under the Act, and potentially rendered my predecessor unable to fully achieve his obligations under the Act. I therefore declare a misconduct by the former CEO pursuant to Section 30(2) during the OCR investigative period of November 18, 2015 to April 6, 2017.

On October 14, 2020 I reported my findings to the new CEO of the NLC. I have indicated to the NLC that the misconduct has gone on to put pressure on the resources of OCR. It is disrespectful. It does a disservice not only to the House of Assembly, but also to citizens like the complainant in 534CF15 who rely on OCR to find the truth behind their complaints and allegations.

The Board of the NLC has considered this report and, via the new CEO and the Chair of the Board, indicated on November 17, 2020 it will endeavor to cooperate with, and conform fully in all future OCR investigations of the NLC.

In my view, the current offence provisions contained in section 46 regarding fines are dated and weak, and do little to deter these types of activities. While a \$500 fine may have been considered adequate when the Act was passed in 2001, subsequent whistleblower mandates assigned to OCR in 2007 and 2014 have much higher fine ceilings (\$10,000) for obstruction, misleading investigators, or destruction of evidence. Likewise, the **Access to Information and Protection of Privacy Act, 2015** contains a \$10,000 maximum fine for similar conduct against the Information and Privacy Commissioner.<sup>5</sup>

As a statutory Officer of the House of Assembly, the Citizens' Representative represents the legislature's interest in oversight of the executive branch on behalf of the Speaker and the Members of the House of Assembly in matters of administration, in the public interest. An affront to the investigatory functions of a statutory Officer is an affront to the will, authority and dignity of the House of Assembly.

Much like the Courts, it is imperative that the House be able to protect itself from acts which directly or indirectly impede its Officers in the performance of their functions.

It is my formal and respectful request that the House of Assembly will now bring reform to the offence provisions of the **Citizens' Representative Act**, to mitigate against the re-occurrence of circumstances germane to this investigation.

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<sup>5</sup> Access to Information and Protection of Privacy Act, 2015, s. 115(2).

## Conclusions

1. An intimate communication and business nexus existed between the former CEO and the NALA.

Cumulative direct evidence of this intimate nexus was clearly in existence at the time of the commencement of Mr. Fleming's investigation on November 18, 2015. This intimate nexus was not disclosed and was denied outright.

2. I declare a misconduct was committed by the former CEO pursuant to Section 30(2) of the Act. This misconduct lead my predecessor to erroneously conclude that:
  - (a) agents were not involved in the NLC's purchases from the futures market for Bordeaux wines;
  - (b) that the former CEO dealt directly with negociants for futures purchasing, not local agents;
  - (c) that the former CEO did not exert any influence over NLC's dealings with agents.
3. Section 46 of the Act requires a higher level of deterrence in terms of monetary fine ceilings. These should be increased to a maximum of \$10,000 to put them in line with similar offences against the Citizens' Representative under whistleblower legislation.<sup>6 7</sup>
4. Defined discoverability language is required in the **Citizens' Representative Act**, similar to that contained in s. 115(3) of the **Access to Information and Protection of Privacy Act, 2015**,<sup>8</sup> to allow the OCR more time to detect evidence suppression, obstruction and misleading Investigators, and to avoid losing the possibility of prosecution after the passage of one year or less.

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<sup>6</sup>**House of Assembly Accountability, Integrity and Administration Act** s. 61(1) "A person who contravenes this Part is guilty of an offence and is liable on summary conviction to a fine of not more than \$10,000 or to imprisonment for up to 6 months."

<sup>7</sup> **Public Interest Disclosure and Whistleblower Protection Act** s. 24 (5) "A person who contravenes this section or section 21 is guilty of an offence and is liable on summary conviction to a fine of not more than \$10,000."

<sup>8</sup> **Access to Information and Protection of Privacy Act, 2015** s. 115 (3) "A prosecution for an offence under this Act shall be commenced within 2 years of the date of the discovery of the offence."

## Recommendations

1. That fines for obstruction of the Citizens' Representative contained in Section 46 of the Act be raised from \$500 to \$10,000: making them equivalent to the obstruction provisions contained in provincial whistleblower programs operated by the Citizens' Representative, established by the **Public Interest Disclosure and Whistleblower Protection Act**, and Part VI of the **House of Assembly Accountability, Integrity and Administration Act**; and,
2. That the House of Assembly further amend the Act to include discoverability language, giving the Citizens' Representative a period of two years from the date of the discovery of an offence to initiate prosecution of the perpetrator(s) of the obstruction.



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**Bradley J. Moss**

Citizens' Representative

10 Dec. 20

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**Date**