



House of Assembly
Newfoundland and Labrador
Commissioner For Legislative Standards

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April 30, 2014

Honourable Ross Wiseman
Speaker
House of Assembly
Main Floor, East Block
Confederation Building
St. John's, NL

Dear Speaker:

Re: Commissioner's Report in the matter of MHA Kevin O'Brien's alleged involvement with the Gander and Area Chamber of Commerce Community Breakfast.

Please find enclosed a copy of my report on the above noted matter for tabling as per the legislative requirements.

I write you in your capacity as Speaker of the House of Assembly per the requirements of Section 44 of the House of Assembly Act and also as Chairman of the House of Assembly Management Commission per the requirements of Section 38 of the House of Assembly Accountability, Integrity and Administration Act.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Victor Powers".

Victor Powers
Commissioner for Legislative Standards

Enclosure

**OFFICE OF THE COMMISSIONER FOR LEGISLATIVE STANDARDS
HOUSE OF ASSEMBLY
PROVINCE OF NEWFOUNDLAND and LABRADOR**

REPORT TO THE SPEAKER
OF THE
HOUSE OF ASSEMBLY OF NEWFOUNDLAND AND LABRADOR

BY VICTOR POWERS
COMMISSIONER FOR LEGISLATIVE STANDARDS

IN THE MATTER OF A REQUEST BY LORRAINE MICHAEL, MHA
(SIGNAL HILL - QUIDI VIDI) THAT THE COMMISSIONER INVESTIGATE
AND PROVIDE AN OPINION WITH RESPECT TO THE ALLEGED CONDUCT OF
KEVIN O'BRIEN, MHA (GANDER) PURSUANT TO s. 36 (1) of the HOUSE OF
ASSEMBLY ACCOUNTABILITY, INTEGRITY, AND ADMINISTRATION ACT

S.N.L. 2007 c. H-10.1

ALLEGATION

On September 17, 2013, Lorraine Michael, MHA, Signal Hill - Quidi Vidi, (hereinafter referred to as MHA Michael), by way of letter to the Commissioner's Office, requested that the Commissioner provide an opinion with respect to the alleged conduct of Kevin O'Brien, MHA, Gander, (hereinafter referred to as MHA O'Brien), respecting his actions concerning a community sponsored breakfast in MHA O'Brien's district.

In her letter, MHA Michael referenced recent news reports aired on St. John's CBC Radio 640 AM and the CBC Central Morning Show on September 16, 2013. According to MHA Michael, these reports describe MHA O'Brien as pushing the members of the Gander and Area Chamber of Commerce to withdraw invitations to serve at a breakfast fundraiser hosted by the Chamber which had been given to St. John's East NDP MHA George Murphy and to a former NDP candidate in the Gander district, Mr. Lukas Norman.

MHA Michael further advised that concern lies in alleged threats made by MHA O'Brien to withhold government funding or interfere with projects for a school in Gander and other projects if his wishes were not upheld.

LEGISLATION

The House of Assembly Accountability, Integrity and Administration Act, S.N.L. 2007, c. H-10.1 ("The Act") was assented to on June 14, 2007.

Section 35 of the Act establishes the code of conduct for members of the House of Assembly. This section of the legislation is found in Part V of the Act entitled "Ethics and Accountability."

MHA Michael has requested my opinion pursuant to s. 36 (1) of the Act. This section reads as follows:

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.

BACKGROUND

MHA O'Brien was first elected as a member of the House of Assembly for the district of Gander in the October 2003 general election. He was subsequently re-elected in the October 2007 and October 2011 general elections. Since elected, MHA O'Brien has held several cabinet portfolios. At the time of the events which are the subject of this report, MHA O'Brien was the Minister of

Municipal Affairs and Minister Responsible for Fire and Emergency Services - Newfoundland and Labrador, and Registrar General.

The “Gander and Area Chamber of Commerce” is a not-for-profit organization made up of businesses, professionals, community groups, and interested individuals in Gander and surrounding communities. The area served by the Chamber includes municipalities in several neighboring provincial electoral districts.

The Chamber organizes and sponsors a community breakfast to be held in Gander on a day each summer in conjunction with the multi-day annual “Festival of Flight” which celebrates Gander’s aviation history and promotes community spirit. The breakfast event is a community event and is well attended by families and residents from the surrounding area. The event also serves as a fundraiser for scholarship money awarded each year to young people in the community. The 2013 Festival of Flight community breakfast was scheduled to take place on August 5, 2013.

The allegations in the September 17, 2013 letter from MHA Michael centered around the community breakfast and originated from various media reports that MHA O’Brien had put pressure on the Chamber to rescind invitations to persons affiliated with the provincial NDP to serve breakfast at the event.

Apparently, there had been three such invitations. One to Ms. Gerry Rogers, NDP MHA for St. John’s Centre who had declined due to previous commitments, one to George Murphy, NDP MHA for St. John’s East, and one to Mr. Lukas Norman, a member of the NDP youth, a former candidate for the NDP for the Gander district in the October 2011 general election, and a former Chamber scholarship recipient.

In a September 12, 2013 newspaper article which appeared in the Telegram, MHA O’Brien put forward his position on the matter. According to this article, MHA O’Brien stated that, “When I was informed that other political parties were trying to make the community breakfast a political platform, I felt I had to stand on principle and advocate to maintain the non-political policy: a policy that was rightfully set up many years ago.” (By the Chamber of Commerce).

The issue of alleged threats to interfere with government funding referenced in MHA Michael’s letter arose as a result of a radio interview conducted by Leigh-Ann Power of CBC Radio with Mr. Barry Warren. Mr. Warren is a resident of Gander, a former president of the Gander and Area Chamber of Commerce, and a former candidate for the Liberal Party of Newfoundland and Labrador for the district of Gander in the October 2011 general election.

During her introduction to the radio interview Ms. Power talks about the NDP members who were invited to serve at the breakfast sponsored by the Chamber and that after MHA O’Brien had met with the Chamber executive, the Chamber asked the NDP members not to serve. She also added, “Well it turns out there’s more to the story than that. The former president of the Chamber says O’Brien threatened to slow down construction of Gander’s new school if the Chamber didn’t take the invites back and Barry Warren says it’s not the first time O’Brien has done something like that and he dropped by our studio to talk about it.”

During the interview which followed, Mr. Warren talked about several difficulties he felt he had in the past in his interactions with MHA O'Brien when Mr. Warren had been president of the Chamber of Commerce.

At one point during the interview, Ms. Power asked Mr. Warren:

"You were not on the Executive at the time but you're well respected within the Chamber and members who were trying to make that decision what to do with that invitation came to you and they asked for your advice. What did they tell you was the choice offered them by the MHA?"

In his response, Mr. Warren indicated:

"...the reality was that the threat was made or the words that funding ..., I was told that funding would be held up for the new Gander Academy and the renovations and so on and so forth and that other future funding that they may be looking for could be in jeopardy if they didn't change their mind and un-invite the people from the NDP."

INVESTIGATION

On receipt of a request for an opinion pursuant to s. 36 (1) of the Act it is incumbent on the Commissioner to conduct an initial review of the matter to determine whether or not there is any substance to the allegations and whether it is necessary to engage in a formal inquiry into the matter. A formal inquiry is generally a slow procedure that involves the expenditure of substantial public funds. Therefore, where possible the Commissioner will endeavor to investigate and review the matter in detail with a view to providing an opinion with respect to the member's compliance with the legislation and will only embark upon a formal inquiry when necessary. In this particular instance, I am satisfied that the information gathered during my investigation is sufficient to allow me to formulate and offer my opinion on the matter.

In keeping with past practices of my Office, and as a matter of procedural fairness, I wrote MHA O'Brien on September 19, 2013 enclosing a copy of the correspondence received from MHA Michael and advised that a request had been made for me to provide an opinion pursuant to s. 36 (1) of the Act with respect to the allegations contained in the media reports. In my letter to MHA O'Brien I also inquired as to whether he wished to make a written response to MHA Michael's letter and offered a reasonable amount of time for him to do so. MHA O'Brien chose not to provide a written response to my office.

Subsequently, I contacted Mr. Barry Warren with a request that he attend at my office for an interview to discuss the particulars of the matter as reported in the media.

I also wrote the Gander and Area Chamber of Commerce requesting access to any and all documentation in the possession of the Chamber relating to the 2013 Festival of Flight community breakfast and MHA O'Brien's involvement with it.

The requested documentation provided by the Chamber included minutes from three meetings relating to the Festival of Flight breakfast. The Chamber further advised that these minutes were the only documents or materials in their possession, as it was the practice of the Chamber to destroy any audio recordings of meetings once the minutes had been transcribed. My office was provided with the minutes of a special board meeting held on August 2, 2013 at 9:30 a.m., a board meeting held on August 2, 2013 at 2:00 p.m. and a regular board meeting held on September 10, 2013.

In addition, I determined that interviews with members of the Chamber of Commerce were necessary for me to formulate my opinion on the matter. Interviews were held in Gander, NL on November 7, 2013. At that time I interviewed Mr. Dion Falkner, Chamber President, Darrin Murray, Past Chamber President, and Ms. Hazel Bishop, the Chamber's Chief Operating Officer.

Throughout my investigation, I received full cooperation from the individuals involved, both in my requests for interviews and in my requests for document production.

FINDINGS AND OPINION

During my interview with Mr. Warren he outlined his past involvement with the Chamber of Commerce as an active member for many years. He had previously served in several positions on the Chamber's executive including a period of time as Chamber President. Mr. Warren indicated that he does not currently sit on the Chamber executive but that he still maintains his membership in the Chamber of Commerce. He said he had, in the past, consulted on several other issues with board members and board Presidents. On the issue of the NDP associates serving at the community breakfast, he said he had spoken with two Chamber members about his opinion on that matter, both of whom I subsequently interviewed.

Mr. Warren also advised that he had not personally attended any of the meetings held by the Chamber to discuss the issues surrounding the community breakfast. He advised that his awareness of a threat being made by MHA O'Brien to slowdown construction of Gander's new school if the Chamber didn't take back the invites given to the NDP representatives was based upon his conversations with others.

During his interview, Mr. Warren also spoke about his time as president of the Chamber of Commerce when he had felt that his relationship with MHA O'Brien had deteriorated quickly. He referenced his own problems in dealing with MHA O'Brien concerning several issues in the community.

Mr. Warren also advised me that he was aware of a similar episode in the past whereby MHA O'Brien was alleged to have made a threat to impact government funding to a businessman in the community and that he was under the impression that an audio tape existed of MHA O'Brien making such a threat. Upon further review it was confirmed that no such audio tape existed but

discussions with the businessman and MHA O'Brien did occur in October 2006. MHA O'Brien has no specific recollection of those discussions. As the alleged discussions took place prior to the coming into force of the Act and the establishment of the code of conduct for members, this issue was not pursued further.

As indicated above, I also conducted interviews with three members of the Chamber who had been in attendance at the board meetings concerning the community breakfast issue. In addition to these interviews, the Chamber had also provided me with copies of minutes of the three meetings held by the Chamber discussing the issue of the community breakfast. These meetings took place on August 2, 2013 at 9:30 a.m., August 2, 2013 at 2:00 p.m., and September 10, 2013.

Ms. Bishop and Mr. Murray had been in attendance at all three meetings while Mr. Faulkner had chaired the two meetings held on August 2, 2013 but was not in attendance at the September 10, 2013 meeting.

What I determined from these interviews and from examining copies of the minutes from the three meetings was that when MHA O'Brien learned that three people affiliated with the NDP Party had been invited to serve at the 2013 community breakfast he had made calls to several board members expressing his dissatisfaction with this decision. It was clear that MHA O'Brien was not happy with the situation and wanted it changed.

It also appears to me that several of the board members had agreed with MHA O'Brien's position regarding the politicizing of a community event and felt it was necessary to stop that from occurring in the future. It was also apparent that their concern with the current year's breakfast was that these people had already been invited to serve and that there would likely be some embarrassment associated with a decision to rescind the invitations.

The focus of the 9:30 a.m. meeting on August 2nd was for board members to discuss the protocols surrounding the community breakfast and what options were available to the Chamber in resolving the issue of rescinding invitations previously extended to the NDP representatives to act as servers.

The focus of the 2:00 p.m. meeting on August 2nd was to invite MHA O'Brien to speak to the entire board and outline his objections personally rather than for any one member of the Chamber to act as a liaison between the Chamber and MHA O'Brien.

During the 2:00 p.m. meeting of August 2, 2013 MHA O'Brien clearly set out his position on the matter. According to the minutes of this meeting, MHA O'Brien indicated he could not agree with the decision that was made to remove the two NDP MHA's from St. John's and to leave Mr. Norman on the serving line. MHA O'Brien had no issue with these individuals attending the breakfast but he did not feel they should be on the serving line as that may indicate a political connotation. MHA O'Brien viewed the matter as one of principle that the community breakfast should not become a political event. This was MHA O'Brien's opinion and according to the minutes he told the Chamber that "if they don't agree with him when he walks out of the room he will not hold it against them (Chamber)".

Also, at the 2:00 p.m. meeting of August 2, 2013 the issue of funding for schools in the area was briefly addressed. According to the minutes of the meeting, MHA O'Brien indicated that his goal as a politician is "not only getting a Grade 4-6 school but also a K-3 school as he's not in agreement with doing renovations to the old Gander Academy to address the K-3." This meeting concluded with MHA O'Brien indicating that there are often competing interests around the Cabinet table when Ministers are trying to achieve things for their own communities but felt he was in a good position and is achieving things.

As stated earlier in this report, I have been requested to provide an opinion pursuant to s. 36 (1) of the Act as to whether or not MHA O'Brien has violated the code of conduct for members.

The central issue to be addressed in providing this opinion is whether or not MHA O'Brien threatened to withhold government funding in the district if his request to the Chamber of Commerce to rescind the invitations to the NDP representatives to act as servers at the community breakfast was not granted.

The code of conduct for members is to be treated as a standard by which the actions of a member may be judged for the purpose of censure by the House of Assembly and the public. A finding that a member has violated the code of conduct may have very significant consequences for that member. Given the significant consequences that an adverse finding from the Commissioner for Legislative Standards may have upon a member it is necessary for the evidence to clearly establish that a violation has occurred.

In civil matters such as this one, the burden of proof is on a balance of probabilities. According to the Supreme Court of Canada in *F.H. McDougall* [2008] 3 S.C.R. 41 the only practical way in which to reach a factual conclusion in a civil case is to decide whether or not it is more likely than not that the event occurred. In making such a determination the evidence must always be sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test. In reviewing this matter it was necessary to keep the standard of proof in mind at all times.

When one reviews this matter it is clear that the September 17, 2013 request of MHA Michael seeking my opinion on this matter flowed from the CBC reports MHA Michael referenced in her letter. It was the interview with Mr. Barry Warren where the issue of MHA O'Brien threatening to withhold government funding was first raised in the public forum. The Festival of Flight breakfast was discussed in this interview as well as the possible withholding of funding for Gander Academy. However, it is clear that what was being communicated by Mr. Warren in this interview was information that had been communicated to him by various third parties. Although Mr. Warren was a former member of the Chamber of Commerce he was not present at the Chamber meetings where the issue of rescinding the invitations to the NDP representatives was discussed. The information he was conveying to the CBC was information that was conveyed to him by others.

During my interview with Mr. Warren he suggested on numerous occasions that the minutes from the Chamber of Commerce should be reviewed. Upon reviewing these minutes it is clear that MHA O'Brien attended only one meeting with the Chamber of Commerce in addressing this

issue. That meeting took place at 2:00 p.m. on August 2, 2013. The minutes of that meeting demonstrate that MHA O'Brien was concerned with the event becoming political and that it was his opinion that the invitations to the NDP representatives should be rescinded. At the conclusion of this meeting the minutes indicate that MHA O'Brien stated "if they don't agree with him when he walks out of the room he will not hold it against them (Chamber)". The minutes of this meeting do not demonstrate a threat, but rather, a difference of opinion which MHA O'Brien indicated he was willing to accept if the Chamber did not agree with him.

Furthermore, while it is true that the issue of Gander Academy was addressed at this meeting, the minutes in no way suggest that MHA O'Brien was prepared to withhold funding for the school if the invitations to the NDP representatives were not rescinded. According to the minutes of this meeting, MHA O'Brien indicated that his goal as a politician is "not only getting a Grade 4-6 school but also a K-3 school as he's not in agreement with doing renovations to the old Gander Academy to address the K-3."

In conducting my review I interviewed two members of the executive of the Chamber of Commerce and its Chief Operating Officer. Each of these individuals was interviewed separately by me on November 7, 2013. None of these individuals could confirm or recall a threat being made by MHA O'Brien to withhold government funding in the region if the invitations sent to the NDP representatives were not rescinded.

As noted above, in order to establish a finding of a breach of the code of conduct for members there must be clear, convincing, and cogent evidence to satisfy the balance of probabilities test. While information was communicated to Mr. Warren regarding the matter he was not present at the meeting when the issue was discussed. When one reviews the minutes of the meeting attended by MHA O'Brien there is no indication that he was threatening to withhold government funding for Gander Academy, or any other public work in the community, at that meeting. The interviews of executive members of the Chamber of Commerce add corroboration to these minutes. In light of the foregoing evidence it cannot be concluded that MHA O'Brien violated the code of conduct for members by threatening to withhold government funding in the region if his wishes were not upheld.

CONCLUSION

It is my opinion that the evidence fails to establish that MHA O'Brien has violated the code of conduct for members and therefore I make no recommendation as to any sanction against the member.