

The Kirby Report

made under the

House of Assembly Accountability, Integrity and Administration Act



August 24, 2018

Bruce Chaulk
Commissioner for Legislative Standards

EXECUTIVE SUMMARY

On May 14, 2018, Colin Holloway, (MHA, Terra Nova) (hereinafter referred to as the MHA Holloway) wrote the Commissioner's Office requesting an investigation into the conduct of Dale Kirby, (MHA, Mount Scio), (hereinafter referred to as MHA Kirby) with respect to an alleged violation of the Member's Code of Conduct.

MHA Holloway alleged incidents of harassment and intimidation by MHA Kirby directed at MHA Holloway and that these incidents were a violation of sections 3, 4, 5 & 11 of the Members Code of Conduct. MHA Holloway also indicated that the culture of harassment and intimidation was pervasive within the Liberal Party Caucus.

While acknowledging the seriousness of the issues raised by MHA Holloway, it must be stated that the statutory mandate of the Commissioner for Legislative Standards is to provide an opinion with respect to the compliance of a member with the provisions of the House of Assembly Accountability, Integrity and Administration Act S.N.L. 2007 c. H-10.1 (hereinafter referred to as the HOAIA) and the Member's Code of Conduct.

I have also considered specifically whether MHA Kirby engaged in behaviour that amounts to harassment. In doing so, I have relied on a definition of harassment as objectionable or offensive behaviour that is known or ought reasonably to be known to be unwelcome.

In that regard, as a result of my review, I am of the opinion that MHA Kirby was not in violation of Principles 3, 4, 5 and 11 of the Member's Code of Conduct.

BACKGROUND

The HOAIA Act provides the authority of the Commissioner for Legislative Standards to examine and comment on the actions of elected members of the House of Assembly.

Subsection 36(1) states 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.

Upon receipt of a request for an opinion under 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 or not it may be necessary to engage in a formal inquiry of the matter. However, before the commissioner may start an inquiry the commissioner is required to give the member concerned reasonable notice in accordance with s.37(1) of the Act.

Section 37(1) states as follows:

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.

As noted by s.37(1), providing notice to the member concerned is not indicative of the start of an inquiry. An inquiry is started when the commissioner decides to conduct an inquiry and may start after the commissioner has received a response from the member concerned.

When the commissioner decides to start an inquiry, then the results of an inquiry shall be reported no later than 90 days after beginning the inquiry in accordance with s.38(4).

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.

CHRONOLOGY OF EVENTS

On May 14, 2018 a written complaint was received by the Commissioner from MHA Holloway. In the complaint, MHA Holloway requested that the commissioner conduct a formal investigation into MHA Kirby in accordance with s.36(1) of the HOAIA for an alleged violation of the Member's Code of Conduct.

On May 28, 2018 a letter was sent to counsel for MHA Kirby requesting a written response to the complaint.

On June 7, 2018 a written response was received from MHA Kirby.

On June 29, 2018, after an extensive review of proposals from professional services firms, with expertise in conducting

workplace investigations, Rubin Thomlinson LLP was retained by the commissioner to assist in investigating the complaints. On July 19 and 20, 2018, interviews were conducted by the Commissioner with the assistance of the investigator with MHA Holloway and potential witnesses.

On August 1, 2018, an interview was conducted by the Commissioner and investigator with MHA Kirby.

On August 2, 2018, MHA Kirby's response was provided to MHA Holloway.

On August 3, 2018, MHA Holloway responded in writing to MHA Kirby's response.

THE INVESTIGATION

The complaint raised by the Member dealt with four specific issues. These are as follows:

- 1) MHA Pension Plan;
- 2) Election of Speaker of the House of Assembly;
- 3) Culture of Harassment and Intimidation; and
- 4) Accusation of being a Liberal leak.

1) MHA Pension Plan

MHA Holloway's submission:

Since being elected as the MHA for the District of Terra Nova on November 30, 2015, the atmosphere of harassment and intimidation with the Liberal Party Caucus has continued to escalate. I recollect the first intensive issue surrounded the proposal to redefine the MHA Pension Benefit Plan. Over a two week period, MHAs were convened into meetings in hopes there could be a united front on a proposal to change the Pension Plan to a Defined Benefit Plan. In that example, I was the only MHA who refused to agree and to sign a Letter of Consensus which would then be sent to the Speaker of the House of Assembly. It was during this period that I openly referred to the tactics being used by several members of Caucus as "bullying and intimidation". It was the first time that Mr. Eddie Joyce approached me to say that "as a leader around the Caucus table, I could have taken a different approach to get my message across". I now realized that my advocacy would not always be well received by others.

During his interview, MHA Holloway said that there had been a commitment made by the Premier and Cabinet to review the MHA pension plan. He said that a lot of work had been done by MHA Bernie Davis, the Premier's office, and Finance to move from a defined benefit to a defined contribution. He said that those options were being presented around the Caucus table. MHA Holloway noted that when he agreed to run as MHA, there was portability between his existing public service pension plan and the MHA plan. He said, "A year in, portability is going to be taken off table."

MHA Holloway said that there was a lot of pressure for people to sign on to a defined contribution plan. He said that he did his own analysis and was sharing it with members of Caucus.

MHA Holloway said that he believed that all information should be on the table for people to make informed decisions. He said that there was considerable opposition and that certain Cabinet Ministers were being pushed to intimidate and harass those individuals who were starting to think that the proposal coming forward was not the right one. He said that one Sunday night they were called in for another Caucus meeting and told that they were going to draft and send a letter to speaker of house and it was going to state that there was unanimous consent for MHA Davis's proposal. MHA Holloway said that he told them that he would not sign the letter, and therefore they could not say that it was unanimous. He said, "That did not go over well." He said that Minister Joyce came to him about the fact that he was not being supportive of the government and was going against the Premier. MHA Holloway said, "And it's bullying at its finest."

I asked when MHA Joyce made the comment and MHA Holloway said that he came to him after a meeting and said that MHA Holloway was seen as a leader around the table, but that there were better ways to do what he was doing. He said

that this was a private conversation.

MHA Holloway was asked what made it bullying, and he said that they would not let it go and kept coming at him. I asked what distinguished the discussion from debate about the plan, and MHA Holloway said that it got personal. For example, he said that he was told by another Member that he was not a team player, and that he was told that if he was not on board then he should get out. MHA Holloway could not recall if the latter comment was made in this context because “it was said so many times.”

MHA Kirby’s response to the allegation

I have at no time threatened, bullied, or harassed Mr. Holloway.

During his interview MHA Kirby said that loyalty was very important to him in life. In the context of a discussion about “anti-premier organizing” at a caucus meeting, he said to others in the room that if they were making those comments, then they should not be in the room.

Factual Findings – MHA Pension Plan

In this report, I have made my findings on the balance of probabilities standard. Essentially, I have determined, based on the available evidence, whether it is more likely than not that the incident occurred. The onus to establish that the evidence supports a finding that an incident occurred rests with the complainant.

MHA Kirby acknowledged that loyalty was very important to him. Throughout his interview he stressed that point, and acknowledged that on at least one occasion, unrelated to the pension plan, he made a comment similar to that alleged by MHA Holloway, to the effect that if he was not on board with the government’s plan then he should not be in Caucus. On the basis of that admission, I find that he made such a comment. That said, I do not find it was made in the context of the pension plan given that MHA Holloway himself was unsure that it was made in that context, and MHA Kirby would also not have been in the meetings where the matter was largely discussed.

2) Election of the Speaker of the House of Assembly

MHA Holloway’s submission

I recall shortly after being appointed Parliamentary Secretary to the Minister of Municipal Affairs and Environment in July, 2017, when the topic of who would be the next Speaker of the House of Assembly began to percolate throughout Caucus. As you might appreciate, there were a number of names being suggested, including MHA Pam Parsons.

In making her decision to put her name on the ballot, MHA Parsons called me and asked if I would support her application to be the next Speaker. In reflecting on the process followed in 2015 when MHA Tom Osbourne became Speaker for the 48th General Assembly, I agreed to give my support to MHA Parsons. Being a newly elected MHA, in 2015, there is no doubt the learning curve was steep. While I was trying to be open, honest and fair to my colleagues, I was surprised to learn that the Premier publicly supported former Cabinet Minister Perry Trimper and his bid to become the next Speaker. I immediately found myself in quite the quandary.

It was also my understanding that the election of the Speaker was a free vote and it was a secret ballot.

It is also not typical for a Premier to openly endorse one candidate over another. Having weighted out all factors, I openly communicated to MHA Parsons that I would support her.

The election of the new Speaker for the House of Assembly took place on August 8, 2017. On that day, @ 12:48 p.m. (42 minutes before the House of Assembly would reconvene) I received a BBM message from Mr. Dale Kirby stating:

“I hope you understand that should Pam succeed today (being Election Day for the Speaker) in embarrassing Dwight by setting up this Confidence Vote in our government, we will likely be heading to the polls in less than a year. Better dust off your election signs ‘

In my estimation, Mr. Kirby’s message was a direct threat aimed to deter any MHA from voting in support of MHA Pam Parsons.

As you know, MHA Pam Parsons was not successful in her bid to become the Speaker of the House of Assembly. As a consequence for her perceived defiance, and my support of her (another act of perceived defiance), the seating chart in the House of Assembly was changed. Originally, following the 2015 Provincial Election, MHA Parsons was seated in the third row directly behind the Premier. I, like other Parliamentary Secretaries, was seated in the last seat in the second row, directly behind MHA Steve Crocker.

However, following the election of the Speaker, when all MHAs returned to the House of Assembly for the Fall 2017 Session, both MHA Parsons and I were moved to the last two seats in the third row; isolated from the rest of Caucus. Personally, I felt this was a direct consequence for not following orders and further solidifies my claim that harassment and intimidation continued to exist in the Liberal Party Caucus.

MHA Holloway said that after getting elected in November 2015, he received calls from two individuals who were both looking to be elected Speaker. MHA Holloway told one individual he would support him. He said that two years later, in 2017, he understood that the vote for Speaker “is private, no one should be influencing it.” He said that MHA Parsons called him and told him that she was interested in being Speaker. He said that he told her that he would support her. He said that the Premier then went public and said that he was supporting Perry Trimper. MHA Holloway said, “My understanding is that’s unheard of. Immediately I started to hear that people should follow who Premier is endorsing. For policy or budget there’s a certain partisanship. Electing a speaker is a free vote, you should be able to do what you wish.”

MHA Holloway said that he received a BBM from MHA Kirby at 12:50 p.m. on the day that the vote was scheduled in the afternoon. He called it “a last ditch effort to harass and try to influence an independent vote for speaker. That was probably the epitome of the influence and skullduggery that was happening around vote for a speaker”

MHA Holloway said that he was “unsure” if he spoke to MHA Kirby about the BBM.

MHA Holloway said that after the House of Assembly reconvened in November 2017, the seating had been changed and he had been moved to the very last desk before the door. He said that he and MHA Parsons were isolated from everyone else.

MHA Kirby

The August 2017 Blackberry Message I sent to Mr. Holloway regarding the election of House of Assembly speaker, which is the only communication I had with him on this matter, was not a threay as Mr. Holloway alleges. This was my opinion regarding one of the potential outcomes of the Speaker election.

I have at no time threatened, bullied, or harassed Mr. Holloway.

MHA Kirby said that despite what MHA Parsons and Holloway said publicly, the vote for Speaker was a whipped vote. He said that he was told as much by staff in the Premier's office, but would not identify the specific staff member because he is a "team player". MHA Kirby said that he was in Florida with his family at time of the vote for Speaker and could not come back in time to vote. He said that he had heard from colleagues that MHA Holloway was the only person supporting MHA Parsons and he sent the message to make MHA Holloway aware of the implications of his actions. MHA Kirby said, "It was more or less a confidence vote in the Premier. If you don't win a confidence vote then the outcome is a general election".

Factual Findings – Election of the Speaker of the House of Assembly

I have found that MHA Kirby's acknowledgment that the Speaker vote was essentially a whipped vote to be compelling in that, in the context of this allegation, it went against his self-interest. In acknowledging it, he chose not to name and assign blame to any staff, but rather presented it as an explanation for his own actions, which he also acknowledged. I find that MHA Kirby sent the BBM message to MHA Holloway, and did so in order to notify him of the potential consequences of voting against the choice of the Premier. I do not find that the message was "threatening", and note that MHA Kirby did not have the power to enact the potential consequences himself.

It is worth noting that MHA Parsons, in running for Speaker, contacted MHA Holloway and sought to gain his vote. MHA Holloway had no issue with such a call and acknowledged telling her that he would support her. Also, given that MHA Kirby, who was in Florida, was aware that MHA Holloway was supporting MHA Parsons, I find it likely that MHA Holloway was also speaking with other Members about supporting MHA Parsons for Speaker.

Regarding the relocation of MHA Holloway's seat in the House of Assembly, I do not find that he has provided any credible evidence that such a move would be the result of a decision by MHA Kirby.

3) Culture of Harassment and Intimidation

MHA Holloway's submission

The culture of harassment and intimidation is pervasive within the Liberal Party Caucus. In just over two and half years, I have counted at least six instances when MHAs have been told that "if he/she does not support the direction or decision, there is the door and you best get out".

For the past six months, the culture of harassment and intimidation has continued with new comments for Members to leave the Liberal Caucus should he or she not support the consensus of the group. I can appreciate and encourage diversity in opinion. As leaders and advocates for our respective electoral districts, MHAs are often tasked with finding the right balance between bringing forward issues of concern on behalf of their Constituents and being part of a unified team which is trying to do what is best for the Province. But, the level of verbal abuse, harassment and intimidation goes well beyond these interactions.

Recently, as part of the present investigation into harassment behaviour by Mr. Joyce and Mr. Kirby, I met with Premier Ball and I expressed my concern over how negative comments such as the ones about "getting out or there's the door" are unwelcomed by many members in Caucus.

MHA Holloway was asked for examples of comments or behaviour that he felt fell under the general culture of harassment. He said that "for some others, sitting around caucus table, they think it's ok to harass, bully people, ok to

have your thinking influence others at all costs.” He noted that after allegations of harassment were raised in the House of Assembly by the opposition, an email was sent by MHA Kirby that said, “You better come forward.” He also noted, “We go into a Caucus meeting the next day. They wanted to confiscate the phones. Graham Letto and Brian Warr are saying cough up your phone. They want to know who’s talking to media. And I’m sitting there thinking that stuff in my phone is between me and my constituents, go get a court order.” MHA Holloway said that he told MHA Kirby that he could not believe that he sent the email the previous night “given the atmosphere right now, with people at table talking about being harassed by another cabinet minister.”

MHA Holloway added, “Many days where I wished I didn’t even open my mouth, life would have been easier. I hope this is a good investigation. I don’t wish anybody any ill will or harm. But I do expect people to be accountable for their actions.”

MHA Kirby’s response to the allegation

The May 2018 email I sent to my Liberal Caucus colleagues was not harassment as Mr. Holloway alleges. This was a message expressing my concern regarding the proper process for reporting complaints after allegations arose during Question Period in the House of Assembly.

I have at no time threatened, bullied, or harassed Mr. Holloway. Furthermore, Mr. Holloway alleges I have violated clauses 3, 4, 5, and 11 of the Code of Conduct. There is absolutely no evidence that I have in any way breached these clauses specifically, or the Code of Conduct generally. Mr. Holloway has attended social events at my residence in St. John’s on multiple occasions, including in November 2017 and March 2018. I have also visited Mr. Holloway’s district with him on multiple occasions including as recently as April 2018. My behaviour toward Mr. Holloway is in no way consistent with his allegations.

MHA Holloway’s Reply

In reply to MHA Kirby’s response, MHA Holloway wrote:

Having read the short submission, I felt it was important to provide my additional feedback to Mr. Kirby’s comments about attending social events at his residence as well his comment about a recent event in April in my District.

By nature, I do not attend social events where alcohol is served. Personally, I find drinking alcohol in mixed company is not an appropriate behavior. As an MHA, we are expected to respond to Constituents at all hours each day of the week. It does not matter to a Constituent if I am at a family event, a Caucus sponsored event or attending a public event in my District. When a Constituent is in need, there is an expectation that the MHA is available to help.

The events at Mr. Kirby’s house were Caucus sponsored events. On the two occasions when I did attend the Caucus sponsored events at the Kirby residence, I refrained from drinking alcohol (I drink diet cola). My purpose in attending these two events was in response to advice from the Premier that all Caucus members should make every effort to attend these events.

I realize that in this role, we have to attend events and functions that are not always high on the priority list but it is important to be seen as a team player.

Furthermore, in response to Mr. Kirby’s comment about attending a recent event in April, 2018 in the

District of Terra Nova. This event was organized by the Rotary Club of Clarenville. Mr. Kirby was the guest speaker. He did advise me in advance of the event and that I could attend. Mr. Kirby did all the talking at this event and there was no formal opportunity provided for me to engage with my Constituents. It was simply a photo opportunity.

I trust this email provides some additional clarification to Mr. Kirby's commentary.

Factual Findings- Culture of Harassment and Intimidation

In his written complaint, MHA Holloway did not identify under this heading any additional specific behaviours of MHA Kirby that contributed to a culture of harassment or intimidation. When we met and I asked for examples, under this allegation MHA Holloway provided one example of an email sent by MHA Kirby following the receipt of the first complaint about the Member, which is the subject of the next allegation below. I find that MHA Kirby sent that email, which he does not deny. As noted above, I also find that there were comments made by MHA Kirby to the effect that if you do not support the Premier then you should get out the door.

4) Accusation of Being a Liberal Leak

MHA Holloway's submission

The issue of harassment reached a pivotal point in mid-April, 2018 when MHA Sherry Gambin-Walsh came forward with allegations against Mr. Joyce. As that situation was unfolding, the media was reporting on information which may have come from within the Liberal Party Caucus.

On April 24, 2018 the following email was sent to several MHAs within the Liberal Caucus by Mr. Kirby:

"If someone in the Caucus actually planted these harassment allegations with Paul Davis (Leader of the Official Opposition) or any other Opposition MHA, the person or persons have a moral obligation to reveal this to the rest of us"

On April 25, 2018, during a Caucus meeting, the issue of the possible leaking of information to the public came up for discussion. At that time, I indicated to Mr. Kirby that I thought his email to me, (and others as I later learned), was inappropriate.

Three days later, on Saturday, April 28, 2018, I, along with MHA Pam Parsons was named in numerous tweets on Twitter as being "Liberal Leaks". These Tweets made reference to bullet holes in a bucket placed on a man's head as well as "mopping up the mess left in the offices of Liberal Leakers MHA Pam Parsons and Holloway MHA".

Based on a review of the content of the Tweets, it is my opinion that the author is someone who works close to Members of the House of Assembly. Furthermore, the series of Tweets were of such a concern for my personal safety that a complaint has been filed with the Royal Newfoundland Constabulary.

The matter is currently under investigation by the RNC's Major Crimes Unit. I am providing a copy of my official complaint which was filed with the RNC on May 1, 2018.

MHA Holloway said that on twitter, @wackjobNL named MHA Parsons and him as "Liberal leakers." He called it "pretty

graphic stuff. Bucket on his head, bullet holes.” He said that they went to the Premier about the matter and also lodged a complaint with the RNC. He said that the RNC concluded their investigation because Twitter would not cooperate, nor would they release the IP address. MHA Holloway said that he received a call from the investigating officer about a week before his meeting with me, telling him that twitter would not cooperate. MHA Holloway said, “We’re hoping to find out one way or another that it’s Dale Kirby.”

MHA Kirby’s response to the allegation

Regarding the email, as noted above, MHA Kirby wrote:

The May 2018 email I sent to my Liberal Caucus colleagues was not harassment as Mr. Holloway alleges. This was a message expressing my concern regarding the proper process for reporting complaints after allegations arose during Question Period in the House of Assembly.

Regarding the Twitter account, during his interview, MHA Kirby said that he had never had a Twitter account other than his own inactive account, which he had previously identified as @dalegkirby. He said that he did not know who @wackjobNL was and said that it was absurd to suggest that it was affiliated with him.

Factual Findings – Accusation of Being a Liberal Leak

As noted above, I find that MHA Kirby sent the email about the harassment allegations to several MHAs. That said, the allegation that MHA Kirby was responsible for the Twitter account in question was speculative in that MHA Holloway had no evidence to support his claim that the account might belong to MHA Kirby. Absent any evidence from Twitter, which they declined to provide to the RNC, there is no basis on which to conclude that MHA Kirby directly or indirectly controlled the Twitter site that called MHA Holloway a Liberal leaker.

Conclusions:

In summary, I have found MHA Kirby engaged in the following behaviour:

- Commented to MHA Holloway on more than one occasion to the effect that if he was not on board with the government’s plan then he should not be in Caucus.
- Sent a BBM message to MHA Holloway on the day of the Speaker vote in order to warn him of the potential consequences of voting against the choice of the Premier.
- Sent an email to MHA Holloway and others after the media reported that a Liberal MHA might have leaked harassment allegations that said if someone in the Caucus actually planted the harassment allegations with the Leader of the Official Opposition, the person or persons have a moral obligation to reveal themselves.

The relevant sections of the Code of Conduct for Members of the House of Assembly are as follows:

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:

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.

11) Members should promote and support these principles by leadership and example.

I have also considered specifically whether MHA Kirby engaged in behaviour that amounts to harassment. In doing so, I have relied on a definition of harassment as objectionable or offensive behaviour that is known or ought reasonably to be known to be unwelcome.

My findings relating to the actions of MHA Kirby reflect his stated belief in the importance of loyalty. All three findings indicate attempts to prevent or respond to acts of perceived disloyalty by MHA Holloway and others. That said, I do not believe that his actions rose to the level of objectionable or offensive behaviour that would support a finding of harassment or bullying. I believe that they fall within the scope of behaviour that exists in a political environment in which debate about decisions rightfully occurs, and individuals seek to persuade their colleagues to support their desired outcomes, or the desired outcomes of party leadership. Even the email sent about the harassment allegations was not about stifling complaints of harassment, but rather was about responding to possible leaks of information to the opposition party.

Looking at the specific language of the Code of Conduct, I do not find that the actions of MHA Kirby towards MHA Holloway violate any of the excerpted sections above. Specifically, I do not believe that my findings indicate unethical political practices or unlawful behavior by MHA Kirby that would undermine the public trust or bring discredit to his office.

Accordingly, while I find that MHA Kirby engaged in some, but not all, of the behaviours alleged by MHA Holloway, I do not conclude based upon the totality of the evidence that his behaviour towards MHA Holloway, violated the Code of Conduct for Members of the House of Assembly.