XIV

The Memorandum of Agreement for Employees

1. 1994 - 1997

Current and past employees have voiced concerns over how they were treated before, during and after the currency of the Compensation Program. They voiced concerns to the Government and the public as events unfolded, and to me during the course of my review. In this chapter, I describe the history and nature of some of those concerns, as well as how the Government sought to respond to them.

As described earlier in this Report, Government officials did not identify the employees or their union as stakeholders or parties with interests to be considered in the process, either before or during the negotiations with claimants' counsel which culminated in the Memorandum of Understanding ("MOU") and the Compensation Program. Thus, a significant component of the Government's response was undertaken without consultation with employees and without informing them of the contemplated program.

Almost as soon as the Government announced its three-pronged response to reports of institutional abuse, the Nova Scotia Government Employees Union ("NSGEU") sought to become involved. Its president, David Peters, wrote to the Minister of Human Resources, the Honourable Eleanor E. Norrie, asking to be advised of interviews that were going to be conducted with employees, and to have the NSGEU represent the employees throughout the process. He also sought to make submissions with respect to the review being undertaken by Ms. Samuels-Stewart. On December 20, 1994, Peters called for a public inquiry, with its attendant procedural safeguards, to ensure due process for employees.

As noted earlier in my Report, the Internal Investigations Unit ("IIU") was formed in the fall of 1995. In October and November 1995, IIU investigators started issuing notices of allegations to current employees at the Shelburne Youth Centre. By December 6, 1995, 18 employees had been notified of allegations against them and five managers had been served notices of disciplinary default in accordance with the Nova Scotia Management Manual.[1]

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[1]A notice of disciplinary default is an allegation that the manager failed to report, direct and/or exercise appropriate action for the prevention of mental, physical or sexual abuse suffered by residents.

As more allegations surfaced, the IIU began to provide some details of the allegations to current employees. For those who faced many allegations, the investigators would give them only information about the most serious allegations. The information provided consisted of the names of the alleged victims, the nature of the conduct alleged, and the time period involved. In some instances, 'can-says' (that is, summaries of what the witnesses could be expected to say) or partial transcripts of claimant interviews were also provided.

Claimants had also named past employees as abusers. The IIU did not follow a consistent pattern respecting the nature and extent of information disclosed to past employees about those allegations. This was at least partly due to the fact that past employees were not facing discipline, but were rather a source of information in ongoing investigations of others. During this time frame, the IIU was only interviewing them in order to corroborate the story of either a claimant or a current employee undergoing a disciplinary investigation. Sometimes past employees did receive 'can-says' or the contents of claimant statements. However, for the most part, past employees were frustrated by the lack of information about the allegations against them and about the details of the Compensation Program.

Both past and current employees made attempts to obtain information through the *Freedom of Information and Protection of Privacy Act* ("FOIPOP").[2] Approximately 30 former employees applied under the Act for information as to the number of allegations against them, what compensation had been paid based upon these allegations, and what allegations had not yet been resolved within the Compensation Program or had been dismissed as fraudulent. Some of the FOIPOP applications were later abandoned. Twenty-three were ultimately denied. One of the applicants whose request was denied appealed the decision and was ultimately successful in part.[3]

On June 27, 1996, NSGEU president David Peters expressed concerns to the Minister of Justice, the Honourable William Gillis, on behalf of current employees named in allegations of abuse. He stated that unsubstantiated allegations were having a significant impact on union members' lives, and reiterated his position that a full public inquiry was the only way to determine what really happened at Nova Scotia institutions. He also raised the issue of the Government providing support services to employees under investigation.

Cameron McKinnon, a Truro lawyer, assisted one employee in December 1995, when she was interviewed by the IIU. The number of employees that he assisted subsequently grew. Ultimately, he was retained by the NSGEU to provide assistance to a variety of employees.

On July 26, 1996, McKinnon wrote to Marion Tyson, a senior Department of Justice ("Justice") solicitor. He stated that it had always been, and remained, his clients' position that they would co-operate with any Justice investigation provided they were given adequate disclosure to defend themselves against allegations made. Under Tyson's supervision, officials

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[2]S.N.S. 1993, c. 5.

[3]*In the Matter of an Appeal pursuant to Section 41 of the Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5* (June 13, 2001), Halifax S.H. 155707 (N.S.S.C.).

within Justice provided some information to employees regarding their files.

By September 4, 1996, Fred Honsberger, Executive Director of Correctional Services, sent the first batch of letters to employees advising them that investigations into certain allegations of abuse had been completed and that no disciplinary action would be taken in relation to the allegations. At least one letter went so far as to state that the employee had been exonerated, as the allegations had been found to have no merit.

On October 2, 1996, Mr. Peters asked the Minister of Justice to provide legal assistance to unionized and management staff who were the subject of abuse allegations – assistance at least equal to that provided to those making the allegations. On November 27, 1996, the NSGEU followed up this request by issuing a press release, in which the union expressed its hope that the Minister would consider the concerns of employees facing false allegations. It called upon the Minister to recognize that employees needed to be protected from false allegations.

2. JANUARY 1997 - JULY 1998

In mid-January 1997, the Deputy Minister of Justice met with Peters to discuss employee concerns. The Deputy Minister agreed to pay for certain legal fees incurred by employees facing internal investigation, but not for services provided in defending criminal charges. The Province began to provide the NSGEU with funds for legal services effective January 10, 1997.

In late February 1997, Mr. McKinnon informed the Deputy Minister that at a meeting on January 15th the employees had expressed concern about how the Government was dealing with disciplinary matters. He asked if the Government was prepared to compensate the employees for the devastation caused by the investigations. On March 3rd, the Deputy Minister responded that "all staff who have allegations against them will be treated fairly during the investigation and disciplinary process as may be required ... [E]ach employee's situation will be assessed on an individual basis and staff will have an opportunity to respond before any disciplinary action is taken."

Also on March 3, 1997, McKinnon wrote again to express concerns about the investigation. In this letter, he expressed doubt that the extent of the abuse was as great as asserted by the claimants:

> For there to have been abuse on the scale alleged one would have to believe, erroneously, in a conspiracy of epic proportion. I am sure you know the system of checks and balances that was inherent in the Shelburne Youth Centre throughout the years ... To put it quite bluntly, any conspiracy at play is as a result of the government offering $33.5 million to anyone who had ever suffered abuse at government institutions. Human nature being what it is it is not surprising that the government grossly underestimated the number of claims presented.
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> (Emphasis in the

original.)

On March 25, 1997, the NSGEU filed a policy grievance. In order to explain the substance of the grievance, it is necessary to quote extensively from it:

> The Union is alleging that the Employer has violated Articles 6, 21, 24, 26 and any other relevant Articles of the PR Collective Agreement and the similar provisions in the MOS, EDC and TE Collective Agreement by the manner in which it has conducted an investigation into complaints of misconduct by members of the bargaining unit employed at these facilities. The Union claims that the affected employees have been aggrieved and treated unjustly by the actions and inactions of the Employer. They have been subjected to discipline without just cause.
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> The Union says that the Employer has treated the affected employees unfairly and has denied them due process. Some employees have been suspended from their jobs without being given an opportunity to answer the complaints against them. They have been denied access to their personal files and have not been fully informed of the complaints made against them. They have been questioned by investigators acting for the Employer without proper notification in advance to the Union and to the employee affected and without Union representation or legal counsel being present, despite requests that representation and counsel be permitted to attend such interviews.
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> The Employer has compounded the unjust treatment of some employees by pre-judging the allegations of misconduct against them and awarding compensation to some individuals who have complained against them and awarding compensation to some individuals who have complained they were abused by these employees before allowing the employees an opportunity to respond to the allegations.
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> Finally, the Employer has unreasonably prolonged the investigation process, significantly adding to the damage caused by its unjust treatment of these employees.
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> The Union submits the Employer has breached the Collective Agreement and has been negligent in its treatment of these employees. The employees have suffered damage to their health as a result of the actions and inactions of the Employer. Their professional reputations and their reputations in their communities have been diminished. They have been forced to obtain independent legal counsel in an effort to protect their interests and they have suffered a loss of income and a loss of employment opportunities.
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> The Union will claim the following in relief:
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> - A declaration that the Employer has breached the terms of the Collective Agreement;
> - An Order that the Employer withdraw the suspensions of the employees and reinstate them to their positions forthwith;
> - An Order that the Employer publicly announce the exoneration of employees when it determines the complaints made against them have not been substantiated;

- An Order that the employees be compensated and made whole for the losses they have suffered including:

  a. Full compensation for lost income;
  b. The payment of legal costs;
  c. Aggravated damages;
  d. Punitive damages;
  e. General damages for pain, suffering, and loss of reputation.

William Lahey, Director of Corporate Services in the Department of Human Resources, responded on April 7, 1997. In his view, the letter submitted by the NSGEU did not constitute a policy grievance: the allegations made were matters for individual grievances. The union responded that the dispute involved the general application or interpretation of the collective agreement, as well as individual matters. It was, therefore, properly a policy grievance.

On May 26, 1997, Mr. Lahey denied the grievance on behalf of the Government. He notified the union that if the matter proceeded to adjudication, the Government would be arguing that the matter should not be dealt with as a policy grievance. The parties corresponded on the issue of choice of arbitrator over the summer and the matter was eventually set down for hearing on January 8, 1998.

On September 24, 1997, the NSGEU issued a press release calling on the Minister of Justice to take action to prevent unfounded allegations from being made and to demonstrate to employees that frivolous allegations would not be tolerated. On November 6, 1997, the day the Government announced further changes to the Compensation Program (outlined in the Compensation for Institutional Abuse Program Guidelines), David Peters wrote to the Minister noting that the Government had still not addressed the concerns of employees, even though it had tightened up the Program somewhat. He again asserted that employees were entitled to compensation for the damages suffered throughout the Government's response to claims of abuse. He also called, once again, for a public inquiry to deal with allegations of abuse and to examine the way the matter was handled by the Government. Soon thereafter, the Deputy Minister and IIU management were subpoenaed to attend the grievance hearing set for January 8, 1998.

By December 1997, the employment status of current Shelburne employees facing allegations varied. Four employees who faced either a significant number of allegations or a serious single allegation were on leave with pay; they were instructed to stay off the Shelburne property. Seven employees were on long-term disability and two were on short-term disability. Two were working within the institution but assigned to other duties; one had been transferred to another department. Nineteen employees were still performing their regular duties. Five retired under the Early Retirement Incentive Program.

During the latter half of 1997, the Department of Justice had considered engaging a

human resources consultant to assist current employees facing allegations. In the spring of 1998, it entered into an agreement with TWB Thompson Associates Inc. ("TWB"). TWB was a firm of recruitment and career counselling consultants, owned by Diane Peters. Its role was described by Fred Honsberger in a letter to Peters:

- To provide personnel assessment and career counselling services for Shelburne Youth Centre employees who have been affected by allegations of abuse.

- Services will focus primarily on returning to work at the Shelburne Youth Centre or finding new positions that are an appropriate fit with the knowledge, skills and abilities of employees.

- To ensure the continued productivity and improved morale of employees who have been affected by allegations. To provide necessary supports to enable an effective career transition for these employees.

Fred Honsberger suggested in a memorandum to the Deputy Minister that TWB provided excellent service, but some employees reported to me that they were not always satisfied with the assistance they received. There is no need, however, for me to try to reconcile these competing assertions.

In the meantime, William Lahey and David Peters continued their dialogue over the policy grievance. On December 22, 1997, Lahey suggested that there might be dispute resolution methods other than arbitration that would facilitate the resolution of the grievance. That same day, Lahey advised the Deputy Ministers of Justice and of Community Services that an arbitration would be lengthy and complex, would not benefit employees, and would complicate departmental efforts to re-integrate employees. For these reasons, he recommended that it was advisable to seek resolution of the matters raised in the grievance by other means.

On December 31, 1997, Lahey, Honsberger and Peters met and agreed that arbitration would not be the best way to achieve the desired outcomes. A series of meetings between Lahey and Peters followed. They hoped to resolve the issue and have a Memorandum of Agreement in place by February 15, 1998.

During this period, the demands of former employees for both meetings with the Government and the payment of legal fees intensified. On January 14, 1998, Honsberger suggested to the Deputy Minister that when meeting with former employees, the Department should listen and respond to their concerns where possible. He also suggested that a "communication link be established" whereby the executive of the group of former employees could meet with the Deputy Minister and himself once every two to three months. He thought it would be appropriate to send a formal letter to former employees exonerating them, where applicable, after the investigation was complete.

On February 21, 1998, the Premier, the Honourable Russell MacLellan, met with retired employees in Shelburne. Meetings also occurred, as suggested, between former employees and Honsberger and the Deputy Minister. In early March, the past employees expressed the view that

these meetings were productive and there appeared to be a genuine effort on the part of the Government to work towards a satisfactory solution.

On March 4, 1998, the Deputy Minister responded to a communication sent to him by Past Employees Against ADR, the predecessor of Past Employees for Restorative Justice ("PERJ").[4] He stated that the Province would pursue charges for fraudulent claims. He agreed that staff should be given polygraph results. He also advised that where the IIU investigation was complete, letters of exoneration would be provided, as appropriate, though these letters would have no bearing on the RCMP investigation. He said that all requests for information should be made through FOIPOP.

On April 28, 1998, Honsberger informed Lee Keating, PERJ's President, that the Province could not pay for the legal defence of former employees facing a criminal investigation and/or charges. However, he said the Province would pay for up to four hours of legal advice so that former employees could understand their rights and obligations in criminal matters.

Leahy and Peters continued work on a Memorandum of Agreement. On April 18, 1998, they achieved some success. An Interim Memorandum of Agreement was signed by the NSGEU and the Province. It provided for benefits to current employees facing allegations under investigation by the IIU, without prejudice to the employer, while negotiations between the NSGEU and the Province continued. It covered areas where agreement had previously been reached, including the use of third party professionals such as TWB, and the top-up of long term disability benefits. Issues such as the payment of legal fees and the availability of the Early Retirement Incentive Program and the Early Departure Incentive Program remained unresolved.

Cameron McKinnon requested that the Government also provide assistance for management staff. Lahey advised McKinnon to contact the Deputy Ministers of Justice and Community Services. On May 21, 1998, the Deputy Minister of Justice informed McKinnon that management staff would receive the same consideration as members of the NSGEU, consistent with the Interim Memorandum of Agreement. He stated that special arrangements for management staff would be inappropriate.

3. THE MEMORANDUM OF AGREEMENT

The final Memorandum of Agreement ("MOA") was signed on June 25, 1998. It is reproduced at the end of my Report as Appendix "H". Once it was executed, the NSGEU withdrew its policy grievance.

A serious dispute remains between the NSGEU and some of its membership over the

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[4]PERJ is a group that was formed to pursue the concerns of past employees in connection with the Compensation Program.

signing of the agreement. Members allege that the final draft was not submitted to them for approval, that it was negotiated behind closed doors, and that it was forced upon them. Recently, a lawsuit was launched against the NSGEU by some of its members, alleging that the union failed to represent the members' interests from the outset of the investigation into abuse allegations.[5] The NSGEU and Peters disagree with this position, and they maintain that the employees were well served in difficult circumstances by the union. This, of course, is a matter for the courts to resolve.

The purpose of the MOA was to define the options available to employees against whom allegations of abuse were made within the mandate of the Internal Investigations Unit, but who were not discharged as a result of the IIU investigation. (The Interim Memorandum of Agreement continued to apply while the IIU investigation was ongoing). The MOA also outlined the procedures to be used in applying these options, and how disputes would be resolved.

Several options were available to employees under the MOA. First, an employee could request a placement or transfer into a different position within Government. The Province agreed to provide assistance with retraining and relocation expenses associated with such moves, which were intended to be long-term. Second, an employee could transfer into the private sector . The Province agreed to allow such employees to end their employment in government in accordance with the already established Early Departure Incentive Program. Third, an employee could opt for early retirement. The Province agreed to establish a four-year early retirement program, to run from April 1, 1998 to May 31, 2002.

The MOA also provided several direct financial benefits to employees. The Province agreed to top-up to 100% the pay of employees on short-term or long-term disabilities caused by allegations of abuse. It also agreed to compensate employees for pay lost by them while on long-term disability before the Interim MOA came into force, as well as during the period "between the exhaustion of short-term and long-term disability benefits." The Province further agreed to reimburse employees for legitimate expenses reasonably incurred as a direct consequence of being accused of and investigated for abuse. An employee did not have to be charged with a criminal offence to obtain such reimbursement, but employees who were acquitted of criminal offences could obtain reimbursement for legal expenses incurred in their defence, providing they were not disciplined by the Province for conduct on which the charges were based.[6]

Any employee who was cleared by the IIU investigation was entitled to a written exoneration from the Province. The MOA stipulated that such exonerations were based on non-criminal investigations for the purpose of making employment-related decisions, and had no application to the criminal process.

Disputes concerning the application of the MOA to a particular employee were to be

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[5] *John Bingham et al* and *Nova Scotia Government Employees Union* (August 24, 2001), S.Y. No. 443.

[6] An employee could be acquitted of charges, yet disciplined for the underlying conduct because of the different standards of proof applicable to the criminal and disciplinary proceedings.

determined by a career development/job placement professional. Disputes as to the interpretation of the MOA were to be decided by one of three designated chairpersons.

4. IMPLEMENTATION OF THE MEMORANDUM OF AGREEMENT

In order to implement the MOA, a working committee was established by the Government on July 3, 1998. Members of the committee included representatives from the Departments of Human Resources, Justice, and Community Services. They were responsible for considering the situations of individual employees and administering the MOA.

Employees continued to be concerned with their treatment at the hands of Government officials despite the existence of the MOA. On November 25, 1998, the current employees asked that Linda Chisholm from the Ombudsman's Office be appointed to address their concerns. At a meeting on December 14, 1998, a group of current employees expressed the view that the MOA had broken down. Among other things, they complained that the Department of Justice was controlling the working committee, and that some employees had only been given two-year positions outside of Shelburne, with no guarantee of longer-term employment.

In April 1999, Honsberger arranged for an Employee Assistance Program ("EAP") officer to meet with PERJ to better understand the past employees' need for assistance. EAP was a program through which the Government offered professional counselling services to its employees. On September 15, 1999, the Deputy Ministers of Justice and Community Services asked that such a program be put in place for employees who were being interviewed by the RCMP.

As of January 2002, 52 employees had sought some sort of assistance under the MOA.

5. ANALYSIS

As indicated above, current and former employees complained on many occasions that their rights were disregarded by the response chosen and implemented by the Government. They have referred in their representations to the principles of the Magna Carta, *procedural fairness, due process, and the* Canadian Charter of Rights and Freedoms. *They complained, in particular, about the negotiations, without their input, leading up to the Memorandum of Understanding, and their inability to obtain information from the Government about how many claims were outstanding against individual employees, how many were settled and for how much. Above all, they have submitted that the Compensation Program paid claimants for alleged abuse without providing the employees with a forum to refute those allegations. This, in turn, gave claimants a powerful motive to fabricate and exaggerate. Since the veracity of abuse allegations was presumed, not only were the Government and the public losers in the process, but the reputations and emotional well-being of former and current employees were irreparably damaged.*

The impact of the process upon employees (and claimants) was earlier described. One aspect of that impact for current employees was the effect of allegations upon their ability to work either at their institutions or elsewhere. Some were disabled and rendered unable to work. Others were moved out of their institutions while awaiting the investigation of the allegations made against them. Yet another complaint registered against the Government by employees is that their employment status was dealt with by Government in inconsistent, sometimes arbitrary, ways. Some employees were sent home, while others similarly situated were permitted to remain at work. This meant to the outside world that some had already been adjudged to be guilty.

The Supreme Court of Canada said the following in 1997 in Reference Re: Public Service Employee Relations Act (Alta.):[7]

> *Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.*

The Court spoke again, two years later, in Slaight Communications *v.* Davidson:[8]

> *[E]mployment is seen as providing recognition of the individual being engaged in something worthwhile ... [E]mployment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem.*

The case law clearly indicates a duty on employers to act fairly to their employees. While no current employee was dismissed as the result of allegations made by claimants, it is not out of place to quote from a wrongful dismissal case decided in 1984:[9]

> *It is difficult to conceive of an accusation more calculated to cause humiliation and anguish to a dedicated bank employee than that of theft of the bank's funds. Moreover, the manner in which the plaintiff was dismissed was arbitrary and humiliating. Before her co-workers and family, at the beginning of what she hoped would be her career, she found herself branded as a thief. Not only were the circumstances of the plaintiff's termination of employment abrupt, harsh and humiliating, but that humiliation continued up to the time of trial.*

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[7][1987] 1 S.C.R. 313 at 368, *per* Dickson C.J.C.

[8][1989] 1 S.C.R. 1038 at *per* Dickson C.J.C., citing Beatty, "Labour is not a Commodity" in Reiter and Swan, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980) at 323-324.

[9]*Rahemtulla* v. *Vanfed Credit Union*, [1984] B.C.J. No. 2790 (B.C.S.C.), *per* McLachlin J. (as she then was), at paras. 34-35.

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> *In these circumstances it is not surprising that the plaintiff suffered severe mental distress. Her initial reaction was one of shock and despair. For a period in excess of a month she suffered severe depression, such that she was unable to leave the house or engage in any of her normal pursuits. She felt life was not worth living. She suffered from sleeplessness and she stopped eating. She had blackouts and headaches. On several occasions medical attendants were called to the home and she was twice briefly hospitalized. While other problems such as the tumour she discovered in her chest may well have contributed to her distress, I am satisfied that the most significant cause of her depression and continuing unhappiness has been the treatment she has received at the hands of the defendant and the effect that has had upon her prospect for employment.*

These cases reinforce the duty of employers to act fairly to their employees, and the terrible anguish, humiliation, physical and mental distress suffered by employees against whom false allegations of criminality have been made. My mandate neither requires nor permits me to determine whether the legal rights of employees were violated to the point where the Government is liable to them for damages. What I am able to say is that the Government's response to reports of institutional abuse, most particularly the Compensation Program and its lack of a credible validation process, was unfair to employees. The fact that the settlements or awards were purportedly confidential and that the Government made no admissions of liability did not, in the context of the Nova Scotia situation, prevent individual employees and employees collectively from being prejudiced.

Further, the way in which the Government addressed the employment status of suspected abusers was also deeply problematic in at least two ways. First, as earlier indicated, similarly situated employees were sometimes dealt with inconsistently and arbitrarily. Second, the Government adopted a response that caused some employees to be kept 'in limbo' for years, to a point that some could never be reintegrated into the work environment, even if ultimately exonerated.

I have found that the Government's response was, at times, inappropriate, unreasonable and unfair to employees. Having said that, to its credit, the Government did recognize that measures had to be taken to address the impact of the process upon its employees. The interim and final Memoranda of Agreement represented well intentioned efforts on the part of the Government to ameliorate that impact. Given the pending litigation between some employees and the NSGEU, it would be unwise for me to decide whether the NSGEU should or should not have entered into the Memorandum of Agreement. For the purposes of my Report, I can only say that no Memorandum

of Agreement would have been necessary had the Government's response been better designed and given greater prominence to the interests of its employees.