IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Davison v. Nova Scotia Government Employees Union, 2004 NSSC 29

Date: 20040203
Docket: 09311
Registry: Truro

Between:

Brenda Davison, Chris Davison, Mark Dawe, Ann Hollis
(The "Truro Employees")

Plaintiffs

v.

Nova Scotia Government Employees Union ("NSGEU")

Defendant

DECISION

Judge:	The Honourable Justice J. E. Scanlan
Heard:	(November 10, 12, 13, 14, 17, 18, 19, 20, 24, 25, 2003 Truro, Nova Scotia)
Post Trial Briefs & Submissions completed:	January 12, 2004
Written Decision:	February 3, 2004
Counsel:	Dale Dunlop, Solicitor for the Plaintiffs John Merrick/James Rossiter, Solicitors for the Defendant

Scanlan, J.:

[1] Let there be no doubt, the plaintiffs in this case are victims. The issue in this case however is whether the defendant Union should be held liable for any damages sustained by the plaintiffs.

[2] The plaintiffs were four of many Provincial Government employees whose lives and careers have been impacted as a result of unsubstantiated claims and allegations made by some former residents of Provincial institutions in which the plaintiffs were employees. The impact of the allegations was so serious that one employee committed suicide, and in the case of one of the plaintiff's, there was an attempted suicide. None of the plaintiffs were charged criminally or disciplined in relation to any allegations made against them. There is no evidence in this case that any of the plaintiffs did anything wrong.

[3] As I have said, there is no doubt in my mind the plaintiffs are victims of false allegations, the question is whether the plaintiffs are entitled to recover losses or damages as against the defendant, Nova Scotia Government Employees

Union (NSGEU), based on any actions or inactions of the NSGEU. The issues more accurately stated are:

1. Did the NSGEU properly and fairly represent the plaintiffs' interests in representing the plaintiffs while negotiating a settlement of a policy grievance arising from the employee complaints against the Province of Nova Scotia?
2. Did the NSGEU actions in complaining to the Nova Scotia Barristers' Society in relation to the Plaintiffs' counsel, Cameron McKinnon, give rise to a cause of action and damages?

BACKGROUND

[4] I start by echoing the comments in the opening page of the executive summary of the report prepared (Kaufman Report) by the Honourable Fred Kaufman, C.M., Q.C., DCL, dated January, 2002, "**Searching for Justice"**:

> Abuse is a terrible thing. It forever alters its victims, particularly when they are children. And even more so where the victims are in the care of their abusers.

> It follows that those who abuse children while in their care should be rooted out.
>
> But not at the expense of basic fairness to all concerned.
>
> Reports of abuse at Nova Scotia's youth facilities caused the Government to adopt a response. Central to the response was a Compensation Program for those said to have been abused.
>
> The Program was seriously flawed. So flawed it has left in its wake true victims of abuse who are now assumed by many to have defrauded the Government, employees who have been branded as abusers without appropriate recourse, and a public confused and unenlightened about the extent to which young people were or were not abused while in the care of the Province of Nova Scotia.
>
> This Report cannot begin to separate out the true and false claims of abuse. One of the byproducts of a flawed Government response has been to now make that determination (in the vast majority of cases) impossible. But this Report can document how the Government's response, however well-intentioned, failed to meet the needs of its citizens, was fundamentally unfair to some of the Province's current and past employees, and did a disservice to true victims of abuse. As one former employee put it to me, "The road to hell is paved with good intentions."

[5] The plaintiffs' were all employees working in the Truro Youth Training Centre or the Residential Centre in Truro. Both centres had different names throughout the years but were responsible for the care and treatment of youth or adults who presented perhaps the most difficult challenges care givers might encounter in any setting. At all relevant times the plaintiffs were members of the NSGEU. The NSGEU acknowledges that all of the plaintiffs were good and valued employees with unblemished work records.

[6] In October of 1994 the Government of Nova Scotia announced a so-called three prong strategy in response to reports of physical and sexual abuse by Provincial Government employees against former residents in Provincially operated institutions. The three prong strategy included; investigation of the alleged abuse; an assessment of the safety of youth then in custody; and a compensation program. The investigation process, as referred to above, was undertaken by former New Brunswick Chief Justice Stuart Stratton who recommended the establishment of an alternative dispute resolution process to respond to allegations of institutional abuse. The compensation program came into effect on June 17, 1996. It has been adjusted at least twice since its inception. The Department of Justice also retained Vicki Samuel Stewart to do an audit to assess the safety of youth currently in custody. The parties to this action agree that the Vicki Samuel Stewart audit and report was flawed in terms of her approach and conclusions. As noted, Justice Kaufman's report suggests the Government's response, however well intentioned, failed to meet the needs of the victims or its citizens. It was fundamentally unfair to some of the Province's current and past employees.

[7] When referring to the "Kaufman" report I do take into account the fact Justice Kaufman was mandated to conduct a review as opposed to a public inquiry. This means there was no opportunity for interested parties to test through cross-examination, the accuracy or veracity of statements made. The plaintiffs and defendant here accept the conclusions of the Kaufman report.

[8] The four plaintiffs in this case were the target of serious allegations made against them by alleged victims claiming compensation. The plaintiffs and defendant agree there is no evidence to support the validity of these claims. Although I have not heard all possible witnesses in relation to the allegations all the evidence before me supports only one conclusion; none of the plaintiffs acted inappropriately in any of the instances which were complained of. In spite of the seriousness of those allegations no charges have ever been laid against them nor have they been disciplined. The plaintiffs assert very strongly that they are indeed victims of false allegations and I accept those assertions. The accusers, on the other hand, have been paid untold thousands of dollars in relation to these allegations. As with many allegations made against the employees, the money was paid out to accusers prior to a full, or in some cases, any investigation. The

Kaufman Report" (page 4 of the Executive Summary) notes that 1,246 claims were processed in the compensation program.

[9] In one instance money was paid in relation to an allegation made against one of the plaintiffs even before the plaintiff employee was advised of the complaint. In other cases employees were alleged to have perpetrated abuse even though they were not even an employee at the time. The money was there for the asking and there were ads in newspapers encouraging claimants to come forward. There were anecdotal accounts of some former inmates driving up to the front doors of the institutions asking where they could pick up their cheques. We will never know how much was paid to true victims. Even they are now under a cloud in which they are suspected of getting money they did not deserve.

[10] I am not suggesting there was never abuse within the Provincial institutions. There were in fact some employees, none of whom are plaintiffs here, convicted based on their wrong doing. None of the plaintiffs were ever charged and, according to the evidence in this trial, there has not been a single case, other than those who now stand convicted, for which there was enough evidence to even warrant discipline.

[11] I pause for a moment and point out just as with the Vicki Samuel Stewart report, the report of Judge Stratton and the report of Justice Kaufman, none of the complainants who claimed they were abused were here to present their position and to be cross-examined on their allegations. Complainants did not have an opportunity to cross-examine the plaintiffs. Not all witnesses who could speak to the allegations of abuse were called as that was not the issue before the Court. It may well be that there are true victims of abuse who will never be heard and it will be folly for me in this decision, not having heard from all persons involved, to suggest there are no more valid complaints to be made against any employees in these provincial institutions. As noted in the executive summary prepared for the Kaufman report:

> One of the bi-products of a flawed government response has been to now make that determination (in the vast majority of cases) impossible.

In this case the plaintiffs and defendant have agreed these plaintiffs were not guilty of any of the allegations made against them. In fact they both took the position that one hundred percent of all of the allegations were false other than

those for which there have been criminal convictions. I do not presume to judge all of those other cases.

[12] The plaintiffs and their colleagues have in many cases had their career choices limited or eliminated as a result of false allegations. In many cases families have been destroyed, homes have been lost and tragically, as already noted, some have taken or tried to take their own lives.

[13] The plaintiffs were just a few of the many government employees who were caught up in a whirlwind wherein just about everyone in that group was painted with the same brush; presumed to be abusers of those entrusted to their care and custody. There is more than enough blame to go around. Individuals such as Vicki Samuel Stewart seemed to infer that there were abusers hiding in every corner in these provincial institutions. The media in many cases embarked on a feeding frenzy no less brutal than sharks after wounded prey. In some cases the media portrayed the institutional workers almost as a single group. Some in the media had the workers tried and convicted and their sentencing was being done in public. They like Ms. Samuel Stewart, never took the time to consider the evidence, wait to hear from the accusers and all potential witnesses and hear both

sides of the story. This feeding frenzy no doubt contributed to the community attitude to the government employees in those institutions. It no doubt contributed to the anguish of any provincial employee who was innocent yet portrayed as being guilty.

[14] These plaintiffs gave evidence about being shunned by neighbours and co-workers, having been treated as though they were all paedophiles or abusers of children or disabled adults. In one case even though one of the plaintiffs had moved hundreds of miles away from his home community, word leaked out that he was accused of wrongdoings. His neighbours stopped coming to his house. The situation was so serious that the local School Board moved the bus stop from in front of that persons home, down the road to another location.

[15] For the plaintiffs and their co-workers, I have no doubt they felt alone and under attack. They could even be justified in concluding their employer for whom they had given many years of loyal service, had turned on them. It was the Province who commissioned the flawed Vicki Samuel Stewart report which did such a disservice to these employees, the citizens and even true victims of abuse.

It was that same government that had established an internal investigation unit (I.I.U.) which was continuing with investigations of alleged abuse.

[16] The plaintiffs and their co-workers initially found themselves in a position where they were not afforded even basic legal rights during that internal investigation process. In many, if not all cases, when the internal investigation process began employees did not even know the nature of the complaints made against them. They were being asked, in fact even being required by their employer, to give statements.

[17] Through counsel they were asking for the right to have counsel during the interrogations but this right was being denied in spite of the potentially serious criminal ramifications. It is a lesson for all to realize that innocent people want counsel during interrogations too. Just because one asks for the right to counsel does not mean there is something to hide.

[18] During this initial investigation stage one of the government employees privately retained a lawyer in Truro, Cameron McKinnon. Many employees described him as being a life line for all of the institutional workers who were the

subject of complaints or allegations. Mr. McKinnon has stood by these government employees throughout the entire process without wavering. Mr. McKinnon alone fought with just about every available means at his disposal to get funding for legal counsel and to get basic information about the allegations being made against employees. During the initial phase of the investigation process the government representative, Marion Tyson, failed or refused to recognize the jeopardy of the employees. She resisted every attempt by the employees to obtain information about the allegations and to have the right to counsel during interrogation.

[19] Throughout this lengthy and complex process the NSGEU funded Mr. McKinnon to the extent of approximately $400,000.00 in legal fees and disbursements. That type of funding was unprecedented for the NSGEU. The situation the employees found themselves in was without precedent in Nova Scotia. The President of the NSGEU, David Peters, took a personal interest in the file and met with the affected employees, mainly in Shelburne, on a regular basis. I cannot envisage how the NSGEU or Mr. Peters could have been more supportive in these early years.

[20] The $400,000.00 was spent during a most difficult financial period for the Union. The employees were given almost unlimited access to Mr. McKinnon, all paid for by the Union. Such a commitment to the union members was unprecedented for the NSGEU and is evidence of the priority they gave to this problem. The expense for legal fees was so onerous as to jeopardize the financial stability of the Union.

[21] It took Mr. McKinnon and the employees many, many months to convince the IIU that not all government employees working in these institutions were abusers. All through those months the government was handing out millions of dollars to persons who simply had to make an allegation without proof. The more serious the allegation the more money they received. Throughout these many months Mr. McKinnon's efforts in trying to obtain even basic procedural protection for his clients met with stiff resistence. Only after Ms. Tyson was removed from, or left, was Mr. McKinnon able to develop a reasonable process where he could attend interviews with the clients. He assisted in the development of a polygraph program which in the end was used to vindicate many of the employees. Even that testing procedure was described by one of the plaintiffs as being one of the most tortuous experiences he ever endured.

[22] During this entire compensation program, before it was finally halted, claimants were paid in excess of thirty million dollars. Other costs associated with the program increased the total cost to over sixty-one million dollars by the time the Kaufman report was authored in January, 2002. While there were victims of abuse who deserved compensation, the evidence before me convinces me that as between the plaintiffs in this case and their accusers the only victims were the plaintiffs.

[23] The Union, its members and Mr. McKinnon all worked co-operatively with a single objective of protecting employees rights. There were no serious disagreements until early 1998. From 1994 to 1998 the union used many different approaches or strategies, culminating in the filing of a policy grievance complaining of the employers actions. I will return to the issue of the policy grievance, for now I simply point out that it was resolved by agreement between the union and the employer by memorandum of agreement (MOA) in 1998. It was preceded by an interim memorandum of agreement earlier in that same year. Suffice to say at this point that Mr. McKinnon and at least some of the members of the NSGEU were not in agreement with the terms of the interim memorandum of

agreement or final MOA as negotiated. The rift between NSGEU and some of the members became even more apparent when the final MOA was signed in June of 1998.

NSGEU Complaint to the Nova Scotia Barristers' Society re: Cameron McKinnon

[24] In the May/June period of 1998 an extremely serious issue arose as between the defendant, NSGEU and Mr. McKinnon. As I had earlier noted, Mr.McKinnon had been funded by the NSGEU to the tune of approximately $400,000.00. The President of the NSGEU, Dave Peters, confronted Mr. McKinnon as regards him expressing negative opinions to the institutional employees in relation to the interim memorandum of agreement and the final MOA. Mr. Peters asked that Mr. McKinnon, as solicitor for the NSGEU, stop making these negative comments. Mr. Peters suggested Mr. McKinnon was counsel for NSGEU and that it would be a conflict for Mr. McKinnon to make comments which did not support the NSGEU. Mr. McKinnon took the position that NSGEU was not his client even though they had paid his legal fees. He said he had an individual solicitor/client relationship with each of the members he represented.

[25] In an effort to stop Mr. McKinnon from commenting negatively on the MOA a complaint to the Nova Scotia Barristers Society was filed by the NSGEU through its President, Dave Peters. The Nova Scotia Barristers' Society eventually dismissed the complaint. There is nothing before me to suggest that decision by the Bar Society was in error. Having said that I do appreciate that Mr. Peters and others in the NSGEU did feel Mr. McKinnon was "their lawyer too". It is also easy to appreciate how they came to such a conclusion given the open cooperation and payment of fees by the NSGEU on behalf of their members.

[26] A large number of employees supported Mr. McKinnon and they no doubt felt betrayed by the NSGEU and their employer. They were displeased with the MOA which had been negotiated and the one person who many of them considered their life line was being challenged by the NSGEU because he did not agree with the terms of the MOA. Those employees felt that not only was Mr. McKinnon now fighting a battle with the internal investigation unit and the Province of Nova Scotia, but also fighting with their Union. Many members were concerned that fight may even cost Mr. McKinnon his career. I have no doubt that by this time they felt truly alone with nobody but themselves and an embattled Mr. McKinnon to protest their innocence.

[27] Given the potentially serious consequences for Mr. McKinnon's career and the union members who were his clients, the Union executive and counsel involved in drafting the complaint to the Bar Society did not take much care in ensuring the accuracy of the details in the complaint. For example it referred to a policy grievance suggesting Mr. McKinnon had recommended the filing of the policy grievance which he was now criticizing. Mr. McKinnon had in fact not been involved in that grievance but had recommended an earlier grievance be filed many months before.

[28] NSGEU Presidenet, Mr. Peters, felt betrayed by Mr. McKinnon. Even at trial he failed to understand how the Union could have paid over $400,000.00 to Mr. McKinnon and yet the Union was not his client. Much of the money the Union paid was eventually repaid by the Province. Mr. McKinnon insisted from the beginning the Province should be responsible for the legal fees. I am satisfied Mr. McKinnon stated from the beginning the employees were his clients. There is no evidence he ever implied or suggested he represented the NSGEU. This was simply a mistaken assumption by Mr. Peters.

[29] Owing solely to the perseverance of Mr. McKinnon in continuing to represent his clients, in spite of the NSGEU complaint, the members were not without representation during the complaint process. Mr. McKinnon was correct in his assertion that even though the NSGEU paid him, his clients were the individual employees. I also accept that Mr. Peters, as President of the NSGEU, did not appreciate that distinction could exist.

[30] While I am critical of the lack of care in drafting the complaint to the Bar Society, I am not convinced the complaint to the Bar Society was intended to harm Mr. McKinnon or the employees he was representing. The complaint was intended to address what the NSGEU considered to be a legitimate concern. The Union concern, although based on a misunderstanding, was not the result of malice or bad faith. I say this even though I note the personal hostility of Mr. Peters which still existed at the time of trial in relation to this issue.

[31] I congratulate Mr. McKinnon on his perseverance. His professional commitment to his clients in the face of personal challenge speaks to his professionalism, his integrity and his fortitude. It is that perseverance and commitment in the face of adversity which minimized any further damage to his

clients. Having said that I am also satisfied the NSGEU was entitled to have its rights determined by the Bar Society in a situation where they felt betrayed. The NSGEU is not liable for any damages in relation to their complaint against Mr. McKinnon or their attempts to have him removed from the file.

NSGEU Actions re: Settlement of the Policy Grievance:

[32] Aside from the issue surrounding the complaint to the Nova Scotia Barristers' Society as regards Mr. McKinnon, the plaintiffs' statement of claim and submissions can and should be reduced to a single issue: whether the settlement of the policy grievance by the NSGEU and the relinquishment of a claim for lump sum compensation and up front criminal defence fees constitutes a breach of the duty of fair representation owed by the Union to its members. Intertwined with that issue is the question of whether the acceptance of repayment of legal fees by the Province to the Union was improper. I consider the process by which the Union negotiated the settlement. I also take into account the members participation, or lack thereof, in the final decision to accept settlement of the policy grievance.

[33] In Nova Scotia there is no legislative codification of Union duties to its members. The duty is as established by the common law including the case **Canadian Merchant Service Guild v. Gagnon** [1984] 1 S.C.R. 509. The Supreme Court of Canada was dealing with a situation of a Union member who was a pilot boat captain transferred to maintenance duties. It was beyond question that this captain was subjected to unfair treatment by his employer without just cause. The Union, based on a legal opinion, refused to continue with arbitration related to the grievance. Quoting from **Rayonier Canada (B.C.) Ltd. and International Woodworkers of America, Local 1-217** [1975] 2 Can. LRBR 196. The Supreme of Canada said:

> ...it is apparent that a union is prohibited from engaging in any one of three distinct forms of misconduct in the representation of employees. The union must not be actuated by bad faith in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of a particular employee's [sic] unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory matter. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgement about what to do after considering the various relevant and conflicting consideration.

[34] The Court summed up the duty on the Union in the following words:

> The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.
>
> 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
>
> 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
>
> 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance in the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
>
> 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
>
> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

[35] **Gagnon** has been applied in Nova Scotia and as noted by Cacchione, J. in **Romard v. Canadian Union of Public Employees** (2000) NSSC No. 143789, at para. 63:

> ...when negligent conduct is at issue, the onus is on the plaintiff to prove that there was serious negligence on the part of the Union. ...mere negligence by a Union did not constitute a violation of the duty of fair representation. In more recent decisions, boards have affirmed that only gross negligence, and not simple negligence, will make the union liable.

Union's Actions Prior to Settlement of the Policy Grievance

[36] As I have noted earlier I do not question the commitment the NSGEU had to its members between the period of December, 1994, through to 1998 when the interim memorandum of agreement and MOA were finally signed. The Union and its president were deeply committed to the members affected by the abuse programs. While the employees now complain about the tactics or strategy of the Union or its president throughout that period, I find no fault with the Union throughout that period. It is easy with hindsight to say the Union could have done this or that. Between 1994 and 1998 the Union did not have the benefit of hindsight and even now I question how much more effective they would have been even if they acted as the plaintiffs now suggest they should have**.** I doubt the public or the employer would have been sympathetic to job action or louder complaints. That public and the employer simply appear to have judged the members without trial and they were in no mood for job action or more press releases.

[37] The compensation program as developed was an open invitation for false allegations. Once the allegations were made the employer was faced with the

prospect of having employees who were the subject of these allegations working in a position of caring for inmates or clients who would be at risk if the allegations turned out to be true. Depending on the seriousness of the allegations the employer took the position in many cases that it was necessary to reassign the employees to duties or departments where they did not have the same access to potential victims. I do not find the Union was in error in taking the position that this reassignment by the employer was not a grievable issue pending investigation. In all cases of which I am aware, the employees were reassigned with pay.

[38] The plaintiff suggests that the Union could have or should have reacted differently to things such as the Vicki Samuel Stewart report, the Stratton report and the suicide of one of the employees who was the subject of a complaint. Much of their criticism would suggest the Union should have been held to a standard of perfection in relation to these incidents.

[39] I am satisfied that, even with the benefit of hindsight, I cannot find much fault with the Union in terms of its response to any of these or other issues raised by the plaintiffs. The Union executive and members, as I have already noted, found themselves in an unprecedented situation where they and few others knew

of and believed in their innocence. Ms. Samuel Stewart, the IIU, the media, the employer through Ms. Tyson, all seemed to have either concluded or at least acted as though the employees were guilty of some misconduct or, alternatively, that they didn't deserve due process in terms of the investigative process.

[40] In spite of this adversity the Union took extraordinary measures to identify employees rights, assert those rights and champion the innocence of their members when appropriate. The plaintiffs suggest through counsel that there were some things such as job action or press releases which the Union did not use throughout the relevant period. I have considered the lengthy evidence of Mr. Peters and I am fully satisfied that throughout that period Mr. Peters was fully committed to all of the employees. His actions do not bespeak of any negligence. Had the employees wished to take job action they certainly were the ones to do that. Press releases Mr. Peters made appeared to have been timely and appropriate.

[41] I do take into account the evidence of Ray Davis, a former local 5 (Shelburne, Queens, Lunenburg) president and member of the finance committee for the NSGEU. He stated that he was present during a number of discussions concerning the policy grievance and talked with members of the executive daily.

He fielded calls on a regular basis from members complaining that the local Union representative, Art Beaver, was not returning calls from members. The complaints about Mr. Beaver were a fairly constant theme in the evidence.

[42] Mr. Davis also gave evidence of a conversation he had with a Union executive member, Joan Jessome, telling her the Union should do more for the affected employees. Her response was said to be that she had talked to the R C M Police and that there were "6-12 guys going to be charged" and that she was not going to do any more than she had to on behalf of the Union.

[43] Neither Mr. Beaver or Ms. Jessome were called to contradict this evidence. While it is a concern that these individuals may not have responded in a way that was fully consistent with the interests of the employee members, I do not see that the overall approach of the Union, especially Mr. Peters, reflected the same lack of attention or distancing from the members' concerns and problems. On the contrary Mr. Peters was, as I have already stated, fully engaged in trying to address the unique and serious concerns of his members.

[44] In one situation related to a suicide of one employee, Mr. Peters decided against making a press release, even though it would have highlighted a deficiency in the governments investigation of events surrounding the suicide. I am satisfied there was a reasonable explanation related to the emotional well being of the Union members which explains the delay in that press release. I am also satisfied the NSGEU took appropriate steps in responding to suggestions from government representatives which cast doubt on whether the suicide victim had denied allegations of wrongdoing. In this regard the NSGEU wrote directly to the Minister of Justice reporting on the comments of the government's spokes person, a Mr. Peter Spurway. Mr. Peters quite appropriately pointed out that Mr. Spurway acted in a most unprofessional manner in speaking of the suicide incident if Mr. Spurway was suggesting the deceased employee had not denied guilt.

[45] In summary, prior to the negotiations in relation to the interim memorandum of agreement and the final MOA there is nothing in the Union's actions that speaks of negligence. It is not enough for the plaintiffs' to now second guess the strategy used by the Union throughout those years and say something could have been or should have been done differently.

[46] The Union and employer faced a dilemma. As evidenced by earlier convictions, there had been abuse by some employees perpetrated upon some residents in the various institutions. The government faced potential liability if it did not appropriately respond to complaints as they arose.

[47] Based on all of the evidence before me, the Province's reaction in reassigning or suspending employees with pay appears to have been a measured and reasonable response in a very unprecedented situation. The Union assessment that the government response was not grievable appears to be a logical conclusion.

[48] I again point to the fact that it was the ill considered compensation scheme which spawned the disastrous situation. It may have been well intentioned in terms of ensuring that true victims did not have to be subjected to the ordeal associated with trial. That same system resulted in victimization of innocent employees falsely accused of wrongdoings. In a separate action some employees have sued the Province and therefore the question of whether this compensation program and the Province's treatment of its employees gives rise to a separate cause of action will be left for another day. The Union objective throughout the

period prior to the settlement of the policy grievance appears to have been to protect its members and to establish a reasonable process to afford the members protections and rights throughout the investigation process.

Settlement of the Policy Grievance including acceptance of repayment of legal fees:

[49] A more complex question relates to the specific issue as to whether or not the actions of the NSGEU in relation to the abandonment of the policy grievance and by negotiating and signing the interim and final MOA gives rise to any liability.

[50] I want to briefly review, perhaps repeat, the chronology of events. In June of 1995 the **Stratton** report was released. That report suggested there was generally reliable evidence of historical abuse although no allegation had been made against any current employee. In part he recommended an ADR process to allow for compensation without true victims having to be re-victimized by the ordeal of a trial. In July of 1995 the government announced an ADR process to assess claims for compensation from alleged victims. By the fall of 1995 the RCMP were conducting investigations and the employees were concerned as to

how they should respond if questioned about their own activities. By March of 1996 the NSGEU had agreed to hire a criminal lawyer, Cameron McKinnon, to assist the members in dealing with the investigative process. Mr. McKinnon was given an unlimited retainer to represent the affected members. One of the main issues that Mr. McKinnon faced was frustration of his efforts to get proper disclosure for his clients and to ensure representation for them during the IIU interrogations. In June of 1996 Mr. McKinnon recommended to the NSGEU President that a policy grievance or individual grievance should be filed as employee rights were not being respected. By August of 1996 Ms. Tyson withdrew from the file and the problem of disclosure and the right to representation during the IIU process seemed to have disappeared with Ms. Tyson's departure. With her departure there was no longer the same degree of concern for employee rights in relation to the IIU investigation process. Mr. McKinnon's suggestion re: the policy grievance was no longer an issue.

[51] By June of 1996 a memorandum of understanding (MOU) setting out the ADR process as between the government and yet to be identified alleged victims was signed. By the fall of 1996 the flaws in the ADR process were becoming clear. Large numbers of claims were surfacing and the investigative process was

over burdened to the extent that payments were being made without any proper investigation. Perhaps the biggest single flaw in the MOU was the time line set between the filing of an allegation and payment of compensation. The number of allegations by far exceeded expectation and overwhelmed the I.I.U. capacity to investigate complaints. Employees were suspended or reassigned pending completion of investigations. Employees who were the subject of allegations were put in the position where they were either unable or did not want to go back into the same work environment due to the allegations. Mr. Peters said he and the Union recognized that "special arrangements" would have to be made to give his members income and job security.

[52] By November of 1996 the Union was meeting with legal counsel to pursue the idea of drafting a policy grievance which was separate and distinct from the earlier policy grievance I referred to in relation to disclosure and the investigation process involving Mr. McKinnon. Mr. Raymond Larkin prepared a draft policy grievance but he was also advising that it was doubtful such a grievance would be successful at arbitration. It was agreed by Union executive the policy grievance was strategic in Union attempts to get yet undefined assistance for the affected employees. It was also Mr. Larkin's opinion that punitive or aggravated

damages would not be within the jurisdiction of an arbitrator. Members were told the grievance was not intended to go to arbitration and that it was a strategy employed by the Union to negotiate a settlement. Throughout 1997 it was obvious the government's attempt to avoid re-victimization of true victims of abuse was having a very substantial negative impact on the new victims; innocent employees.

[53] The NSGEU pursued the policy grievance through the arbitration process and, by December 12, 1997, had issued a number of subpoenas and document requests. The NSGEU strategy was based on an assumption that there were many documents which they had subpoenaed and which the government would not want made public. On December 31, 1997 the President of the Union, Mr. Peters, was asked to meet with government representatives to discuss ways to possibly resolve the policy grievance through negotiation. He met with a Mr. Honsberger and Mr. Leahey on December 31, 1997 and they agreed it may be possible to resolve the policy grievance outside the arbitration process. They also agreed to meet at a later date to negotiate a possible resolution. On January 12, 1998, a number of high ranking NSGEU officials met to try and establish objectives for the negotiations. As a result of that meeting the NSGEU considered one of the most important objectives was to establish income and employment protection for

those employees who could not, or would not go back to the same work environment. The NSGEU also developed a series of provisional objectives including; dealing with priority in obtaining placements, retraining, re-education, relocation, compensation, early retirement options, enhanced severance for those who wish to resign and short term and long term disability benefit top-ups. Mr. Peters was aware that some affected members had expressed as their priorities, the need for up front legal expenses if any employee was charged as the result of complaints. He was also aware of their demand for some form of apology or exoneration and lump sum damages. Mr. McKinnon described these as "the big three" for his clients.

[54] An arbitration hearing was scheduled for April 7, 1998. Between January and April, 1998, negotiations between the Union and the Province continued. The Province wanted to adjourn the arbitration pending continued negotiations. By April 7, 1998, there were a number of points of agreement. The NSGEU did not want to adjourn the arbitration hearing unless they were able to take something to their membership. The result was an interim memorandum of agreement. Mr. Peters took the interim agreement to Shelburne to meet with and explain the interim agreement to a number of concerned and affected employees. There were

approximately 40 members in attendance. Some members expressed concern about the fact there was no movement on up front criminal defence fees or on lump sum payment. There was discussion that it was probable an agreement could be reached on a form of exoneration. The Union representative, Mr. Beaver was aware that some members were concerned as to whether they had the right to sue as individuals, outside the grievance process.

[55] Negotiations continued and by June, Mr. Peters, as President of the NSGEU, testified that he felt there was nothing more that could be obtained through the negotiations process. He said it was time to decide whether to accept the terms of agreement which had been negotiated to that point in exchange for settling the policy grievance. The final agreement did not include provisions for upfront payment of legal fees if any of the employees were charged. It did not include lump sum payments for damages. The final MOA did purport to give up any individual right of the employees to sue the Province for damages.

[56] The final MOA was taken to Shelburne and a number of employees expressed opposition to the agreement due to the failure to include “the big three”. Copies of the signed agreement were not handed out at the meeting. The MOA

contained a number of provisions which conferred special benefits to the employees who were the subject of allegations. These special employee rights were above and beyond the normal contract provisions which governed most other employees in the same bargaining unit.

[57] These provisions include:

1. Affected employees seeking another job were to be offered available positions after laid-off employees but in priority to all other employees regardless of seniority;

2. Placement was to be facilitated by temporary placement, trial placements, managed placements and retraining;

3. All placements would be on the basis that the employee would retain their existing salary level even if the salary for the new job was lower;

4. If the placement required relocation the employee would obtain financial assistance equivalent to an employee who had been transferred at the discretion of the employer.

5. Increased assistance under the Employee Assistance Program (EAP).

6. Access to an Early Retirement Program.

7. Improved financial terms for those employees who might decide to leave the public service. This was a provision negotiated after the Interim Agreement.

8. Top up for those on short term disability (STD) or long term disability (LTD) and income continuance pending transferring to LTD. The NSGEU had been made aware that a number of individuals had gone off on LTD at reduced income and that this was an important benefit. Using the example of a employee earning $40,000, without top up they would lose $12,000 in income. The top up would bring them back to the $40,000.00.

9. Reimbursement for expenses incurred as a direct consequence of being accused or investigated. This was a provision that was negotiated after the Interim Agreement.

10. Reimbursement to the NSGEU for a portion of the legal costs it had absorbed in relation to the services of Mr. McKinnon. This was a provision that was negotiated after the Interim Agreement.

11. Payment for criminal defence legal costs incurred by employees provided they were not convicted of the offence and were not

successfully disciplined for the offence. This was a provision that was negotiated after the Interim Agreement and was a partial satisfaction of the employee/union wish to have criminal defence fees paid. The undertaking by the employer to pay for the legal costs of a criminal defence or acquittal was an unprecedented benefit for these employees.

12. The government was to give a written exoneration that would be in the context of the employment relationship. This was a provision that was negotiated after the Interim Agreement.

[58] I am satisfied that to the extent that the interim MOA and the final MOA afforded rights to the affected employees above and beyond the contractual rights, there was valuable consideration to the employees. There were substantive concessions made by the employer which had real costs to the employer. The MOA gave priority to the needs of the affected employees placing them in a position which was superior to fellow employees.

[59] Mr. Larkin, as counsel for NSGEU, was present when the MOA was explained to the employees. He referred to **Weber v. Ontario Hydro** [1995] 2 S.C.R. 929. I will provide further analysis of this case later but note for the time being only that Mr. Larkin was of the view that based on a reading of **Weber,** up front fees, lump sum and punitive damages were not something which could be achieved through the grievance process. The policy grievance had asked for up front legal fees in the event an employee was charged criminally.

[60] The plaintiffs have, during this trial, referred to a number of instances wherein they say it is questionable as to whether the employer has lived up to its commitments under the MOA. I refer, for example, to Mr. Dawe and his request for retraining or payment of his moving expenses. There were also complaints of other plaintiffs as regards the jobs that were or were not made available to them pursuant to the MOA.

[61] I simply point out to the plaintiffs that it would be inappropriate for me to judge those issues in the absence of proper representation from the Province at this hearing. I am not prepared to comment further on the issue as to whether the Province has fulfilled its commitment under the MOA. If the plaintiffs are

entitled to further benefit under the MOA it is for the affected employees and their Union to pursue their claims under the terms of the MOA.

[62] The plaintiffs have also complained about the Union's involvement in pursuing their rights pursuant to the MOA. This puts them in the contradictory position of on the one hand complaining about the terms of the MOA but on the other hand suggesting the Union has not been assertive enough in protecting the rights they have pursuant to that same agreement. In this regard it would appear that in some cases, for example, Mr. Dawe's claim for expenses arising from a relocation, the employees have not made specific requests of the Union to enforce their rights. The Union can and will only be judged in terms of its actions in asserting the claims once the specific requests have been made. I simply point out that the Union has an obligation to pursue individual rights as afforded under the MOA and to provide appropriate representation in the implementation process.

[63] The plaintiffs through counsel have invited me to comment on specific claims and even to comment on the issue of the Province's liability to pay lump sum damages I point out **the Province is not a party to this action. It is**

inappropriate for me to predetermine an issue which I understand to be before the Courts in a separate action.

[64] I return to the issue as to whether or not the settlement of the policy grievance constitutes a breach of a duty of fair representation. Grievances, including policy grievances, are ultimately controlled by the Union. Individual members do not have any entitlement to dictate how grievances are resolved. The duty on a Union is to exercise its discretion in settling grievances in good faith, objectively and honestly, after a thorough study of the grievance in the case, taking into account the significance of the grievance and of its consequence for the employee on the one hand and the legitimate interests of the Union on the other hand. The Union's decision must not be arbitrary, capricious, discriminatory or spiteful. It is advisable for Unions to consult with the affected employees before reaching a settlement but the failure to do so does not necessarily result in a breach of the Union's duties to the affected employee.

[65] Even though it is advisable to consult it does not mean that a Union must accept the position of the affected employees. There are a number of factors that must be taken into account on the settlement of any grievance. In this case the

Union did consult with the plaintiffs by keeping Mr. McKinnon advised as to the negotiations in relation to the policy grievance. In addition the Union had regular meetings with at least some of the employees or their representatives before and after the interim MOA was signed and before and after the final MOA was signed.

[66] In this case Mr. Peters said it was for him to make the final decision in this case as to whether or not to accept the terms offered in the final MOA. In making this decision he took into account the interests of other members of the Union. These interests included not only the impact of what that MOA would have on them as regards things such as job placement and seniority rights but also the overall financial stability of the Union. He also was entitled to take into account the legal advice he was getting on the issue of the likelihood of success at arbitration.

[67] As I had noted earlier the Union was in a difficult financial situation throughout this entire process. Their financial difficulties resulted in part because of the substantial legal fees the Union was paying during the investigation process. In addition the government was in the midst of a very substantial reorganization, downsizing of government employees. This combined with other management

issues was having a substantial negative impact on the Union finances. The Union was entitled to consider their financial position in settling the policy grievance. Having said this I am satisfied that the primary motivation in signing the policy grievance was not financial.

[68] The plaintiffs complained vigorously about the fact that as a final incentive for the NSGEU signing the MOA and settling the policy grievance the government offered and reimbursed in excess of $125,000.00 of the legal fees that the NSGEU had paid to Mr. McKinnon.

[69] On May 19, 1998, the Province offered the Union $115,122.92 as a one time contribution to past legal fees. This offer was made by Gordon Gillis on the condition that:

> it is understood that the above contribution will be made when the Government of Nova Scotia has been informed that policy grievance P-97-124 has been withdrawn.

As far as Mr. Peters could recall a settlement of the policy grievance was probably reached the next day.

[70] While the timing of this payment gives rise to an assertion by the plaintiffs that the Union sold them out for the lump sum reimbursement of legal fees, I am satisfied that was not the primary focus of attention for Mr. Peters or the NSGEU. I am satisfied that the Union was correct in its assertion that they were entitled to and deserved this repayment. This was consistent with some objectives Mr. McKinnon was pursuing for his clients. Mr. Peters testified that negotiations had gone as far as they could and there was no more to be obtained through that process. It was a matter of accepting what was negotiated or proceeding to arbitration. The issues still on the table were the ones Mr. Peters was advised by legal counsel could not be obtained through arbitration. The repayment of legal fees was an appropriate consideration. I am satisfied the repayment of legal fees was simply part of the total package included in the MOA. I also point out that the plaintiffs were part of the larger Union membership and as part of the larger body they also benefited from the reimbursement of legal fees. They also had a vested interest in the financial well being of the Union. To emphasize the point I again state, I am satisfied the repayment of legal fees was not a significant factor in the Union's acceptance of the MOA and the NSGEU did not breach any duty to its members, including the plaintiffs in accepting that repayment.

[71] At this juncture I also address another issue raised by the plaintiffs. They suggest the MOA did not confer any meaningful benefit to the affected employees. There is not enough evidence before the Court to enable me to do a full analysis of the cost of the MOA to the Province. This same deficiency in the evidence prevents me from determining the monetary benefit of the MOA to the employees. There were a number of top-up provisions in relation to retirement packages, disability programs and retraining which could have a very substantial monetary impact. Even with the absence of specific information, I am satisfied the rights afforded to the plaintiffs and other affected employees under the MOA have a real cost for the Province and provide substantive and meaningful benefits to the employees including the plaintiffs.

[72] Of the plaintiffs, three of them obtained benefits under the MOA. Chris Davison is one of a number of employees who had been displaced in two Truro facilities which were closed for reasons not related to the abuse allegations. He was asking to move back to Truro. He was successful in getting his present position pursuant to the terms of the MOA. He was given priority over all other applicants who were not on the lay-off list. Mr. Davison was compensated for living accommodations during training and compensated for travel back and forth

to Sydney. Mr. Davison may yet be entitled to reimbursement of up to $10,000.00 in terms of loss on the sale of his home in Sydney.

[73] Brenda Davison has been off work on LTD for a number of years for reasons unrelated to the compensation program. She has not requested any benefits under the MOA but if she does wish to come back to work she will be entitled to placement under provisions of the MOA.

[74] Mark Dawe has received training in Occupational Health and Safety. There is no permanent position available for him. It is apparent that if he wishes to pursue a career in Occupational Health and Safety as an inspector that he will have to get additional training. In the meantime he has obtained placements which would not be available to him but for the existence of the MOA.

[75] Ann Hollis had been displaced from her job in Truro when the facility closed. She was not entitled to any benefits under the MOA until 1999 when she was told of an allegation against her. Although the allegation was made much earlier she was not aware of it until 1999. She was then included in the MOA. Although she was not able to get her job of choice within a few months she was

able to get a position in Truro. She would not have been able to obtain the job in Truro but for her priority status under the MOA.

[76] My reference to the benefits to the plaintiffs under the MOA is not to suggest the plaintiffs have been made whole again. The emotional toll is obvious. They may well be limited in terms of their ability to return to the work they chose at the beginning of their career. Untold promotion opportunities have been lost. The list could go on. Even retraining efforts have failed to open new doors for some. For example Mr. Dawe cannot get work in the Occupational Health and Safety field. Ms. Hollis cannot get a job of choice. Mr. Davison has not been allowed to pursue retraining of his choice. All of the plaintiffs are left in a position whereby a certain stigma attaches to them because they are part of a group of employees who cannot conclusively prove their innocence.

[77] In summary there have been some benefits accruing to the plaintiffs pursuant to the MOA. Depending on the situation of a given employee there were many benefits available to them under the MOA which were not available to other employees.

[78] I am satisfied that no matter what the NSGEU did, there would be Union members who would not be totally satisfied with the decision to accept the MOA or any other negotiated settlement. The particular circumstances of employees were as diverse as the individuals themselves. No one agreement could address all of their concerns or priorities. As noted in the words of Mr. Peters, the decision to accept the MOA was "an extremely heavy decision" made in the best interest of all his members.

[79] As part of the duties and responsibilities of a Union in deciding to accept or settle a grievance the Union must possess reasonable knowledge or expertise in all areas of the law which they purport to deal with on behalf of their members. This includes reasonable knowledge with respect to tort claims which they may pursue for their members. **Weber v. Ontario Hydro** served to expand the jurisdiction of an arbitrator to deal with issues in labour disputes. Mr. Larkin was of the view that **Weber** substantially expanded the jurisdiction of arbitrators to deal with matters that, up until **Weber**, might not have been an issue within the authority of the arbitrator. Mr. Larkin explained that in his view, for an arbitrator to have jurisdiction the grievance must arise from a matter covered by the collective agreement. He said that in the circumstances of this case the issues faced by the

plaintiffs would not likely be determined to have arisen out of the collective agreement.

[80] The expanded jurisdiction increases the burden on Unions to ensure they are reasonably informed as to the nature and extent of their members rights in legal issues covered by that expanded jurisdiction. Mr. Larkin on behalf of the Union testified that he advised Mr. Peters (the NSGEU) that issues related to lump sum and punitive damages and upfront payment of legal fees in the event of criminal prosecution were not within the jurisdiction of an arbitrator pursuant to the policy grievance as filed. He may have been correct in that regard.

[81] I understood Mr. Larkin also to be saying that in the post **Weber** period there were grey areas in which plaintiffs could not obtain redress for their wrongdoings pursuant to the grievance process or through the Courts. I am satisfied that there are grey areas based on the facts. In those cases it may not be clear as to whether the relief sought should be obtained through the grievance process or alternatively through the Courts. Clearly there are some actions which fall beyond the grievance process. I do not understand **Weber** to say there is a void in which there are wrongs for which there is no forum in which to recover.

In **Nova Scotia Union of Public Local 2 v. Halifax Regional School Board,** 171 N.S.R. (2d) 373, Justice Cromwell writing for the Court of Appeal referred to the statutory process and framework which is at the centre of labour relations. He referred to **St. Anne-Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219,** [1986] 1 S.C.R. 704, in stating:

> The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold the matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the Courts at common law.

Justice Cromwell referred to the fact the Supreme Court of Canada has repeatedly made it clear that the exclusive jurisdiction of labour arbitrators must be respected by the Court. That is reaffirmed in **Weber**. The **Weber** and **O'Leary** model holds that:

> if the difference between the parties arises from their collective agreement, arbitration is the exclusive process for its resolution; the Courts have no concurrent jurisdiction.

Justice Cromwell went on to state at paragraph 23:

> Under **Weber** and **O'Leary**, the question of whether the subject matter of the dispute falls within the collective agreement is to be approached by determining the dispute's "essential character"...This determination of "essential character" of the dispute requires a detailed analysis of the facts and the provisions of the particular collective agreement. ... As McLachlin, J., said in **Weber**, it is impossible to categorize the classes of case that are within the exclusive jurisdiction of the arbitrator...
>
> This consideration is particularly important in this case. Of course, whether a matter is arbitrable and whether the Court has jurisdiction with respect to it are not identical

> questions. The answer to one does not invariably provide an answer to the other. However, the question of arbitrability and the reasons a dispute is or is not arbitrable are highly relevant to the issue of the Court's jurisdiction. ...
>
> The **Weber** decision does not simply limit the jurisdiction of Courts; it also takes an expansive view of the jurisdiction of arbitrators. ...
>
> Of course, arbitral and court jurisdiction are not always the mirror image of each other; the correlation is not exact. In some cases, court action may be barred even though there is no remedy available to through the arbitration process. For example, if a grievance is time barred, there may be no remedy available at arbitration and yet the court may also decline jurisdiction: **Piko v. Hudson's Bay Co.** (1977), 24 O.T.C. 238 (Gen. Div.). Similarly, a union may decide not to proceed with an individual employee's grievance or settle it against the employee's wishes and yet the court may not take jurisdiction in the individual's court action raising essentially the same complaint: ... The premise of such decision is that all of the employees' rights, substantive and procedural, in the given area are exhaustively codified in the collective agreement. There are no others to be asserted in Court.
>
> However, **the collective agreement does not set out the parties' rights exhaustively, and therefore exclude, court jurisdiction in all situations.** McLachlin, J., in **Weber** refers to two categories of such cases. Actions between employees and employers which do not "expressly or inferentially arise out of the collective agreement" are not barred, and, in addition, courts "possess residual jurisdiction based on their special powers...".

Recovery for actionable wrongs must not fall through the cracks based simply on the lack of a proper forum. There are no causes of action which lack a forum for adjudication. There are only cases in which it is not clear which forum is appropriate.

[82] I have been invited by plaintiff counsel to pronounce upon the validity of the plaintiff claim against the Province. To do so would be wrong. These plaintiffs know all too well there have already been too many instances where parties have been inappropriately affected in situations where they have not been present to put forth their case. To do so again vis a vis the issue between the Plaintiffs and the Province would only serve to repeat that same grievous error.

[83] Plaintiff counsel acknowledges Mr. Larkin as being a foremost authority on labour law in Nova Scotia. I do not accept the position taken by Mr. Larkin as regards his suggesting that some actions are without a forum. If Mr. Larkin was correct in suggesting that the arbitration would not grant relief as regards any lump sum damages claim or up front legal fees, I must ask; was the Union negligent in signing an MOA which purported to bar action in another forum? As stated already, I am not prepared to determine the issue of whether the employees are entitled to lump sum damages or even whether the MOA prohibits recovery if the right ever did exist. In terms of this action that is not the test for liability of the Union.

[84] It is not necessary for me to decide in this case whether the issues as between the affected employees arose from matters included in the collective agreement. I simply state that if the matters were not covered by the collective agreement then it is difficult to comprehend how the Union could settle issues that went beyond the collective agreement on behalf of the employees. It will be for the Courts to determine in another action as to whether the plaintiffs' rights existed separate and apart from the collective agreement. While **Weber** does expand the jurisdiction of arbitrators, I do not understand **Weber** to be saying that there is a void as between the jurisdiction of the arbitrators and labour law situations and the jurisdiction of the Courts in the common law wherein there would be claims which are not judicable in one or the other forum. To the extent that there may be issues which were not covered by the collective agreement any rights of the plaintiffs may still have survived. As I noted, it will be for another Court on another day to determine that issue.

[85] If there was a separate cause of action which did not arise pursuant to the terms of the collective agreement the Court must then decide whether the Union had any authority to negotiate on behalf of the employees as regards forfeiting this potentially independent right of action.

[86] I must review the actions of the NSGEU based on the fact they had received legal advice from Mr. Larkin on the issue. Even if Mr. Larkin was in part wrong in his interpretation and application of the **Weber** case, the Union cannot be held liable simply because that legal advice may not have been completely correct. For the Union to proceed in the absence of legal advice, correct or incorrect, would perhaps leave them in a more vulnerable position. Mr. Larkin, as any other lawyer, is not held to a standard of perfection. He is not on trial here but even if he was the issue would be as to whether or not he gave a reasoned opinion, not whether he was completely correct in his opinion. The Union is not to be held to the higher standard. The steps the Union took in settling the policy grievance were based on what Mr. Peters and others understood to be reasonable advice. The Union clearly believed the plaintiff could not get "the big three" pursuant to the grievance procedure and that the MOA was not compromising any possibility of recovery outside the grievance or arbitration process.

[87] For the plaintiffs to succeed they must have presented credible evidence to prove on the balance of probability that the NSGEU did not act in good faith or

honestly or that its decision was arbitrary or capricious and its representation was with serious or major negligence. I am not satisfied the plaintiffs have proven any of these elements on the balance of probabilities.

[88] If the Union has effectively negotiated away the rights of the employees to seek damages (if any such cause of action did exist) I am satisfied that the Union was not negligent in relying upon Mr. Larkin's legal advice in settling the policy grievance. The Union sought and obtained legal advice on the issue. Even if that advice was not entirely correct they cannot be held liable for relying on what they felt was reasonable advice.

[89] In view of my decision on the issue of liability it is not necessary that I deal with the issue of damages.

[90] I will hear from the parties on the issue of costs.

J.