

**Ontario Human Rights Commission and Michael McKinnon  
and  
Ministry of Correctional Services, Frank Geswaldo, George Simpson, Phil James,  
and Jim Hume**

**Summary of November 29, 2002 Decision of the Board of Inquiry on Implementation  
(H. Albert Hubbard)**

***Introduction***

Mr. McKinnon (the Complainant), a person of native Canadian ancestry, had worked as a Corrections Officer at the Metropolitan Toronto East Detention Centre (the Centre) since December 1977. Starting in November 1988 he filed a series of complaints with the Ontario Human Rights Commission (the Commission) alleging that he faced discrimination and harassment in his workplace because of his race, ancestry and ethnic origin, and subsequently, that this discriminatory behaviour continued and he was targeted for retaliatory action.

In its initial decision, dated April 28, 1998 (at pages 149 - 150, in reference to the poisonous atmosphere), the Board of Inquiry (“the Board”) stated that:

“In my opinion, the facts as I have found them, together with the inferences I have drawn, clearly establish that the Complainant suffered harassment, reprisals and discrimination at the hands of the Respondents contrary to the provisions of the Code. ... (T)he failure of its managers to take appropriate and timely measures to deal with the conduct complained of constituted an infringement by the Ministry of the Complainant’s right to equal treatment without discrimination because of race, ancestry or ethnic origin in that the employer permitted a “poisoned work place environment” to exist as a condition of employment affecting the Complainant differently from others.”

And at page 154, in discussing the Ministry’s liability, he concludes:

It is obvious from a review of the evidence that the workplace environment of the Centre was poisoned by racial harassment and discrimination, and that such sporadic efforts as were undertaken to address it were inadequate and often begrudged. The Complainant’s requests for action were viewed with suspicion and either ignored, mishandled or met with undue delay, as were the complaints of several others.”

As a result of these findings several remedial orders were made to redress the situation, both individually for the Complainant, and to correct the poisoned workplace atmosphere. With respect to the latter, Order #12 required:

“That the respondent Ministry establish at its own expense a human rights training programme that meets with the approval of the Ontario Human Rights Commission,

which may be called upon for assistance in that regard, such programme to be conducted within six months of the date of this award.”

On March 23, 1999 the Complainant requested that the Board reconvene the hearing to consider his allegations that the Ministry’s compliance with the orders had neither been timely nor complete, that further acts of harassment and reprisal had occurred, and that the poisoned environment of the workplace had continued unabated. After a legal challenge to the Board’s authority to reconvene the hearing it did resume on June 20, 2001 for over 33 days of evidence and legal argument.

The Board determined that the overriding issue before him was “whether the Ministry carried out those orders in good faith with a view to making them effective”. The only question before him as to liability was whether the Ministry failed to comply fully with one or more of the 1998 orders, in consequence of which the atmosphere of the Centre remained poisoned. In answering this question the Board, in its reasons, determined that the Complainant must establish that there was, in fact, non-compliance with one or more of the orders, and if such non-compliance was established then the Ministry had to refute the presumption that the workplace atmosphere continued to be poisoned. By “compliance” the Board made it clear that just superficial (or *pro forma*) compliance with the “letter” of the orders was not enough. The issue was whether or not the orders “...were carried out in good faith with a view to making them effective” (at page 17).

### ***The Failure to Comply***

The issue of non-compliance for the Board revolved around the twelfth order, the establishment of a human rights training program. The Board explained why the twelfth order was to be viewed in the context of all of the findings that were made in the first decision which found that rampant racism was permitted to exist as a condition of employment; “the only conceivable remedy for which is the elimination of such unlawful discrimination, the ‘express order’ being but a means to that end” (at page 18).

The Board held that the Ministry failed to comply with Order 12 in three major respects: (1) the training programme did not comply with the time limit set out in the Order; (2) the training programme provided was not of the kind that was ordered; (3) The training programme delivered by the Ministry was not the one agreed to by the Commission (at page 53).

The programme, which should have been completed (not just initiated) by October 1998, was not approved by the Commission until the end of the year and the delivery of that programme was not completed until October 1999. The Board commented that “(w)hat is particularly disconcerting regarding this failure is the Commission’s unseemly indulgence of the Ministry’s cavalier disregard of the time line set out in the twelfth order” (at page 19). The result of which was to deny the Complainant protection during the period intended for the workplace to make

the necessary transition and to leave the Complainant “to languish in that poisoned atmosphere”.

The Commission’s “approval” was found to be invalid because of this lack of timeliness (as the time-frame was mandatory and not open for the Commission to amend), but also because of the approval process that was followed and the inadequacy of the “approved” programme to address the issue of racism at the Centre and remedy the violation of the Complainant’s right to a workplace free of discrimination. The Commission had agreed that the Ministry’s Systemic Change Training Programme (SCTP), with some revisions, would satisfy the order. The Ministry and the Ontario Public Service Employees Union (OPSEU), as a result of a Grievance Settlement Board order in relation to a gender-discrimination claim, had jointly developed the SCP and it was designed to deal only with gender issues and had nothing to do with racial discrimination. The Board found that “a belated minor addition to some other Ministry-wide programme by way of lip-service to that order does not qualify as such a programme [one designed to deal with racism at the Centre and remedy the violation of the Complainant’s right to be free in that workplace from discrimination because of his race, ancestry, or ethnic origin]” (at pp 24 - 25) and found the programme to be inadequate because:

“The training programme contemplated by the order was to have focused primarily on managerial personnel, it was to have concerned racial discrimination, it was to have been a stand-alone-programme, and it was to have been carried out primarily at and for the Toronto East Detention Centre. Instead, however, the programme delivered was designed for Ministry-wide purposes regarding a host of other matters, with insufficient time devoted to racial issues of the kind described in the 1998 decision, and with inadequate emphasis on the training of *any* managers, let alone the depth of training that a reading of the decision shows to have been necessary for the Centre’s management at all levels. Thus, as it was not a programme of the kind ordered, there was no approval of an appropriate programme.” (at page 25)

The Board also held that the training program provided by the Ministry was not the program approved by the Commission as the Ministry’s pre-approval promise of extra training for managers was never fulfilled.

The Board went on to consider evidence that not only was an untimely, unsuitable and inadequately approved programme put in place, but that the programme also failed in its execution and evaluation. According to the facilitators who testified, the absence of participation by managers was a source of complaints. The quality and effectiveness of the programme was compromised by there being too much information to impart in too little time. The facilitators themselves felt ill prepared to cope with the issues of racial discrimination. The inclusion of the “Dale case scenario” about an aboriginal Corrections Officer who is called “Chief” by an inmate not only failed in its intended purpose of highlighting issues of race and aboriginal culture, but it trivialized and belittled the concerns raised by the Complainant.

There was no accompanying message positively reinforcing the April 1998 decision from the

Ministry. This, when seen in conjunction with the fact that the facilitators were not provided with the details of the Complainant's case and were discouraged from discussing the "McKinnon case", left the impression of reluctance on the part of the employer to acknowledge the problems and remedy the poisoned atmosphere of the workplace. Both the facilitators and the expert witness testified that the programme lacked proper focus on racial issues and although informative, was ineffective in fulfilling its goals.

### ***The Poisoned Workplace Environment***

With respect to the condition of the workplace atmosphere, the Board explained (at page 55) that:

"Its noncompliance with the order in question having been established [for reasons regarding the onus of proof provided at length by the Board elsewhere in its decision], it falls to the Ministry to rebut the presumption that the atmosphere of the Centre remains poisoned, and this it has clearly failed to do. The evidence relating to the Systemic Change Training Programme actually points to an environment that remains racially poisoned; moreover, not only was no other evidence led to show that the complainant's workplace has been substantially cleansed of racism, but the affirmative evidence that it continues to be so affected is entirely convincing."

Not only were there incidents of continued targeting directed towards the Complainant, but also there was evidence establishing that racism was a Ministry-wide problem. The facilitators who were called as witnesses testified that, in delivering the training, they encountered complaints of racism and the poisoned work environment while delivering the programme, and the evidence showed that some racist behaviour simply "went underground". The Board agreed with the Commission's submission that the Ministry had received numerous reports identifying various forms of systemic discrimination, and these reports identified management action or inaction as having created or sustained systemic discrimination at the Ministry. The expert witness also testified about "the very corrosive environment" at the Ministry, two indicia of which were an inordinate number of complaints and an ineffective system for dealing with them. The Board notes that the Centre's administrators paid "little heed" to the 1998 decision, and that the decision appeared to have been received with resentment and anger by "a Ministry determined to do no more than it thought necessary to comply with the orders" (at pp. 69 and 75). And although the Board was unprepared to find the assaults of three black inmates within a six month period as evidence of a racially poisoned work environment, he did find that the Ministry's failure to direct an investigation of the clear possibility of racial motivation underlying the assaults, was "another sign of indifference that would not likely take root at the level of senior management in an organization in which racism is simply not tolerated." (at page 82)

Incidents that were specific to the Complainant included:

C His being shunned as an outcast by his colleagues who showed an adverse

- reaction to the April 1998 decision;
- C Lack of support from management to assist him in dealing with the insubordination of other employees when he was acting in a management role;
- C Incidents that occurred soon after the April 1998 decision with other employees (L. Ashley, N. Gonzalez, and R. Sellick) targeting the Complainant while one of which showed support of one of the Respondents
- C Incidents that occurred in 1999 through to 2001 of further targeting of the Complainant (R. Spencer, V. Parish, M. Dewar, D. Matwichuk, M. MacFarlane, R. Rusaw, and J. Miller)

The behaviours described in these incidents included unfounded grievances being lodged against the Complainant, a fellow employee (away from the workplace on a leave of absence) calling to get the Complainant's home telephone number so she could upbraid him about his "fucking decision", the removal of posted newspaper articles regarding the April 1998 decision while at the same time allowing notices in relation to a party for one of the Respondent's who had been ordered removed from the workplace in the first decision, vandalism of the Complainant's (and no other) work locker, the Ministry's conducting an investigation of the witnesses involved in the first decision (including an unsubstantiated claim of perjury), employees submitting refusals to work with the Complainant on the unfounded claim that he was not competent to supervise the Special Needs unit, and an unsubstantiated complaint that Mr. McKinnon violated other employees' human rights.

The Board concludes (at pp 115-116, and 118) that:

"...the evidence of workplace events affecting the complainant, both directly and indirectly, in the four years following this Board's 1998 decision is further proof that its atmosphere remains racially poisoned for him. ... And when he was vindicated by this Board in the Spring of 1998, the individual respondents who had tormented him were left almost unscathed, the consequential damages assessed against them having been paid by the corporate respondent. The complainant, however, having dared to buck the system, was met with widespread scorn and subjected to name-calling and subtle attacks in the form of false allegations, frivolous grievances and denied training opportunities. As to management's investigation of his concerns, the complainant was met with refusals, delays, bias, incompetence, the twisting of facts, the withholding of information, and unjustified inquiries about, and findings against him.

Would each and every one of the incidents reviewed, considered in and of itself, constitute a breach of the *Code*? Of course not. Would any one of them taken alone demonstrate that the workplace environment was poisoned? Probably not. But when examined collectively, do they reveal a workplace environment that remains poisoned for the complainant? Absolutely. I believe counsel for the Commission got it exactly right when ... she said this:

“I think that targeting was absolutely because of your decision and his complaint... his real complaint ...was that management didn't act.”

...I find that the complainant had (and has) a reasonable perception that these subsequent incidents were retaliatory - that he was “targeted” because of his human rights complaints and their successful prosecution... I think the evidence shows ... that those responsible were motivated by resentment and intended to retaliate ... I find that the failure of management at virtually all levels to take his complaints seriously and/or to properly investigate them amounts to condonation by the corporate respondent. ... the Ministry is liable for this further infringement of the complainant's rights under the *Code*.”

### **Remedies and Orders**

The Board found that the respondent Ministry failed to comply with the twelfth order of the 1998 decision and that the atmosphere of the complainant's workplace remained poisoned, and that he has suffered post-decision harms. Furthermore, the Board determined (at page 131) that he must “address the root causes of “the problem at Metro East”, the most critical of which continues to be ‘indifference, ineptitude and bad faith of management at all levels’ in dealing with race-based complaints and WDHP matters generally, and I must do so far more carefully, directly, and comprehensively than was done in the 1998 orders.” The Board adopted Ministry-wide remedies based on thirteen recommendations (see Appendix “A”) made by a consultant hired by the Ministry to review the WDHP Operating Policy. The Board heard evidence that the Ministry accepted eleven of the thirteen recommendations. The Board issues the following orders (paraphrased from pp. 178-181):

#### **A. Ministry-wide Orders**

1. The thirteen recommendations (see Appendix “A”) made in the *Devlin WDHP Report (Devlin)* be implemented by January 1, 2004 (with the exception of the 6th) consistent with the eight recommendations made in the *Evaluation of the Systemic Change Training Programme Final Report*.
2. In clarifying the role of WDHP Advisors (pursuant to #8 *Devlin*), it is specified that such advisors must be qualified, unbiased, and provided with sufficient resources to carry out their mandate.
3. That “Executive Training” of the Deputy Minister, Assistant Deputy Ministers and the Regional Directors with respect to racial discrimination and WDHP Policy matters be completed within six months of this decision.
4. That three-days “skills-based” training (#2 *Devlin*) be provided for the senior

management of the Ministry (including Superintendents, Deputy Superintendents, staff from human resources, the anti-racism office, and the WDHP office) within six months of this decision.

5. That “performance appraisal” forms (or other documents used for evaluating the performance of the Deputy Minister, Assistant Deputy Ministers, Regional Directors, Superintendents and Deputy Superintendents of the Ministry) be revised immediately to include their responsibility for compliance with this decision.

**B. Toronto East Detention Centre Orders**

6. That the performance appraisal forms used in relation to the Superintendent, Deputy Superintendents and Managers of the Centre be revised immediately to include WDHP policy compliance.
7. That an anti-racism training programme with mandatory attendance be completed at the Centre within sixty days of this decision; and that, prior to the delivery of said programme, an opportunity be given the complainant to make and have considered his comments thereon.
8. That investigations and mediation of all WDHP complaints arising at the Centre be conducted by persons external to the Ministry.
9. (a) That within thirty days of this decision a committee, to be called the “Compliance Committee”, the membership of which is to be approved by the parties, be established at the Centre for the purpose of monitoring compliance with these orders in that facility; and (b) that the Superintendent of the Centre provide the Compliance Committee with monthly progress reports until these orders are fully implemented.

**C. Publication of the Decision**

10. (a) That within two weeks of this decision a person nominated by the Commission and approved by the parties be appointed at the expense of the Ministry to prepare short summaries of this decision and the 1998 decision, and said summaries to be completed and approved by the parties and the Board within one month of this decision; (b) that within five weeks of this decision the said summaries be sent to all employees of the Ministry under cover of an open letter similar to Exhibit 56; (c) that the person appointed to prepare the summaries also prepare a brief *précis* of them, to be approved by the parties and read at parade at all Ministry facilities within six weeks of this decision, and (d) that the said *précis* be read at parade at the Centre by the Assistant Deputy Minister or Regional

Director responsible for the Centre.

11. That full copies of this decision and the April 1998 and May 1999 be kept in the offices of the Superintendents of the Ministry's facilities and that notice of their availability be appropriately posted.

**D. Orders Specific to the Complainant**

12. That the complainant and his wife, Ms. Shaw-McKinnon, if they so request, be granted paid leaves of absence until such time as the Compliance Committee indicates that the orders relating to the Centre have been complied with.
13. (a) That, if they so choose, the complainant and his wife shall continue as acting OM16s until all of the orders (including those that are Ministry-wide) have been fully implemented; and (b) with respect to training and other opportunities the complainant and his wife will be dealt with as though they have accepted the promotions.

**E. Professional Assistance**

14. That within two weeks of this decision a third party, competent to develop and oversee the delivery of the various training programmes referred to in these orders, be appointed to carry out these duties at the expense of the Ministry. The Commission shall nominate the third party, and that third party shall monitor progress and report to this Board at intervals no shorter than six months.

**F. Final Responsibility**

15. The Deputy Minister of the Ministry of Correctional Services shall have the ultimate responsibility for the implementation of these orders.

**Exhibit “A”****Devlin WDHP Report Recommendations**

**Recommendation 1:** The Equal Opportunity Lead should have the leadership role with regard to WDHP and Conflict Resolution within the Ministry.

**Recommendation 2:** (a) All managers to receive three days [skills-based training within six months on alternative dispute resolution methodologies, workplace restoration, team building, cross-cultural communications, *Ontario Human Rights Code*, and *Freedom of Information Act*. (b) All staff receive a half-day refresher annually on WDHP and conflict resolution. (c) The Ministry will partner with Shared Services Bureau to deliver a regionally based, customized WDHP training program to all managers over the next year.

**Recommendation 3:** A Conflict Resolution Unit should be established to manage a range of conflicts that arise, within the Ministry and to manage the variety of resolution processes which exist and which need to be established.

**Recommendation 4:** A roster of external investigators would replace the WDHP 9 investigation role of the IIU. The WDHP Operating Policy speaks to this issue.

**Recommendation 5:** Anti-racism Coordinator and staff should be housed within the Conflict Resolution Unit. The majority of the work of the Anti-racism Coordinator is conflict related and should be consolidated with the other conflict resolution activities.

**Recommendation 6:** Prescribe a process and new time frames for completion of investigations - four weeks.

**Recommendation 7:** A process of managing the volunteer mediators under the Systemic Change Program.

**Recommendation 8:** The role of the role of WDHP Advisors needs to be clarified.

**Recommendation 9:** WDHP Review Committee needs to be established, chaired by the Director of the Conflict Resolution Unit.

**Recommendation 10:** There must be clear and increased accountability for WDHP established. WDHP performance should be included as part of the performance system within the Ministry.

**Recommendation 11:** The organization must undertake high profile activities in support of WDHP. These activities will signal to all staff that there is a willingness to undertake the difficult tasks of removing people from the system who are found to be in serious violation of the policy or imposing significant levels of discipline to less serious violators. There must be

comparative consistency of discipline applied to violators regardless of classification group.

**Recommendation 12:** Exit interviews should be conducted with all departing staff for a period of two years.

**Recommendation 13:** A monitoring mechanism must be established to measure and report at six months intervals for the first three years of the new process. The monitoring activity must be conducted by an external organization in order to ensure the integrity of the process.