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By Email and Mail

Mr. Don Wright

Deputy Minister to the Premier, Cabinet Secretary and Head of the Public Service

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Dear Mr. Wright,

**Re: Ombudsperson’s Report, Misfire: The 2012 Ministry of Health
Employment Terminations and Related Matters**

This is my third and final report as the independent monitor of the government’s progress in implementing or giving effect to the recommendations in the Ombudsperson’s Report.

I will first deal with the recommendations that were due at the end of March or fall due at the end of April, and then add some comments on other recommendations that in my view were not fully implemented at the time of my earlier monitoring reports. I will conclude with a brief report on the recommendations for which I have been given responsibility and on the other functions that I have been assigned under my Terms of Reference.

A. The March 31 and April 30 Recommendations

There are 13 recommendations that were due at the end of March and one is due at the end of April. Here are my comments with respect to each of them.

R – 9 – This recommendation called for the Ministry of Health to issue a written letter of apology to each of the individuals to whom an *ex gratia* payment is made from the compensation fund established in recommendation 4. I made my recommendations about the distribution of that fund in late January and reviewed drafts of the apology letters and provided comments. The letters have been sent and in my view this recommendation has been fully implemented.

R – 10 – This recommendation deals with letters of apology to persons (other than those referred to in other recommendations) who received “data demand” letters. I reviewed and commented on the drafts of these letters and in my view this recommendation has been fully implemented.

R – 17 – This recommendation concerns the development and implementation of a policy framework for dealing with real or perceived conflicts of interest. I had the opportunity to review drafts and revised drafts of the documents prepared in response to this recommendation. In my opinion, they implement the letter and spirit of the Ombudsperson’s recommendation.

One area of special concern relates to the situation that arose in the events investigated by the Ombudsperson in which government made a policy choice to have public servants serving more than one employer. The *Standards of Conduct* address outside remunerative and volunteer work, but they do not address the specific issue of the “dual role” situation, which is complex and may require distinct treatment. The government has undertaken to develop additional case studies and resources for employees and supervisors specifically on this topic and those would be useful steps.

R – 18 – This recommendation is for the assignment of a senior and fully trained staff member to provide advice and assessment of prospective conflicts of interest for every ministry and government agency whose employees are subject to the public service *Standards of Conduct*. I have reviewed a list of staff to whom these duties have been assigned and the training materials used to train them. In my view, this recommendation has been fully implemented.

R – 19 – This recommendation calls for a revised accountability framework to ensure that internal human resource investigations are properly supervised, focused, fair and thorough. I have reviewed a draft and revised draft of the new *Accountability Framework* and in my view, it meets the recommended requirements. In particular, it addresses the best practices protocols check list set out in the Ombudsperson’s Report at p. 373 – 4.

R – 20 – To comply with this recommendation, the Public Service Agency retained Corinn M. Bell, Q.C. to conduct an independent compliance review of the investigatory policies established in response to the McNeil Review. The review was received by government on March 16 and, as recommended, it has been posted to the government’s publicly-accessible website. This recommendation has been fully implemented.

R – 23 – This recommendation requires development of a new procedure regarding reporting employee misconduct to the police in non-emergency situations and for implementation of training for public service investigators on that procedure. I have reviewed a draft and a revised draft of the procedure and the training materials developed to implement these recommendations. In my view, they fully implement the Ombudsperson’s recommendation.

I cannot leave this recommendation without noting the serious negative impact on individuals and families of the public announcement that matters had been reported to the police. Completely innocent people feared that they might have done something wrong, they became suspicious of close friends and colleagues and worried that the police might appear without warning to search their homes. I am gratified to see some mention of this sort of impact to reporting in the new procedure and also to see the articulation of the narrow circumstances in which it would be appropriate for government to make a public announcement that a matter had been referred to the police.

I note that the procedure deals specifically with advising the subject of a referral to the police as soon as the matter has concluded. This is an important procedure. Had that sort of notice been given in the events studied by the Ombudsperson, much unnecessarily prolonged suffering would have been avoided.

R – 27 and R – 32 – These recommendations call for legislation to establish independent reviews of all dismissals for cause and for public interest disclosure of wrongful conduct in government. Legislation in relation to the former was introduced in the Legislature on April 10. My understanding is that legislation responsive to the latter is under development. In all of the circumstances, I think it best to leave further comment on the implementation of these recommendations to the Ombudsperson.

R – 31 – One of the most troubling of the Ombudspersons' findings was that officials refused to follow unequivocal legal advice that their proposed course of action was unlawful. Another was that officials acted in the belief that legal advice had been given on the substance of a matter when in fact it had not. This recommendation is aimed at preventing these sorts of problems. It calls for the development of written protocols as to who can decide not to follow risk-based advice, the procedures that apply to making that decision and the process to be followed when limited advice has been obtained.

I have reviewed a draft and revised draft of the written protocol and in my opinion it fully implements the Ombudsperson's recommendations. Had this protocol been in place and been followed at the time of the events discussed in the Ombudsperson's Report, a good deal of human misery would have been avoided.

R – 36 - This recommendation has been implemented. A new Premier's Award for outstanding work in evidence-based or evidence-informed policy or program development has been established and nominations have been invited.

R – 37 – The payment of \$200,000 to the UBC Faculty of Medicine called for by this recommendation has been made and this recommendation has therefore been fully implemented.

R – 38 – I have confirmed that officials with the Ministry of Health have met with representatives of the Dean's Office in the Faculty of Medicine to discuss the adequacy of the endowment of the Chair in Patient Safety as required by this recommendation. I understand that while the endowment met the University's requirements for endowments when it was set up, the University's view is that it is no longer able to sustain a competitive salary for the holder of the Chair. Given that the recommendation calls on the University and government to "meet and discuss" this issue and that there have been meetings and discussions, I have not pursued the question of the current adequacy of the endowment further.

R – 41 – Government is to report to the Ombudsperson on the status of the implementation of the recommendations. I have reviewed a draft of that report and understand that it will be filed with the Ombudsperson by the end of April.

B. Follow up concerning my first and second monitoring reports

In my first and second monitoring reports, I noted some reservations with respect to the implementation of various recommendations. I provide my assessment of the current status of those recommendations here.

R – 11 – This recommendation relates to personal belongings of some of the harmed persons. I am not aware of any outstanding issues in relation to this recommendation and to the best of my knowledge, it has been fully implemented.

R – 21(a) – This recommendation calls for the Investigation and Forensic Unit (IU) to implement a program of ongoing professional development on administrative and procedural fairness for its investigators and any employees leading an investigation.

I have reviewed the amended 2018/19 Investigation and Forensic Unit Professional Development Framework and Plan. It emphasizes in several places the importance of administrative and procedural fairness in investigations. There is also an annual mandatory 1.5 day Administrative Law Training session. In my opinion, these changes meet the requirements recommended by the Ombudsperson.

R – 24 – This recommendation calls on the Ministry of Health, following consultation with the Information and Privacy Commissioner, to create new guidelines for making decisions about suspending access to administrative health data.

In my February 28, 2018 monitoring report I drew your attention to what appeared to me to be some gaps in the version of the Guidelines that I had reviewed at that time.

I have now had the opportunity to review a revised version of the Guidelines. In my view, they now fully address the Ombudsperson's recommendations.

R – 33 – This recommendation requires the Ministry of Health to develop and implement a carefully designed organizational reconciliation program which is to, among other things, include clear objectives and deliverables and be completed within 12 – 18 months of the beginning of implementation in September of 2017.

From my review of the reports provided to me, it is clear that a massive amount of effort has gone into the Ministry's implementation of this recommendation. There has been extensive consultation within the Ministry, specific leadership commitments have been developed and a detailed plan for the roll-out of implementation, monitoring and evaluation is now being set in motion. In my view, there is now in place a coherent and ambitious plan to tackle the difficult subject of organizational reconciliation and the pace of implementation has been reasonable given the size and complexity of the task.

That said, it is also clear to me from my many contacts with Ministry employees and contractors that serious challenges remain to be met before the goal of reconciliation has been achieved.

Recommendations R – 34 and R – 35 – These recommendations require the Ministry to review and assess gaps created by the termination of evidence-based programs and to release a plan to address those gaps.

The Ministry has made public a comprehensive review of evidence-based and evidence-informed research projects planned or underway in 2012 and provided its view of the impact of the events of 2012 on them and whether gaps resulted. The Ministry has also made public a detailed statement of its plans to address the gaps that it has identified. In my view, both recommendations have been implemented.

There is a good deal of work contemplated into the future in order to carry out the plan called for by the Ombudsperson’s recommendation R – 35. I have requested and received information about matters that the plan indicates were to be completed in March and April and in my view, these matters are “on track” as set out in the plan. There remains a good deal of work to do before the objectives of the plan will have been achieved. I am particularly pleased to see, in draft, measures that are designed to improve the timeliness of access to data and to bring transparency to the Ministry’s performance in timeliness of access to data.

Recommendation R – 39 – This recommendation called on the Coroner’s Service to develop a policy about disclosure to a deceased’s family or personal representative of documents discovered on the deceased’s electronic devices. In my previous monitoring reports, I expressed the view that the relevant Policy did not address this recommendation adequately.

I have now had the opportunity to review a new “BC Coroners Service Headquarters Policy” devoted to the topic of “Electronic Disclosure to Family and Personal Representative.” The Policy provides that the Chief Coroner will deal with requests of this nature and sets out a number of relevant considerations. In my view, the new Policy implements the Ombudsperson’s recommendation.

C. Recommendations delegated to me and progress under my Terms of Reference

I was asked and accepted to be responsible for making recommendations to implement Recommendation R – 3(b). It called on government to “reverse the financial impact” of discipline wrongly imposed on three public servants who were the subjects of investigation.

I am satisfied that the direct financial impacts of the discipline has been reversed in all cases. But there remain issues about indirect impacts with respect to two of the three individuals. I continue to work with those two people and with government to achieve a resolution of these outstanding issues.

I was also given responsibility for Recommendation R – 4(a)(ii) and (b). That required me to (1.) identify persons connected to three entities who had been impacted by the data and contract suspensions and cancellations; (2.) invite them to apply to the fund for an *ex gratia* payment, and (3.) make recommendations to government for *ex gratia* payments on a fair and equitable basis.

My recommendations to government were made on January 25, 2018 and I am advised that cheques and letters of apology were sent promptly thereafter to the persons to whom I recommended payments be made.

At the request of government and with the consent of the BCGEU, I was asked to make recommendations with respect to the possible revisiting of the grievance settlements as set out in Recommendation R – 6. I have received detailed submissions on behalf of the grievors and have met with them in person. I have also obtained further information from government that is necessary to address their situations. I expect to have my recommendations finalized in the next 4 – 6 weeks.

Under my Terms of Reference, I was given the tasks of facilitating claims by those who wish to assert legal claims against government and of making recommendations for further *ex gratia* payments to those who were harmed by the events described in the Ombudsperson’s Report. I have received in excess of forty claims in relation to these two roles. I expect to complete all of my recommendations to government by the end of June.

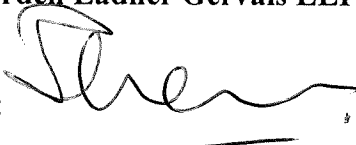
D. Conclusion

This concludes my monitoring role. I am grateful for the opportunity to be of assistance with these matters. My thanks for their help and support to the persons harmed by the events studied by the Ombudsperson and to many other people and officials who provided assistance. I want to record in particular my thanks to Lori Halls and Danielle Burton. While showing absolute respect for the independence of my role, they provided easy access to the necessary information and were unfailingly diligent and professional in carrying out their roles of coordinating government’s response to the Ombudsperson’s recommendations.

Yours faithfully,

Borden Ladner Gervais LLP

by:



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