

SEARCHING FOR JUSTICE

AN INDEPENDENT REVIEW OF NOVA SCOTIA'S RESPONSE TO REPORTS OF INSTITUTIONAL ABUSE

Executive Summary and Recommendations

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Searching for Justice: An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse

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Executive Summary and Recommendations

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 that 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."

THE MANDATE

On November 26, 1999, the Honourable Fred Kaufman, C.M., Q.C., was appointed by the Government of Nova Scotia to conduct an independent review of the Government response to reports of institutional abuse in Nova Scotia. His mandate was defined as follows:

In October 1994 Government responded to reports of physical and sexual abuse by provincial employees against former residents of provincially operated institutions with a three-pronged strategy: an investigation of the alleged abuse; an assessment of the safety of youth currently in custody; and a Compensation Program.

Subsequent to his review of the nature and extent of institutional abuse, former New Brunswick Chief Justice Stuart Stratton recommended the establishment of an alternative dispute resolution process for responding to alleged victims of institutional abuse. The Compensation Program came into effect June 17, 1996.

The Program has been adjusted twice since its inception.

The Department of Justice established an Internal Investigation Unit to investigate the allegations of abuse against current employees for disciplinary purposes. The RCMP established Operation Hope to handle the criminal investigation of alleged perpetrators.

The Program has been criticized by current and former employees who feel that their reputations have been tarnished; by claimants who believe changes made to the Program are too restrictive; and by citizens concerned about the cost and other aspects of the Program.

In response to these criticisms, Government committed to review the Compensation Program for Victims of Institutional Abuse “to ensure the process is fair and upholds the rights of both the victims and the accused”.

Terms of Reference:

The independent review will determine if the Government response to institutional abuse has been appropriate, fair and reasonable. The review will:

- ! document and describe the Governmental response to the allegations of institutional abuse;

- ! assess the appropriateness of the Government response in light of:

the contemporary context and the public interest;

the interests of claimants, staff and former staff of the institutions;
other available response options; and

! assess the implementation of each element of the Government response.

A report of the review findings will be made to the Minister of Justice and subsequently released to the public.

Activities undertaken during the review must not compromise any police investigation being conducted in relation to the alleged institutional abuse.

LIMITATIONS OF MANDATE

Mr. Kaufman was to conduct a *review*, not a *public inquiry*. This means, for example, that there is no opportunity for interested parties to test, through cross-examination, the accuracy or veracity of statements made by other parties. Given this limitation and others, it is obvious that neither findings of credibility nor disputed findings of misconduct can fairly be made against anyone.

The law is also clear that, whether Mr. Kaufman was conducting a review or a public inquiry, he was precluded from finding criminal or civil responsibility. This means, for example, that he was prohibited from determining whether or not any specific allegation of abuse (or conversely, any specific allegation of public mischief or fraud made against a claimant seeking or obtaining compensation) is well-founded.

USE OF TERMINOLOGY

Former and present employees of institutions where abuse has been alleged have been described in various documents and media accounts as “the accused” or as “the abusers.” Apart from references to employees who were formally charged or convicted in criminal proceedings, the Report avoids describing any employees in this way.

Former residents of institutions where abuse has been reported have been described in various documents and media accounts as “victims,” “claimants,” “complainants” or “survivors.” Individuals who have been physically or sexually abused are entitled to be described in a way that shows sensitivity to their ordeal. Indeed, the literature reflects that the use of the term “victim” to describe these individuals creates the danger that they will be defined by their victimization, rather than by their affirmative steps to overcome their ordeals. Accordingly, the term “survivor” has been utilized in the literature to sensitively describe them. However, where, as is the case here, issues remain as to who was truly subjected to abuse and by whom, and where allegations of abuse and of public mischief are

the subject of current investigations, the most sensitive and least presumptuous way to describe these individuals is as “claimants,” unless the context otherwise requires.

THE PROCESS

This review had both factual and analytical components. A description of the Government response to reports of institutional abuse may be regarded as the factual component of the review. This required Mr. Kaufman and his staff to exhaustively review documentation from a variety of sources and question over 100 individuals who had knowledge of various elements of the Government response or who were affected by it.

There were 1,246 claim files processed in the Compensation Program. Mr. Kaufman’s staff also randomly examined 90 of those claim files, to facilitate his understanding of how the Program worked on a day-to-day basis through the various periods of its existence. Additional claimant files were examined as issues arose during the interview process. In reviewing these and other files, steps were taken to maintain the confidentiality of both claimants and employees mentioned in those files.

The factual component of the review included an examination of the impact that the Government response had upon those who were affected by it – particularly the claimants and the employees. To understand this impact, Mr. Kaufman personally met with a number of claimants and employees. This impact is fully described in Chapter XIII of the Report.

The second component of this review was to *evaluate* whether the Government response was fair, appropriate and reasonable and make recommendations for the future. This may be characterized as the analytical (and systemic) component of the review. It represents its most important function.

To this end, Mr. Kaufman’s staff also accumulated materials from various jurisdictions that address how reports of institutional abuse have been or should be addressed by governments. These include law commission reports, studies, discussion papers, alternative programs, models, articles, and internal evaluations of existing programs. Interviews of individuals involved in the design or implementation of alternative programs elsewhere in Canada were also conducted.

Once a number of interviews were conducted and voluminous documentation reviewed, written and oral submissions were provided to Mr. Kaufman on behalf of claimants, past and present employees, the Nova Scotia Government Employees’ Union (“NSGEU”) and the Department of Justice.

STRUCTURE OF THE REPORT

Chapter I is designed to introduce the reader to the scope and nature of Mr. Kaufman's mandate. Chapter II provides a historical overview of the institutions where abuse was alleged. Prior to the Government's response commencing in 1994, allegations of abuse at these institutions had already surfaced and, indeed, been the subject of police investigations and court proceedings. A brief history of these proceedings prior to 1994 is also contained in this chapter.

Chapters III to XII describe the Government response to reports of institutional abuse from its early formulation to the various modifications throughout.

The impact of the Government response on both claimants and employees and their families is discussed in Chapter XIII. Ultimately, negotiations between the NSGEU and Government led to a Memorandum of Agreement defining options available to certain employees against whom abuse allegations had been made. This Memorandum of Agreement is addressed in Chapter XIV.

The Internal Investigations Unit ("IIU") was formed to investigate allegations made against current employees for disciplinary purposes. Its role was later expanded. A report was prepared by the IIU (the Chambers-Baker Report) which has acquired prominence in ongoing court proceedings and which contains an implicit evaluation of the Compensation Program. It is addressed in Chapter XV.

Mr. Kaufman's evaluation of the Government response is contained in italicized sections entitled Analysis in Chapters III to XV. Key components of that analysis are reproduced in this executive summary.

Having described and evaluated the Nova Scotia Government's response, the Report then describes in Chapter XVI the responses in other jurisdictions to reports of institutional abuse. Chapter XVII discusses the recent study by the Law Commission of Canada entitled *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*. Drawing upon the lessons learned from the Nova Scotia experience and from the systemic materials from other jurisdictions, Chapter XVIII contains Mr. Kaufman's recommendations – the 'Blueprint for the Future' – and the Conclusion. These recommendations are reproduced, without the supporting commentary, together with the Conclusion, immediately following this summary.

FORMULATION OF THE GOVERNMENT RESPONSE (CHAPTER III)

In 1993, lawsuits or notices of impending lawsuits were filed, naming the Province as a defendant or potential defendant, seeking damages for sexual abuse allegedly committed upon former residents of provincial youth facilities by members of the staff. Patrick MacDougall, a former

counsellor at the Shelburne Youth Centre (“Shelburne”), was the most notorious, having been convicted of 11 charges of sexual misconduct involving 10 complainants. MacDougall’s case had also attracted notoriety based on the evidence at his trial that, even after the allegations against him had surfaced, his transfer had been arranged by Government officials to the Sydney Children’s Training Centre to work as a night watchman. Two former counsellors at the Nova Scotia School for Girls had been convicted of sexual offences against the residents.

The Government contemplated that further lawsuits involving these staff members were likely, if not inevitable.

On November 2, 1994, the Minister of Justice, the Honourable William Gillis, advised the House of Assembly of the Government’s intentions regarding “a response to incidents of sexual abuse at the Shelburne Youth Centre, formerly the Shelburne School for Boys.” He told the House that the Government intended to proceed with a three-step process.

The first step was described as an independent audit of current practices at the Shelburne Youth Centre and other young offender institutions operated by the Department of Justice. This was to be said to ensure that existing policies and procedures prevented any recurrence of abuse and to assure current residents and their families that young people in custody are safe and secure. Ms. Viki Samuels-Stewart was engaged to undertake this audit.

The second step was described as a thorough, independent investigation into the events that took place at Shelburne in order to determine what happened, who was involved, who knew what was happening and what actions were taken.

According to its Terms of Reference, this “comprehensive investigation” was to determine “the extent of sexual and physical abuse of boys housed in Shelburne” and, in particular, “whether any staff other than Patrick MacDougall engaged in sexual abuse of children.” Practices and procedures in place at Shelburne “that permitted or hindered detection of abuse of children” were to be examined, as was “the state of knowledge of senior officials within the institution and the Department of Community Services as to abusive behaviour of staff towards children from 1956 to 1975.” Finally, the investigator was to establish “what steps were taken at the Children’s Training Centre in Sydney, where Mr. MacDougall was transferred from Shelburne, in order to ensure that children in Sydney were not placed at risk.”

The third step was to be the offer of compensation to victims through an alternative dispute resolution (“ADR”) process “if liability was revealed” through the investigation. The ADR process was to provide “fast and fair” compensation to victims and would be offered as a substitute for civil litigation. Individual complainants were free to pursue a claim through civil litigation.

It was said that the three-pronged response was intended to ensure that victimization not recur, determine what happened and who was responsible, and provide fair compensation for victims, all in a reasonable amount of time and at a reasonable public expense.

On November 7, 1994, the Minister of Community Services, the Honourable James Smith, advised the House that the Minister of Justice had acceded to his request to broaden the scope of the Government's response. It would now include an examination of residential facilities that either had been operated or continued to operate under the aegis of the Department of Community Services ("DCS"), as well as an examination of the Cesar Lalo case.

On December 1, 1994, the Minister of Justice announced that the former Chief Justice of New Brunswick, the Honourable Stuart G. Stratton, Q.C., had agreed to undertake the independent investigation announced in November.

The Minister noted that, without constraining Mr. Stratton, the primary focus of the investigation would be from about 1956 to the mid-1970s. The Terms of Reference would include the Nova Scotia Youth Training Centre in Truro, the Nova Scotia Residential Centre in Truro, and the Children's Training Centres in Sydney and Dartmouth.

Mr. Kaufman's analysis of the events includes the following:

It was appropriate, even commendable, that the Government recognize the need for an audit of its institutions to protect its current residents and ensure that policies and procedures were in place to prevent future incidents. Although I take some issue with how the Samuels-Stewart audit was conducted, the Government was well motivated in directing that an audit be conducted to this end.

It was also appropriate that the Government recognize that the extent of sexual and physical abuse needed to be determined, as well as the state of knowledge of senior officials. No one could quarrel with the desirability that the true facts be known and that persons be held accountable for wrongdoing.

The strategy becomes questionable when one examines the nature of the investigation that was established and the Government's commitment to an ADR program of undefined shape and size, if the investigation found liability.

The commitment to an ADR process found its origin in the Government's early thinking on how to respond to civil suits initiated by individuals whose victimization had been established in the criminal courts. It was not surprising – indeed it was laudable – that [the Department of Community Services] would suggest that a purely adversarial response to these civil suits would not be

appropriate. As will be developed later in this Report, where criminal convictions have been registered against Government employees for their abuse of residents, one would expect the Government to consider a means to avoid a process that compels those residents to again prove their victimization to obtain compensation.

That being said, the announced three-pronged response was not confined, by its terms, to these claims, but was purportedly designed to determine the full extent of abuse, and then compensate its victims through an ADR process. How could the investigation to be conducted by Mr. Stratton serve that end? Its duration was to be short, its resources limited. It was unlikely that such an investigation could be regarded as either “thorough” or “comprehensive.” Mr. Stratton had no statutory power to compel the production of documents or the testimony of individuals. Indeed, it was obvious that Mr. Stratton would not be conducting formal hearings or subjecting individuals to cross-examination by parties adverse in interest. It is, therefore, difficult to see how Mr. Stratton could find liability, except in those cases where abuse was uncontested or where it had been established in the criminal courts. As will be developed in later chapters, I am of the opinion that Mr. Stratton’s investigation could not properly yield findings, given its mandate and the way it was conducted. The Government placed mistaken reliance upon this investigation to create a Compensation Program with little or no verification of individual claims.

The Government appears to have ill considered the interplay between the three-pronged strategy it had adopted and the criminal and disciplinary process. For example, there had been lengthy prior investigations conducted by the RCMP at Shelburne and at Truro. These had led to criminal charges against MacDougall, Hollett and Moss. There was a remarkable lack of interest within Government as to what these investigations had already determined, rightly or wrongly, about the extent of abuse within its institutions.

In the formulation of the Government strategy, accountability was stressed, without any explanation as to how such accountability would take place. (This was only addressed later in the Government Program and, in my view, inadequately.) As well, when one recalls that the Government formulated a three-pronged strategy in part to avoid gratuitously re-victimizing those subjected to abuse, it is surprising that inadequate attention was given to the implications of a strategy that might ultimately compel complainants to describe their alleged victimization to the Stratton investigation, to criminal investigators and again to Department investigators.

One has to question generally how the various options were presented to the Government. For example, [one option – traditional litigation] was described as denying liability and putting the plaintiff to strict proof of all allegations. In my view, this was an inaccurate description. As will be developed in this Report, traditional litigation permits the Government, as a litigant, the flexibility to evaluate the merits of each case, to settle cases of obvious merit, to admit liability and dispute the issue of damages only and, equally important, to litigate – even in highly contested matters – in a

way that is respectful of the litigants and the nature of the allegations made. This is not to say that [litigation] was the only approach or that it could accommodate the needs and privacy interests of true victims of abuse to the same extent as an ADR process. However, the above description of traditional litigation virtually compelled the Government to reject this as an option to address allegations of institutional abuse.

THE SAMUELS-STEWART AUDIT (CHAPTER IV)

Although Ms. Samuels-Stewart's Terms of Reference included all provincially operated young offender institutions, she limited her review to the Shelburne Youth Centre and the Nova Scotia Youth Centre - Waterville, primarily due to the short time frame allotted for the audit.

In March 1995, Ms. Samuels-Stewart completed her report, entitled '*In Our Care*' - Abuse and Young Offenders in Custody: An Audit of the Shelburne Youth Centre and the Nova Scotia Youth Centre - Waterville. The report was made public by the Government on March 29, 1995.

Ms. Samuels-Stewart found, *inter alia*, that:

- ! Persons held in custody at Shelburne and Waterville were not adequately protected against sexual and other abusive conduct (given the reported instances of sexual, physical, emotional and verbal abuse). Indeed, she found that young offenders at both institutions were victims of abuse while at these institutions.
- ! There was not an adequate system in place to ensure that complaints can be made, received and acted upon in a timely and effective manner. Young offenders and employees often do not report abuse, and when they do, the incidents are handled internally, which (in the words of the Report) "is not seen to be adequate."
- ! There were not appropriate mechanisms in place to ensure proper communication and follow-up between responsible departmental authorities and police agencies in the event of allegations of sexual or other abuse of young persons held in custody.

Mr. Kaufman's analysis of the audit includes the following:

[I]t should be acknowledged that Ms. Samuels-Stewart's Audit Report contains a number of useful recommendations. However, that being said, in my opinion the Audit Report is significantly flawed, and these flaws may have contributed, albeit inadvertently, to the overall unsatisfactory nature of the Government's response.

Ms. Samuels-Stewart was engaged to perform an audit into current policies and procedures. She was not mandated to investigate and determine the extent to which sexual and other abusive conduct was occurring or by whom.

A significant portion of the Audit Report is devoted to whether offenders currently in custody are being abused. Much of the audit's methodology (the questions asked in focus groups, questionnaires and interviews) was directed to determining whether current offenders were being abused, the nature of that abuse and by whom it was being perpetrated.

Even assuming that the Terms of Reference invited such inquiries, in my opinion the investigation was flawed. Abuse was defined so broadly as to be misleading. The focus groups were told that "abuse is usually someone exerting power over someone else leaving the victim feeling powerless." Ms. Samuels-Stewart advised my review that this definition appropriately recognized the subjectivity of abuse and showed sensitivity to the needs and concerns of young people. No doubt there is much truth in those comments, but that does not mean that the definition is appropriate to every context. Here, the residents' answers were used to support a conclusion that they were currently being abused.

In summary, it is my view that:

- ! *The definition or description of abuse contained in the Audit Report was unhelpful in ensuring an accurate appreciation of the issues. In the context of a custodial setting, and in the context of the Government's response to serious allegations of physical and sexual abuse, the definition was potentially misleading.*

- ! *The audit's Terms of Reference were not fulfilled. The existing policies, procedures, systems and mechanisms in place to ensure that complaints of abuse are made, received and acted upon appropriately and to ensure proper communication and follow-up between departmental authorities and police agencies, were inadequately audited and were not specifically addressed. Undue focus was placed on trying to investigate the nature and extent of abuse within the institutions, matters outside the Terms of Reference.*

- ! *The methodology used to fulfill the mandate was significantly flawed.*
- ! *As a result, the conclusions were not always supported by the evidence.*
- ! *Available evidence which could have qualified or altered those conclusions was not obtained by the auditor. Ultimately, the auditor bears the responsibility of ensuring that she has accessed the relevant evidence. She did not do so, although I recognize the time constraints placed upon her.*
- ! *The audit was not truly an audit. Instead, it was a collection of anecdotes and information, sometimes speculative or secured through processes that did not enhance the ultimate reliability or accuracy of the information.*
- ! *Many of the Audit Report's recommendations were not dependent upon the flawed findings and methodology and were deserving of consideration. However, a proper methodology and approach would have permitted detailed, precise recommendations directed to modifying existing policies, procedures and practices.*

In fairness to Ms. Samuels-Stewart, I must point out that many of the participants in focus groups spoke positively about her approach and found the sessions beneficial. Some of the responses to questionnaires and information communicated in focus groups invited concern and deserved follow-up and investigation. Further, Ms. Samuels-Stewart did recognize that the Report was to be regarded as exploratory and an initial evaluation only. She recommended that it be followed by a more in-depth audit in 12 months and annual audits thereafter. She also recommended that an external, independent body review the additional information received from the questionnaires and that the Correctional Services Division of the Department of Justice follow up on the other problems, concerns and recommendations put forward by respondents.

THE STRATTON REPORT (CHAPTER V)

On June 30, 1995, Mr. Stratton submitted his report to the Minister of Justice.

Although Mr. Stratton expressed some qualifications upon his findings, he concluded that the abuse claims presented to him (by a total of 89 former residents) were generally reliable and accurate. The former Shelburne School for Boys (“Shelburne”) was the focus of much of Mr. Stratton’s investigation. A total of 69 former residents of the school provided statements to the Stratton investigation, detailing 205 incidents of physical abuse and 103 incidents of sexual abuse. Although Mr. Stratton did not specifically find how many of these reported incidents occurred, he commented that, “leaving aside some exaggeration, ... my investigators were satisfied that in all cases, save perhaps three, the complainants were attempting to recall from their memories and truthfully report

events and circumstances that had occurred some 20-40 years ago.” Nineteen former or current employees of Shelburne were said to be implicated.

Mr. Stratton found that it could be “safely concluded” that counselors resorted to physical force to control residents, and that they had received direction from their superiors to do so. It was not until 1978 that there was an express prohibition against the use of physical force. Mr. Stratton concluded that the use of physical force was an accepted method of maintaining discipline and, as a result, it was sometimes “open season” on the boys at Shelburne.

Mr. Stratton further concluded that staff at the school and officials in the Department of Community and Social Services had been aware that abuse was taking place, but took no positive steps to end it at least until the mid-1970s.

He also addressed the appropriateness of MacDougall’s transfer to the Sydney Children’s Training Centre, allegations pertaining to the Nova Scotia School for Girls, the Nova Scotia Youth Training Centre and Cesar Lalo.

Mr. Stratton noted that a failure to complain was a common theme running through many of the statements he received from former residents of all the institutions, as was the failure of staff to believe the complaints that were made or to take any positive action in response. He stated he could “only infer that there was what I shall call a ‘conspiracy of silence and inaction’ probably inspired by a fear on the part of both residents and staff to ‘rock the boat’ or to draw unfavourable attention to themselves or to the institutions in which they were employed or resident.” However, he also noted that it often might have been natural to disbelieve complaints of abuse made by children who, for varying reasons, might have had problems telling only the truth.

Mr. Kaufman’s analysis of the Stratton investigation included the following:

The Honourable Stewart Stratton, Q.C., is a jurist of impeccable credentials and reputation. The Government can only be commended for his selection. But what did the Government ask him to do? Mr. Stratton was given only six months and very limited financial resources to [investigate all of the matters within his mandate].

It is unclear what the Government reasonably expected to obtain from this investigation, particularly as to alleged sexual and physical abuse of residents at the institutions. If Mr. Stratton was only to determine whether there were a sufficient number of complaints of abuse to warrant a public inquiry or an ADR compensation process which, itself, would evaluate the merits of individual claims, then perhaps Mr. Stratton’s investigation could have served this end. If, on the other hand, Mr. Stratton’s investigation was to determine, among other things, how prevalent sexual and physical abuse actually was at these institutions, such that his ‘findings’ could be used to support

compensation for claimants without further verification of their individual claims, then it was inappropriate and doomed to fail. Yet the Government ultimately used Mr. Stratton's conclusions, time and time again, to confirm that widespread abuse had occurred, and to support the uncritical acceptance of claims of abuse, even those which were not brought forward to Mr. Stratton.

Why do I say that Mr. Stratton's investigation, if it was to determine the prevalence of sexual and physical abuse, was inappropriate and doomed to fail?

Apart from some admissions that some physical force (slapping, grabbing of arms, etc.) occurred that would now constitute abuse, and apart from conduct that had resulted in criminal convictions against MacDougall and others, the most serious sexual and physical abuse alleged to have occurred was challenged by the employees and former employees who spoke with the Stratton investigators. Assessments of credibility were therefore central to any determination of how prevalent such abuse was.

However, Mr. Stratton was not in any position to make assessments of credibility. Sixty-nine claimants alleged they had been abused. Eleven of them supplied their accounts in writing only. They were never seen by the Murphys [the two investigators retained by Mr. Stratton] or Mr. Stratton. Only one of the 58 other claimants was actually seen by Mr. Stratton personally. No one provided accounts under oath. No comparisons were made between accounts given to the Stratton investigation and to the RCMP, where applicable. In light of the time constraints, no effort was made to obtain relevant medical records from Roseway Hospital, or to search for institutional records of the residents or for employment records of the employees. At least three of the former residents who made serious abuse allegations against MacDougall were not at Shelburne when he was. This is an example of information which could have been, but was not, obtained by the Stratton investigation.

This is not to say that all the allegations made to the Stratton investigation were false. Indeed, it says nothing about the truth or falsehood of these allegations. But it does demonstrate that neither the Murphys nor Mr. Stratton were well situated to make findings of credibility or evaluate the merits of disputed claims or the prevalence of abuse generally.

Mr. Stratton recognized many of these limitations in his Report. It was appropriate that Mr. Stratton [do so], although, as I later note, these warnings went unheeded when the Government moved to the third prong of its response – the Compensation Program.

It was also appropriate that Mr. Stratton state, as he did, that there was physical and sexual abuse at some of the institutions examined. After all, convictions against MacDougall and others had already demonstrated that. Similarly, there was general agreement among former residents and employees that physical force had been used in the past by employees to control residents – force

which might now be regarded as unacceptable, although the nature and extent of that force remained in dispute.

With great respect to a learned jurist, the limitations upon his investigation were so fundamental and of such magnitude that no general conclusions as to the residents' allegations should have been stated, particularly publicly. It was no answer to say that the conclusions were qualified, any more than it would be fitting for a trial judge to state that an accused is probably guilty, although he or she has not yet heard all the evidence. The fact that a jurist of Mr. Stratton's stature found the abuse claims to be generally reliable and accurate could only contribute to the perception of the public and the Government that an objective, detailed investigation had confirmed the existence of widespread systemic abuse, perpetuated through a "conspiracy of silence and inaction." And that is exactly how the Report was received and acted upon.

I am convinced that the Stratton investigation might have been better served if additional witnesses, institutional and medical records, and prior statements of complainants had been pursued. The investigation might have reflected greater balance if former residents who denied being victimized or having observed abuse had been interviewed, or if implicated employees had been able to respond to specific allegations. In fairness, such an approach was incompatible with Mr. Stratton's time constraints and limited resources. But even such an investigation – absent any real opportunity to meaningfully test the evidence proffered – could not have provided the Government with sufficient assurances that the residents who complained to Mr. Stratton (apart from those whose veracity had already been established in the criminal process) could be compensated without further verification. So I return to my introductory remarks: if that was the purpose of the Stratton investigation, it was inappropriate and doomed to fail.

Mr. Stratton clearly felt that his investigation provided a sufficient basis to enable the Government to bypass a public inquiry and move directly to the ADR process. However, I readily accept his explanation to me that he never contemplated that his Report would be used to justify an ADR process that required little or no verification of individual claims.

The Government appears to have been largely committed to an ADR process before Mr. Stratton even began his work. Continuing on with that process seemed only to be contingent upon a finding by Mr. Stratton that physical and sexual abuse had occurred. Of course Mr. Stratton would find physical and sexual abuse – such findings had already been made at MacDougall's criminal trial. It is, therefore, difficult to see what Mr. Stratton could have found that would have reversed the direction of the Government's response. Indeed, it can be argued that Mr. Stratton's mandate was framed in a way that made it virtually inevitable that the Government would be proceeding with its ADR program after his work was completed.

The Stratton investigation [was] well intentioned and executed with the utmost good faith. It did collect evidence of abuse that deserved the fullest consideration, through a true investigative process. However, I cannot help but conclude, for the reasons indicated above, that Mr. Stratton's conclusions went beyond the scope of what fairly could be said.

THE ORIGIN OF THE COMPENSATION PROGRAM (CHAPTER VI)

On July 20, 1995, the Minister of Justice outlined the components of the ADR option that had been approved by Cabinet as the third phase of the Government's response, including:

- ! Counseling services for victims, already in place, would be expanded. The Family Services Association ("FSA") had been retained to provide interim counseling and provide an important, non-government contact point for victims;
- ! A 1-800 line had been established to provide easy, direct access to FSA. The number would be advertised. As well, Mr. Stratton would contact all victims that he identified to ensure they were aware that counseling was available and of the ADR process;
- ! An ADR process would be available to residents of any of the five institutions that were the subject of the Stratton investigation. The victims of Cesar Lalo would be offered mediation as a method of determining compensation;
- ! The Family Services Association would assess whether victims could be organized into an advocacy group or groups, and would assist victims in establishing such a group. The advocacy group would be provided with publicly-funded legal representation. It would discuss a range of issues with Government. An agreement regarding compensation and other assistance for victims of abuse would be one objective of those discussions;
- ! Once compensation levels were determined, each victim would choose whether to enter into an adjudication process. A victim could decide that litigation was more appropriate. However, anyone who did enter the adjudicative process would be required to waive their right to sue the Province. An independent adjudicator would assess individual files and award compensation, based on factors such as the level of abuse suffered;
- ! It was anticipated that the process would take 12 to 18 months to complete. This was "relatively fast" compared to other possible remedies;

- ! The Stratton investigation identified 89 complainants. The Government anticipated that others would identify themselves;

- ! The Stratton Report identified criminal activities. The Report had been turned over to the RCMP for appropriate action. The RCMP would respect the complainants' right to privacy. The Stratton investigators would make contact with victims, and only those who consent would be contacted by police;

- ! An internal investigation was underway that would determine whether any current provincial employees should be subject to disciplinary action. The internal examination would reach beyond those who may have perpetrated abuse. The actions or lack of action of those who could have or should have had knowledge of such abuse were also under investigation.

Mr. Kaufman's evaluation includes the following:

In his press conference on July 20, 1995, the Minister described Mr. Stratton's work as "far reaching" and "exhaustive." He did not caution the public that the 'findings' were qualified and made without the procedural protections available to accused persons (and, therefore, should not be used to infer abuse without verification in individual cases). It is apparent that the Government was swept up by the prevailing opinion that abuse was widespread and systemic.

In fairness, when the Government considered its alternatives in early and mid-1995, it was not yet clear that it would adopt an ADR process that involved little or no validation of individual claims. When the ADR option was presented to Cabinet in July 1995, it was proposed that decision-making on disputed claims would be done by an adjudicator, based upon evidence under oath and with validation. The terms of the ADR process would be negotiated once victims were organized into an advocacy group.

However, as we see later, when the framework for the ADR process was negotiated between the Government and counsel for the claimants, true validation of claims fell by the wayside, as did any requirement that statements be taken under oath. Negotiators also abandoned the requirement that a single advocacy group speak for claimants. Put simply, the ADR process that was ultimately negotiated was very different than that proposed to, and approved by, Cabinet in July 1995.

In his press conference, the Minister stated that Mr. Stratton had identified criminal activities and that his Report had been turned over to the RCMP for appropriate action. He indicated that the Stratton investigators would make contact with victims, and only those who consented would be contacted by the police. With respect, if these allegations of abuse were to be believed, they revealed, in many instances, serious physical and sexual abuse, sometimes perpetrated by current

employees. Even recognizing the desire to accommodate the privacy interests of complainants, the Government was in breach of its duty to protect the public by giving complainants the absolute right to determine whether such abuse would be reported to the police. Admittedly, the authorities are entitled to exercise their discretion not to proceed on criminal charges, and this discretion may be based, in part, on the wishes of complainants, particularly their desire for anonymity. However, the public interest required that this decision be made by the authorities. Once a complaint has been made known to government, certain statutory obligations are triggered. These are designed to protect vulnerable persons from further abuse. It was only much later that the Government recognized that assurances of confidentiality offered to complainants by Mr. Stratton and then preserved by the Government were inappropriate and, indeed, possibly unlawful.

THE MEMORANDUM OF UNDERSTANDING (CHAPTER VII)

On May 3, 1996, the Minister of Justice announced in the legislature the establishment of the Compensation Program. As part of that announcement, he delivered an apology to the victims of abuse.

A Memorandum of Understanding (“MOU”), created after lengthy discussions between counsel for claimants and Government officials, initially served as the framework for the Compensation Program. It covered the three institutions at which the Stratton Report found that abuse had occurred: Shelburne, the Nova Scotia School for Girls and the Nova Scotia Youth Training Centre. It provided compensation for what it termed “survivors” of physical or sexual abuse at those institutions.

Its terms are fully developed in the Report itself. Here, it is sufficient to note that categories of abuse with corresponding ranges of monetary compensation were set out in a grid. Claimants were to submit Demands to the Compensation Program, which were to be responded to in writing by file assessors within 45 days. Assessment of Demands were based on claimant statements, medical or other records. No role was allowed for former or current employees. Any dispute with respect to the truth of allegations of abuse or amount of compensation was to be resolved through “negotiation.” If an agreement was not reached, the matter could be referred for a “file review” before a file reviewer to be selected by the claimant from an agreed upon list. The claimant would appear personally before the file reviewer. Counsel for the claimant and for Government would make submissions to the file reviewer who was to be provided with limited information and would not hear from other witnesses. Non-monetary benefits, particularly counselling, were also provided for.

Mr. Kaufman commented on the MOU and its creation, in part, as follows:

The discussions between claimants’ counsel and Government officials were characterized differently by each in their interviews with my staff. Government officials regarded them as true

negotiations, leading to agreement. Claimants' counsel felt that there was a power imbalance in favour of Government, to the point that terms were often imposed, rather than negotiated.

In my view, inadequate consideration was given to what the MOU's legal status was. This later became obvious when the Government made unilateral changes to the Program, scrapping the MOU. Having said that, I am not persuaded that the claimants' counsel were at such a disadvantage that their discussions cannot be regarded as negotiations. The claimants were represented by forceful and effective counsel. Public opinion largely favoured their position, putting pressure on the Government to fully accommodate their interests. Paula Simon, the Government's chief negotiator, was herself highly motivated by experience and background to recognize the claimants' plight. The Government had already announced that an ADR program would be negotiated with the full participation of claimants' counsel. Finally, the terms of the MOU belie any suggestion that the Government imposed a one-sided process upon claimants. On the contrary, some features of the MOU support the view that claimants' counsel were full participants in the process. For example, claimants were given the right to choose the person who would conduct the file review of their claim, from a list of file reviewers chosen in advance by the claimants (and accepted by the Province).

During these negotiations, it became apparent that the number of claimants had dramatically increased, and was continuing to increase. Based upon the 89 complainants who came forward to Mr. Stratton, the Government had contemplated that two or three times that number might advance claims. It was felt that this estimate was supported by the experience in other jurisdictions. However, by March 8, 1996, it appeared that the number had grown to approximately 350. (Indeed, on March 7, 1996, the RCMP advised the Deputy Minister that 410 alleged victims had already been identified.) As the numbers increased, cost projections were adjusted to anticipate 500 claimants. These numbers caused Government officials to reconsider the available options. For example, in February 1996, Ms. Simon considered whether the budget should be increased to \$30 million, the cap should be reduced to \$60,000, the present budget should simply be divided amongst all claimants or negotiations should be terminated altogether. What is striking – indeed remarkable – is that there is no demonstrated appreciation that the number of claimants should invite some introspection about the validity of all of these claims. Indeed, if one examines the cost estimates presented by Ms. Simon, they assume the validity of all 500 claims!

This attitude is seen in the Government's negotiating stance on validation. In discussions with claimants' counsel, Government negotiators suggested that validation was unnecessary where criminal convictions had been registered. This was an appropriate concession. Where validation of a claim is inherent in a criminal finding of guilt, it should be unnecessary to compel the claimant to re-establish the abuse. However, the Government promoted minimal validation for all other claims as well. It was looking for a summary process. With few exceptions, the Government regarded the statements of abuse to be true and did not generally anticipate disputes over whether abuse occurred. As a result, statements taken by the Murphys or by the IIU would be accepted. At

times, Government officials indicated that they would look for documentary confirmation that the employee and resident were at the institution at the same time, and that some medical records might have to be examined. But the view was also expressed that medical and psychiatric records would generally be unnecessary. There would have to be a concrete reason for doubting a claim.

It is ironic that claimants' counsel, concerned that their clients might be disbelieved, advocated a more stringent type of validation process: an arbitration hearing to resolve disputed claims. Later, to respond to the Government's desire for a speedy process, they proposed that the hearing not exceed three days. However, this was rejected by Government officials.

It is not surprising that Government officials did not contemplate the possibility that employees should be parties to the negotiations that led to the MOU. The alleged abusers had not participated in similar programs in Ontario and elsewhere. Their participation alongside claimants would have been regarded, given the outlook at that time, as re-victimizing the victims. As well, the point would have been made that employees were not affected by this process: they were not being asked to make admissions of liability or compensate the claimants. It is, however, surprising that Government negotiators did not even contemplate a role for employees in being heard as to whether the claims were valid, that is, as part of a validation process.

In my view, the position advanced by the Government negotiators that little or no validation was required for claims was a recipe for disaster. It was unsupported by the Stratton 'findings.' As I earlier noted, even the most generous interpretation of the Stratton Report could hardly justify the uncritical acceptance of unverified claims which were never made to Mr. Stratton.

The Government's approach was rooted in several fundamental errors. It is necessary to elaborate upon two of them here.

First, there was often an uncritical acceptance that all but a minute number of claims would be legitimate – regardless of who was making the claims, how the claims had been generated, the existence of any motivation to make false claims and, most important, the absence of any meaningful disincentives put in place to the making of false or exaggerated complaints.

Judicial and legislative developments [described in detail] that permit the evaluation of sexual offence complainants, indeed any witnesses, free from stereotypical or discredited notions about their credibility, can only be welcomed. However – and here is the critical point – these stereotypical or discredited notions cannot be replaced with equally pernicious notions that all sexual offence complainants should be regarded as presumptively reliable, regardless of their backgrounds or the circumstances under which their complaints were brought forward.

It is instructive that even the claimants who met with me recognized the obligation to verify abuse claims, to separate out true and false claims, and provide alleged abusers with an opportunity to respond.

There was a second fundamental error revealed in the Government's negotiations respecting the MOU. Government officials assumed that only an ADR process which sheltered claimants from a critical evaluation of their claims – even to the point of excluding employees from any meaningful participation – could accommodate the concerns of true victims of abuse. Cabinet was effectively asked to choose between not accommodating victims by forcing them to pursue traditional litigation and accommodating victims through a user-friendly ADR process. It is a serious mistake to assume that neither traditional litigation nor arbitration can accommodate the needs of true victims of abuse. To a greater or lesser extent, both can.

Furthermore, an alternative process such as a compensation program can even better accommodate the needs of true victims of abuse in a way that is compatible with the need to discover the truth and to accommodate the rights of those accused to defend themselves. This was not understood. Instead, out of concern for the needs of true victims, the Government was prepared to jettison components of programs in Ontario, already victim-sensitive, to better serve the victims' needs. In so doing, it failed to appreciate that those components were sometimes designed to better ensure the integrity of the process.

In our interviews with Government officials the view was expressed that employees did not need not be involved in the design of the Compensation Program. Their point was that the decision to compensate individual claimants was made without prejudice to the employees implicated as abusers. Settlements and file review decisions were confidential and were not legally binding upon employees. Employees were required to make no financial contribution to the process. They would benefit from the fullest of legal and constitutional protections, should they have to defend themselves in criminal, civil or disciplinary proceedings. Accordingly, it was said, employees were not in any way prejudiced by the process.

As will be developed elsewhere, there are serious difficulties with the view that employees were not prejudiced by this process. The very public apology offered up by Government on May 3, 1996, followed by the compensation of many hundreds of claimants, and the reassignment or suspension of staff, sent a very clear message, particularly in small communities, that the guilt of many employees had been decided.

Cabinet approved the continuation of the process, with an anticipated budget of \$33.3 million, on March 21, 1996. There is no indication that the above issues – the appropriateness of

a process that minimally verified claims, that excluded employees from any role in a verification process, that did not require statements under oath – were raised with Cabinet.

The MOU was finalized within a short time of Cabinet's approval. Indeed, the entire negotiations spanned only seven meetings and approximately three months. It is interesting that Cabinet's earlier approval in July 1995 had contemplated a year-long negotiation process, even when it was expected that the negotiations would take place with one or two advocacy groups representing all claimants. Despite internal and external pressures, it is difficult to see why the Government felt compelled to conclude the negotiations so hastily.

As detailed in Chapter VIII, the IIU and RCMP investigations were underway. Even at the earliest stages, the enormous investigative task was apparent. Mr. Stratton's investigators told my staff that time had not permitted them to look for or obtain medical records, speak to medical personnel or even obtain records to confirm the presence of complainant and employee in the institution at the same time. New documentation was being uncovered. By December 1995, the IIU had uncovered well over 1,000 files which had not been available to the Stratton investigation. The RCMP had assembled a task force, which suggested there were volumes of documentary material, requiring major case management. By March 7, 1996, nine investigators were committed to the task. Potential claimants were being identified.

In my view, as the number of claimants escalated to a level not previously contemplated (at least by the Government), it was important that decisions as to the scope and nature of the Compensation Program be based upon adequate information. In this context, this meant that, at the very least, the Government should have structured a process that permitted it to determine the number of eligible claimants prior to concluding the MOU. Alternatively, as was done in Grandview, the Government could have closed eligibility to the Program, while recognizing that later claims might still be dealt with, but not necessarily in the same way. Or, the Government could have decided to defer resolution of claims not already validated through the criminal process until criminal and/or disciplinary proceedings had been completed. No doubt, it would have been contended that true victims would be harmed by these approaches, and that any such measure would have driven claimants to litigate. Be that as it may, a Government response with true credibility may have compelled such an approach. Such measures, if adopted, would also have ensured that it was unnecessary to change the existing Program mid-stream, causing individuals whose claims had not been processed and who had truly been abused, to feel, with complete justification, that they had been betrayed and unfairly treated.

As for the contents of the MOU itself, Mr. Kaufman's comments included the following:

I take issue with a number of the MOU's provisions. Some are inconsistent with a meaningful validation of claims. The time lines within which the Province was to respond to an initial Demand,

and respond to a submission to file review, not only reflected Government's disinterest in true validation, but also ensured that it could not take place.

The MOU articulated no explicit burden of proof. It identified the parties to appear before a file reviewer, and the "Statement Volumes" to be available to the reviewer to quantify damages, but otherwise was largely silent as to the procedures at the review. There was certainly no suggestion that the file reviewer would hear from employees or others adverse in interest to the claimants. Indeed, not even Government counsel were entitled to attend a file review pertaining to an unrepresented claimant. As for as documentary evidence, the MOU reflected that compensation would be determined by reference to written statements taken by the Stratton investigators, the IIU or a police agency and, at the option of either party, the institution's medical records. Certain medical reports could also be resorted to in certain circumstances.

In my view, the gaps in the MOU pertaining to validation supported the apparent understanding of claimants' counsel (based on communications from the Government negotiators) that little or no verification would be required. As we will see, conflicting views soon surfaced as to how claims should or should not be validated.

THE COMMENCEMENT OF INVESTIGATIONS (CHAPTER VIII)

When the Minister of Justice announced at the July 20, 1995, press conference that the Government had approved an ADR process to compensate abuse victims, he also stated that an internal investigation was underway that would determine whether any current provincial employees should be subject to disciplinary action. He also announced that the Stratton Report, which had identified criminal activities, had been turned over to the RCMP for appropriate action. He cautioned, however, that the RCMP would only approach those victims who consented to being contacted by the police.

Accordingly, during the period leading up to the negotiation of the MOU, the Internal Investigations Unit ("IIU") was formed and commenced operations, and the RCMP initiated an investigation. As part of the investigative process, the Murphys (who had first been engaged by Mr. Stratton) were re-engaged by the Government.

Mr. Kaufman's analysis of this aspect of the Government response includes the following:

The theory that current employees were to be the subject of an independent and fair investigation by experienced investigators had obvious merit, as did [the] view that disciplinary action could not be grounded upon the Stratton 'findings.' The difficulty I have here is how the

Government addressed the interplay amongst the Stratton, ADR, disciplinary and criminal proceedings.

The Government's response to reports of institutional abuse was based, in part, upon the laudable desire to prevent the revictimization of true abuse victims that can occur when they are compelled to seek redress through formal litigation. However, complainants were potentially being exposed to multiple statement-taking sessions. The existence of a criminal investigation meant that many of them would have to provide a statement to the police. The existence of an independent IIU investigation meant that many would have to provide another statement for disciplinary proceedings. Further, if the Government was intent on moving forward at the same time with a Compensation Program, and if such a program was to be credible and fair, validation might have required that the claimants provide yet another statement, unless validation could have been merged with the disciplinary process. It is well recognized that forcing true victims to recount over and over their victimization may adversely affect their emotional well-being.

Of equal concern is the possibility that the Stratton investigators, the IIU and the RCMP may have had very different perspectives on how statements should be taken. The IIU and RCMP regarded the Murphy statements, rightly or wrongly, as flawed. It was suggested that they were not 'pure version' statements: they were suggestive and not in the words of the witness. The Murphys, on the other hand, felt that the statements were appropriately taken and accurately captured the words and intent of the witness. It was not until December 1996 that the decision was taken to develop a statement protocol. Such a protocol was finally signed on April 24, 1997. However, it appears to have done relatively little to resolve the conflicts between the RCMP and IIU in particular.

In my view, the Government created parallel investigations without ensuring, up front, that they would interrelate in an efficient and productive way. The parallel investigations meant, in practice, that witness interviews were uneven – at times supportive and other times adversarial – and that data was shared imperfectly, when it was shared at all.

THE EARLY DAYS (CHAPTER IX)

The Memorandum of Understanding took effect on June 17, 1996. The Program office asked the IIU investigators for all the information they had on the claims being made, but the only information the investigators had, for the most part, was the dates of intake and release of the claimants and employee information at the various institutions.

The terms of the MOU required the Province to respond within 45 days after receipt of a Demand submitted by a claimant. Twenty claims had been submitted by mid-June; the first responses were therefore due by August 1st. By June 21st, the Program had received 154 Demands. Four weeks

later, the number had risen to 259. The sheer number of claims made it difficult for the Government to respond within the agreed upon period.

The IIU was requested to provide institutional records for each of the claims. However, the records were not computerized and the information could not be quickly accessed. For the most part, during the period from June 17th to October 31st, file assessors had little more than the dates of a claimant's intake and release from the institution, and whether or not the alleged abuser was employed at the institution while the claimant was there. Concerns were also raised by Program staff that the lists of institutional employees that had been provided to them were not complete.

By August 14, 1996, 351 Demands had been received from claimants. However, the Murphys had identified 900 potential claimants (many of whom, obviously, had not yet filed a Demand).

There was marked frustration by those involved in the Program over the scarcity of information upon which they were required to base their decisions. In situations where they did not believe in the validity of a claim, there was not enough information to disprove it and, according to the design of the Program, it had to be accepted as valid. The assessors stated that the onus was on the Province to disprove the abuse alleged; the benefit of the doubt was given to the claimant.

On November 1, 1996, the Government announced that the Compensation Program was placed on hold so it could take stock of concerns that had arisen during the first few months of the process, including a significant increase in the number of claims and the discovery hundreds of files that were thought to have been destroyed.

Mr. Kaufman's comments include the following:

As I noted in a previous Chapter, the Government had created a Compensation Program that did not contain a true validation process. The absence of meaningful validation is supported by an examination of the early operation of the Program.

As outlined above, my staff randomly reviewed a number of claim files to assist in providing me with an accurate sense of how the Program operated in practice. This random review demonstrated that during the early operation of the Program file assessors 'accepted' claimants' assertions of sexual and physical abuse without any input from the current or former employees who were alleged to have committed the abuse or from witnesses who might reasonably be expected to have relevant evidence on the issue. As well, file assessors 'accepted' claimants' assertions of abuse without the benefit of documentation that might bear upon the claimants' credibility or reliability. (This is not intended as a reflection on the assessors, but on the Program itself.) Perhaps the argument could be made that employees were not entitled to be full parties to the design of an ADR

process. But even if that were true, it remained sheer folly to accept abuse claims as valid without even knowing what the implicated employee had to say.

The number of claims being processed, the time constraints imposed, the limited information available to assessors, the recognition that abuse was to be presumed, the absence of any right to test the claimant's evidence or to call contradictory evidence even if it were available, all contributed to the absence of a credible process to properly evaluate claims.

Some of the claims were regarded with incredulity by the file assessors but, absent a demonstrable falsehood, they did not feel that they could deny the claim. Instead, they felt that they could only rely upon the perceived improbabilities of the claims to negotiate a lesser amount.

Another scenario presented itself. Individuals who had testified in the criminal process sometimes claimed abuse far more extensive than testified to earlier. Under these circumstances, assessors treated the claim as exaggerated and tried to settle the claim at an amount compatible with the criminal testimony. In this sense, claimants who had testified in the criminal proceedings might be challenged on their statements in a way that was unavailable to assessors for the balance of claimants.

Our random review of the claim files permits me to conclude that some claims – whatever their actual merits – were deserving of close scrutiny and invited serious doubts about their veracity. A true validation process would have permitted these claims to be properly evaluated. Instead, file assessors were driven to either accept dubious claims because they could not be disproven, or engage in the equally flawed process of settling them at reduced amounts. The latter approach was largely motivated by the realization that, absent demonstrable falsehoods, the file reviewers were likely to accept the claims in full. Even recognizing this flawed process, assessors should not have settled claims where any deliberate falsehoods had been demonstrated. This could only further undermine any remaining credibility of the Program. The concerns expressed here are further addressed in later chapters as the Program continues.

None of these criticisms is directed to the claimants or their counsel. They correctly perceived that the approach by assessors to their claims was, at times, incompatible with the spirit of the negotiations leading to the MOU, and the MOU itself. Nor should these criticisms be borne by the file assessors. They were themselves trapped within a flawed process. Furthermore, I do not believe, as alleged by claimants' counsel at the time, that file assessors were systemically attempting to 'low ball' true victims of abuse.

It is obvious from my review of the documents that there were a number of circumstances that explain the Government's decision to suspend the Program on November 1, 1996. These included:

- ! *The anticipated over-expenditure of the Compensation Program budget given the increased number of claimants;*
- ! *Perceived problems with the file review process;*
- ! *The discovery of additional information from documentation and from employees that could impact on the assessment of claims;*
- ! *The lack of tools in the Compensation Program process to effectively test credibility.*

Claimants' counsel questioned whether the suspension was truly motivated by the discovery of additional information or the perceived problems with the validation process. It was suggested that the prime reason was budgetary: the Program was simply regarded as costing too much money.

I am not in a position to rank the reasons for the suspension of the Program. I am satisfied, however, that all of the above contributed to the decision.

The suspension undoubtedly caused turmoil to true victims of abuse. Nonetheless, I am unable to conclude that the Government acted unreasonably in suspending the Program, given the serious concerns about its design and implementation, and how those concerns potentially had an impact on the overall resources of the Province. Of course, as I reflect throughout this Report, the most serious deficiencies in the Program could, and should have been, foreseen. Had they been foreseen, a redress program might have been designed and implemented that served the needs and interests of true victims of abuse, but not at the expense of fairness to other affected parties or to the credibility of the Program itself.

EVENTS DURING THE SUSPENSION (CHAPTER X)

On December 6, 1996, only one month after the Compensation Program was suspended, the Minister of Justice, the Honourable Jay Abbass, announced that the Program would resume, with a number of steps designed to improve the process:

- ! Staff resources would be increased to address the sheer volume of claimants;
- ! The 45-day time limit for responding to demands would be extended to 120 days, though efforts would be made to respond earlier if possible;
- ! The IIU would expand their investigation from discipline of current employees to include investigation of compensation claims. Resources would be added to enable this;

- ! Increased resources would allow staff to catalogue and input new information recently found relating to Shelburne;
- ! To preserve the integrity of the criminal investigation, a statement protocol would be developed by the RCMP, IIU and Facts Probe Inc. All three organizations would share information and coordinate investigations to the fullest extent possible, recognizing the independence of the police investigation;
- ! Victims would now be advised that all statements provided for compensation purposes would be used for investigative purposes (whether criminal or disciplinary) or the Child Abuse Registry. The Minister stated that “[w]e understand it has been difficult for people to come forward, and their wish for confidentiality, but we have a moral and legal obligation to bring perpetrators of abuse to justice;”
- ! To ensure that file reviewers were provided with the best available evidence, claimants and the Province would now be permitted to submit written, recorded or documentary proof from anyone who had evidence relating to a claim. The Minister stated that “[t]his allows victims to bring forward statements from witnesses, and ensures the file reviewers have the most complete information possible when making their decisions;”
- ! File reviewers would now be assigned on a rotating basis;
- ! All file reviews would be conducted within Nova Scotia. Those living outside the province would be able to participate by telephone. The file review process would resume February 1, 1997;
- ! Though levels of compensation would remain the same, awards over \$10,000 would be paid over a four-year period. The greater of \$10,000 or 20 percent of the award would be paid in one lump sum payment, and the remainder paid over time with interest. The opportunity to use counselling allotments would remain unaffected – those allotments would still be accessible immediately. Counseling allotments would be available for a four-year period;
- ! The Government would continue to accept claims or notices of claims until December 18, 1996. The settlement of claims would resume once the total number of claims was known on December 19, 1996;
- ! Compensation would only be provided for abuse by employees and not for abuse of one resident by another. This was described as a “clarification.”

Mr. Kaufman's comments include the following:

To evaluate the decisions to suspend and reinstate the Program, it is important for me here to draw together what we know about the Program up to its suspension.

Up to the suspension, 271 claim files had been completed. The vast majority had been settled. Approximately 33 had been decided by file reviewers. Compensation was being paid in all these cases. Whether settled or decided by a file reviewer, all of these claims had been processed under the MOU. This meant that assessors generally presumed, in the absence of demonstrable falsehood, that abuse had occurred. As earlier noted, even in the face of some demonstrable falsehoods, the balance of a claim might be settled because it could not be disproven. Most disputes turned on where the abuse fell within the designated categories. Though the documents pertaining to the Compensation Program do not always permit precise calculations, it appears that approximately 424 claims were processed prior to the Program's suspension. Only 22 claims were entirely denied by file assessors (subject to the claimants' right to file review). Offers were made in about 383 cases.

Despite the large number of cases completed (271) and the larger number of offers made (383), assessors and file reviewers had no input from current or former employees as to the merits of any of these claims. No one was interviewing past employees. Such interviews did not commence until January 1997, after the Program was reinstated. As I outline in the next chapter, even then, they were initially only telephone contacts that could not be used in file reviews. Very limited interviews of current employees by the IIU had only commenced in September 1996, and those were directed to the disciplinary proceedings, rather than the compensation process. The IIU was providing file assessors with limited information. In fact, it was made clear to the IIU that the Program did not contemplate that the IIU would truly investigate these claims or conduct witness interviews to assist the assessors. It follows that offers were made to claimants, and file review decisions were rendered, without resort to evidence of fundamental importance. Hence, my earlier determination that the validation process was seriously flawed and lacked credibility.

It can be debated whether the Program's suspension was primarily driven by financial concerns or by concerns that the Program was not doing a very good job in credibly separating out true and false claims. It is probably most accurate to say that the Government's attention was more easily drawn to the concerns expressed by Program staff and others about the Program's credibility because it was also costing the Government an extraordinary amount of money. (A revised Government estimate as of October 11, 1996, forecast the Program to cost \$86 million (assuming no changes to the Program), resulting in an over-expenditure of the original estimate of approximately \$52 million.)

Despite the fact that the Government apparently recognized that there were problems with the Program's design and operation, prompting its suspension, I am not convinced that the Government fully appreciated the extent of these problems.

Even if the Program was to be reinstated, Government did so – with due respect – in a 'patchwork' fashion. As discussed in later chapters, immediately after the Program was reinstated, it was obvious that the Program required further reworking.

Having said that, I recognize that a number of the changes made to the Program appeared to be reasonable ones. If the Program was to continue, it was appropriate to extend the 45-day turn around time for the Province's Responses and increase staff resources to allow claims to be investigated and newly discovered documents to be catalogued and inputted. Development of a statement-taking protocol, recognition that the IIU would be permitted to interview claimants rather than rely solely upon prior statements, and the right of the parties to submit written, recorded or documentary proof from anyone who had evidence relating to a claim also represented improvements over the MOU.

It made sense to assign file reviewers on a rotating basis. The entitlement of each claimant to select his or her own file reviewer contributed to the lack of credibility of the validation process and invited suspicion that reviewers were selected based upon prior generous awards to other claimants. Another reasonable alternative would have been to provide for selection of file reviewers on a rotating basis subject to a mechanism that would permit selection of a particular file reviewer, on consent, based on special expertise, knowledge or experience.

It was also appropriate to rectify the arrangement that had permitted claimants to restrict the use that could be made of serious allegations of abuse, regardless of the potential dangers to vulnerable young people or the public at large. Such an arrangement was incompatible with government's duty to protect young people from suspected abuse.

The Government decided to pay out awards over time, rather than in one lump sum payment. There had been accounts – some of which were verified by individuals who spoke with me – of large awards being squandered by recipients or otherwise misused. Some, although not all, of the claimants who spoke with me suggested that payments over time made sense and avoided abuses. Others favoured an approach that would permit the method of payment to be determined on a case-by-case basis.

Despite some changes for the better, the Program remained seriously flawed. Continuation of the Program did not await completion of either the criminal or the IIU investigation. Indeed, it did not even await receipt by Government of the particulars of the claims being advanced, which would be contained either in claimant statements or in the Demands. As I outline later in this

Report, true validation of individual claims could not be done in a vacuum; from the perspective of both claimants and employees, validation would benefit from some ability to compare claims and the other evidence bearing upon them. Such investigative comparisons could yield corroborative evidence of individual claims. It could also demonstrate the likelihood of collusion or the contamination of one claimant's account by another.

The Program now contemplated the use of written, recorded or documentary proof, but it would remain difficult to use that material credibly within a process that permitted no witness other than the claimant to be called at the file review. The turn around time for Responses was extended only to 120 days, unlikely to permit a thorough internal investigation and assessment – especially given the likely flood of additional notices of claims to be received on or before December 18, 1996, and the fact that the recently discovered documentation had not yet been catalogued and put in place.

An examination of the Program, as reinstated, supports these conclusions. As described in the next chapter, cracks quickly surfaced in the reinstated Program. Assessors and investigators struggled to meet the 120-day deadlines and were forced to decide which investigations should be abandoned in the interests of time and resources. They were inundated with files that had to be responded to by mid-April 1997. Claim files already the subject of offers before the suspension were settled without further consideration or investigation. Assessors and file reviewers struggled with how, if at all, employee statements could or should be used to resolve issues of credibility.

In the meantime, true victims of abuse suffered. The position advanced by claimants' counsel – namely, that such victims were being re-victimized by unilateral changes in the process – had merit. Undoubtedly, these changes were also seen as a betrayal not only of the spirit, but of the express terms of the MOU, negotiated in good faith.

Some changes were seen as outright reversals of the MOU. For example, the reinstated Program did not compensate for inter-resident abuse. This was a result of the Government's dissatisfaction with how some file reviewers had addressed the issue of condonation. The change was described as a "clarification." With respect, condonation was expressly addressed, rightly or wrongly, in the MOU. The Government's surprise when compensation was awarded on the basis of condonation represented, at best, a misunderstanding of what their own negotiators had agreed to. I agree with the perspective of claimants' counsel that this change was more properly characterized as a reversal than a clarification.

Be that as it may, on balance, I am of the view that the flaws in the Compensation Program required rectification, despite the potential impact upon some claimants. A Program that lacked credibility and fairness did not ultimately enure to the benefit of true victims either, since their claims were tarred with the same lack of credibility that pervaded the Program itself. However, had

the Government structured a credible Program from the outset, it would have better served those whom the Program was designed to help. Further, as alluded to above, and elaborated on in the chapters that follow, the changes which Government made did not rectify the serious flaws in the Program.

RESUMPTION OF THE PROGRAM (CHAPTER XI)

The Compensation Program remained problematic once it resumed. This chapter documents these problems up to the release of new “Compensation for Institutional Abuse Program Guidelines” on November 6, 1997. These were to provide the framework for the continuing Program. They appeared to replace the MOU, and were made without any prior consent or approval of claimants’ counsel.

The Guidelines have many features that distinguish them from the original MOU. Some of these features were already reflected in the earlier changes made to the Program when it was reinstated. Others, such as the abolition of in-person file reviews and a clause permitting the use of polygraph results at file reviews, were new. The key components of the Guidelines are addressed in the excerpts from Mr. Kaufman’s analysis, immediately below and need not be reproduced here.

Mr. Kaufman’s comments on this period include the following:

Prior to the reinstatement of the Program, there was some recognition on the part of Government that there was a need to ‘tighten up’ the validation procedures for claims. It was also recognized that this would require added resources to enable the IIU and the assessors to respond to pre-existing claims, as well as new claims which would follow the Program’s resumption. Consistent with this view, Mr. Barss proposed an expanded role for the IIU in the investigation of compensation claims.

The Program was reinstated only one month after it had been suspended. The additional resources needed to fulfill Barss’ proposal were not in place. Further, there had been insufficient time for the IIU and the assessors even to ‘catch up’ on pre-existing claims. They had to cope with file reviews already scheduled to proceed, other pre-existing claims that had to be responded to, and the new claims which came forward. All of these were impediments to an effective investigative process. However, they were not the only ones.

In summary, time constraints and limited resources meant that, right from the outset, assessors and investigators struggled to meet the 120-day deadline and had to determine which investigations should be abandoned in the interests of time and resources. The Program was inundated with files that had to be responded to by mid-April 1997. Claim files already the subject

of offers before the suspension were settled without further consideration or investigation. Some files continued to be assessed and sometimes reviewed without any interviews of available employees having been conducted. In other cases, telephone interviews only had been obtained, preventing their use during file reviews.

Even when employee statements later became available, the way in which they were used within the validation process was itself unsatisfactory. File assessors and reviewers struggled with how employee denials in writing could be used to resolve issues of credibility within the framework of the existing validation process.

Assessors and reviewers were taking positions as to whether abuse did or did occur without access to some of the most important evidence bearing on the claimant's veracity. Even where the written denials of employees were available, the file reviewers were placed in the position of weighing the testimony of claimants against written statements to the contrary. How could any validation process be regarded as fair and credible, given those parameters? The claimants' credibility was being measured by some reviewers against the findings of fact made by Mr. Stratton. That is, the credibility of certain allegations made by claimants was enhanced because they conformed to findings that Mr. Stratton had made about what was transpiring generally. As I have earlier noted, Mr. Stratton did not contemplate that his qualified findings would substitute for validation of individual claims or be used for this purpose. Similarly, at least one file reviewer relied on the survivors' book of statements not merely to determine the appropriate category of monetary compensation, but as circumstantial proof of the truth of the claim under consideration.

Polygraph testing was introduced into the process. Considerable time was devoted by the Government to explore whether polygraph testing should be employed and, if so, how it should be done, by whom, and what weight should be placed on its results. Ultimately, the reliance on polygraph testing was incorporated into the November 1997 Guidelines. Although claimants were not compelled at any time to submit to such testing – nor should they have been – it is obvious to me that the IIU placed heavy reliance on the results of such testing. The fact that an employee had passed a polygraph test was even regarded as a basis for placing the claim against that employee on a list of fraudulent claims.

It is obvious that, as the Program continued, and the IIU heard from more and more employees, its investigators became increasingly sceptical about abuse claims generally. Stories about the exchange of information within correctional facilities no doubt heightened this scepticism. There were also serious concerns over new or different allegations coming forward after the compensation grid was published. All of this meant that claimants who were being interviewed by the IIU were being more thoroughly scrutinized.

Counsel for the claimants raised concerns over the way in which their clients were being interviewed by the IIU. These concerns persisted even after the RCMP and IIU signed a statement-taking protocol in April 1997. The protocol was supposed to minimize both the need for claimants to be interviewed more than once, and any adverse effect the IIU investigation might have on the concurrent criminal investigation. It became obvious to me during my review that, unfortunately, the relationship between the RCMP and the IIU, at times, did not advance these objectives. The protocol was often not followed in practice. Indeed, the RCMP felt that the IIU was undermining the conduct of the criminal investigation. At one point, the IIU complained that one of the reasons why the 120-day deadline could not be met was that they had to redo the RCMP 'pure version' statements. Interestingly, these statements were the subject of agreement in the protocol between the RCMP and IIU.

Those who were interviewed, whether claimants or employees, also had different perceptions on how the various agencies took statements. For example, a number of claimants found the Murphys to be sensitive to their victimization, in contrast to the IIU, who were regarded, at times, as accusatory. Some claimants were reinforced in this view by the fact that the IIU investigators often knew them from prior encounters with the law. Many employees, on the other hand, regarded the IIU interviews initially as accusatory, but then as fair, even sympathetic, as the IIU became more knowledgeable about the claims. No one regarded the Murphys as accusatory, although the employees expressed concern about how the Stratton investigation was generally conducted.

In my view, investigators must approach any interview in an open-minded way, free from stereotypical notions about abuse, claimants or employees. Although my recommendations later address this point more fully, I am of the view that the IIU may sometimes have allowed their preconceived notions about individual claimants or claims to unduly affect the way in which their interviews were conducted. Their perceptions may well have been correct about the merits of individual cases but, nonetheless, I must emphasize that interviews of claimants and employees should have been conducted in a completely open-minded way, without any preconceptions. This was not always done. In fairness, this reflected, in part, the IIU's understanding – which was correct – that the assessment and review process provided little or no opportunity to challenge the veracity of claimants. As such, the IIU may have felt that it was important to be pointed in their questioning of claimants.

A process that permitted the wholesale review of claimants' medical and other private records without regard to relevance violated the dignity and legitimate privacy interests of claimants and, of significance, is not even a requirement for parties to adversarial litigation. Finally, if the RCMP had conducted a video interview of a claimant, fairness required that, in the least, the IIU review that video before compelling that claimant to be re-interviewed. Even if additional questions were required, review of such a video should obviate the need to have the claimant re-describe each and every allegation, unless the object of the exercise is only to trap the claimant in inconsistencies.

The latter approach is incompatible with a process that is intended to meet the needs and interests of true victims of abuse.

As is obvious from my comments throughout this Report, I am of the view that the Compensation Program was unfair to employees by failing to provide for a credible validation process that appropriately recognized the importance of hearing from them. But having said that, I also recognize that this process might have become unfair to true victims of abuse as well. As the IIU became increasingly sceptical about the majority of abuse claims, and recognized that there was not a forum for the employees' accounts to be fully considered within the Program, their interplay with claimants became more accusatorial, until the process became quite unfriendly not only for those whose claims were false, but also for true victims of abuse. The effect on true victims was, no doubt, compounded by the fact that the Program was originally designed very differently. As I have said elsewhere, claimants could justifiably regard the changes in the Program as a betrayal of the spirit and express terms of the original MOU, negotiated in good faith with the Government.

General dissatisfaction with the process – on the part of claimants and employees – prompted calls for a public inquiry. It was suggested in the briefing note Barss provided to the Premier's office that it was likely that a public inquiry would only confirm Mr. Stratton's findings or, alternatively, that the IIU could provide a comprehensive report that would quell the calls for such an inquiry. In my respectful view, whatever the merits of a public inquiry, which I later address in my recommendations, it could not reasonably be discarded because it was likely to confirm Mr. Stratton's findings – itself, a highly debatable proposition – or because the IIU could produce a substitute report. The very strength of a public inquiry rests on the fact that its findings are based on sworn evidence, with rights afforded to affected parties to cross-examine, tender evidence and make submissions, and upon the independence and impartiality of the presiding Commissioner, often a judge or former judge.

The Guidelines were introduced in November 1997. A number of its provisions did represent an improvement over what previously existed. It was fitting to articulate the burden of proof both for the Province and for file reviewers, and to make it the balance of probabilities. It was appropriate to reflect that where one groundless, implausible or deceitful allegation was made, the Province would draw an adverse inference in considering other allegations. Without purporting to speak to the precise amount of time that the Province should have been given to respond to claims, it was reasonable to further extend the time within which to respond and to reflect that complex cases or delays in obtaining material might justify even a longer response time.

Some of the Guidelines' provisions were less desirable. Although the Guidelines provide some protection against indiscriminate access to medical and other private records, a provision that permits access to such records "where they are needed to evaluate the Demand" provides insufficient protection to affected individuals.

I accept that there was a place for polygraph testing within the investigative process. I do not agree with the use of polygraph results, subject to exceptional circumstances, during the file review process itself, particularly given the fact that the subjects of the polygraph testing were not themselves witnesses. It was appropriate that claimants not be forced to take such tests.

The most significant change in the Guidelines limited file reviews to written submissions only. In my view, such an approach precluded the reviewers from properly assessing credibility, failed to recognize the desirability of permitting true victims of abuse to be heard, and ultimately undermined the credibility of the validation process itself. In stating that written reviews precluded the reviewers from properly assessing credibility, I refer not only to the opportunity to observe the witnesses (the importance of which can be overestimated), but the ability of the reviewer to question the claimant or clarify what it is that the claimant has to say.

COMPLETION OF THE PROGRAM (CHAPTER XII)

The Report describes the continuation of the Program, in the aftermath of the Guidelines.

The cost of the Government's response to reports of institutional abuse has been significant. Below I outline some of the known costs associated with the Compensation Program, as reported by the Department of Justice on November 30, 2001:

Salaries	\$2,994,862
Other administration	\$954,617
Awards to claimants	\$30,006,485
Counselling	\$7,607,167
Legal Fees	\$4,573,794
Family Services Association	\$1,440,596
Other Professional Services	\$1,819,802
IIU	\$7,686,485
Shelburne Employee Assistance Program	\$4,002,997
Total	\$61,086,805

Mr. Kaufman's analysis includes the following:

After the Guidelines were introduced, the validation of individual claims remained problematic. Some claims continued to be dealt with without any input from available employees against whom allegations were made. The polygraph continued to be used – not inappropriately – in the investigative process, but at times assumed undue prominence and substituted for a full and thorough inquiry. In fairness, this criticism should not be visited upon the investigators, given their limited resources and the time constraints associated with their tasks. The investigation of claims continued to reflect many of the shortcomings identified in Chapter XI.

Claims that made their way to file reviews revealed serious flaws in the process. Two need to be elaborated upon here: the use of polygraph results and the abolition of in-person hearings.

There was no consistency in approach by file reviewers to the use to be made of polygraph results. Some gave these results little or no weight, sometimes relying on their inadmissibility in court; others appeared to confer some weight upon the results.

In my view, this inconsistency reflected a larger failure of the Program to take adequate measures to ensure some consistency, both procedurally and substantively, in the approaches taken by file reviewers to their duties. Such measures, compatible with the independence of file reviewers, are outlined in Chapter XVIII.

However, the inconsistent approaches taken to polygraph results also reflected the inherent illogic of utilizing polygraph results to assess the credibility of individuals who had no opportunity to appear before, or be questioned by, the file reviewers.

Although the rationale for abolishing all in-person reviews was not clearly spelled out, it is obvious that the Government adopted this approach, in part, as a way of purportedly reconciling the inability of employees to attend file reviews with basic fairness. In other words, it was felt that the inability of employees to appear in person made the exclusion of claimants justifiable, while remaining true to the underlying objective that adversarial litigation be avoided. (Some also felt that the abolition of in-person hearings avoided unjustified appeal to emotion. I do not regard this as a valid reason to abolish in-person hearings.)

The decision to abolish in-person hearings was, with respect, unwise and inappropriate. First, an ADR process that excludes claimants, including true victims of abuse, from any right (if they so choose) to meet with the fact finders is likely to fail. It is incompatible with principles of respect for true victims, and their engagement in a process intended to provide them relief, which principles are fundamental to the success of any redress program. Indeed, an opportunity to be

heard may be critical to the healing process for some abuse victims. I further address these and other such principles in Chapters XVII and XVIII of my Report.

Second, fairness for affected employees could be addressed by enabling them to appear before the file reviewers in a way that remained compatible with the desirability of avoiding unnecessary or gratuitous harm to true victims of abuse. I discuss how this can be done in Chapter XVIII. The claimants' lawyers themselves recognized this in their early proposals to the Government on how the Compensation Program could include a time-limited arbitration process.

With respect, it is inconceivable that employees would feel that the process had become fair because they were no longer the only parties who could not appear before the file reviewers to make their case. This is particularly so given their exclusion from the design of the process, their limited knowledge of what was happening within the Program or at file reviews, and the extensive awards (and, they presumed, the findings) that had apparently already been made by these same file reviewers from the Program's inception. As well, although claimants could no longer appear in person before the file reviewers, their counsel (unlike counsel for the employees) continued to represent them at file reviews and make representations on the claimants' behalf. So as not to be misunderstood, this is not to say that an ADR process must include counsel for the employees – a position with which I do not agree – but only to say that the abolition of in-person reviews did not address the fairness problems intrinsic in the process, or even the appearance of unfairness.

Third, the assessment of reliability and credibility should generally not be done through a paper review, or even a paper review supplemented by some videotaped interviews. There is a wealth of jurisprudence that establishes that triers of fact who have observed the witnesses are well situated, unlike appellate courts, to make findings of credibility. As a result, these findings are accorded great deference on appeal or judicial review.

Apart from these concerns, my examination of the file review process during the post-Guidelines period also revealed that file reviewers were, at times, confused or took fundamentally different approaches to how claims should be assessed within the regime of an ever-changing ADR process. It is true that the burden of proof was now explicit and provided some direction. Some file reviewers regarded this as a change; others saw it as confirmatory of what was implicit in the process itself. However, file reviewers continued to struggle with how assessments of credibility should be made, not only in light of their inability to observe the interested parties first hand, but also within an ADR regime whose mandate and philosophical perspective became unclear.

As the Compensation Program wound down, it left in its wake true victims of abuse and innocent employees, both victimized by its flawed approach to validation, and a public which could not know, and may never know, the nature and extent of abuse within the Province's youth facilities.

The Government's response also exacted a heavy financial toll upon the Province's coffers. I earlier cast doubt on the projections made by the Government of the costs of alternative responses. It is unnecessary, and probably impossible, for me to now quantify what reasonable, alternative responses would have cost. Suffice it to say, I am far from convinced that the Government's response could reasonably be regarded as having saved the Government money, when compared to alternative responses available. More to the point, I am satisfied that the human costs incurred by the Government's response, resulting in large measure from the lack of a credible, fair and legitimate validation process, cannot justify the response, whatever the financial savings might have been.

IMPACT OF THE COMPENSATION PROGRAM (CHAPTER XIII)

Mr. Kaufman's comments, in this regard, include the following:

Not surprisingly, many of those reading this Report will hold highly divergent, indeed polarized, views on the Government response and, in particular, on who was truly victimized by it. It is, therefore, important to say at once that the Program has left in its wake both claimants and employees who have been damaged by it. As I reflected earlier, my mandate does not permit me – nor did I have the means – to quantify how many claimants were truly abused or, on the other hand, how many employees were falsely implicated. I have no doubt that there were claimants who were truly subjected to physical and sexual abuse. Not even the most cynical observer of the Compensation Program can reasonably challenge that proposition. Similarly, I have no doubt that there was a significant number of employees who were falsely implicated.

One of the challenges of any Government response to reports of institutional abuse is to ensure that the lives of true victims of abuse are enhanced without, however, destroying innocent employees and their families. This requires balance, something the Nova Scotia response lacked. As stated elsewhere, the Government response was skewed against the employees to an extent that the innocent were deeply hurt, sometimes irreparably. Then, as the Government revised the Program, trying to provide some balance, true victims of abuse sometimes suffered.

The media coverage exacerbated the problems caused by the Program. It is not my role to pass judgment on which media accounts were accurate and fair and which were not. Nor do I intend to tell the media how to do their job. But it is important to stress that strongly held views by reporters and columnists, sometimes expressed in strong language, may have caused unnecessary hurt to people who were already viewed with suspicion, be they claimants or employees, past or present. Government, in designing and implementing a response to reports of institutional abuse, must appreciate the impact that the media have, and govern itself accordingly. This might mean, for example, that Government should repeatedly and effectively reiterate, in its public utterances, the presumption of innocence and the importance of avoiding premature judgments about individual employees or claimants.

THE MEMORANDUM OF AGREEMENT (CHAPTER XIV)

The final Memorandum of Agreement was signed on June 25, 1998. Once it was executed, the NSGEU withdrew its policy grievance.

The purpose of the MOA was to define the options available to employees against whom allegations of abuse were made within the mandate of the Internal Investigations Unit, but who were

not discharged as a result of the IIU investigation. (The Interim Memorandum of Agreement continued to apply while the IIU investigation was ongoing). The MOA also outlined the procedures to be used in applying these options, and how disputes would be resolved.

Mr. Kaufman's analysis includes the following:

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

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

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

I have found that the Government's response was, at times, inappropriate, unreasonable and unfair to employees. Having said that, to its credit, the Government did recognize that measures had to be taken to address the impact of the process upon its employees. The interim and final Memoranda of Agreement represented well intentioned efforts on the part of the Government to ameliorate that impact. Given the pending litigation between some employees and the NSGEU, earlier referred to, it would be unwise for me to decide whether the NSGEU should or should not have entered into the Memorandum of Agreement. For the purposes of my Report, I can only say

that no Memorandum of Agreement would have been necessary had the Government's response been better designed and given greater prominence to the interests of its employees.

THE IIU REPORT (CHAPTER XV)

In December 1999, the Internal Investigations Unit provided a Report to the Minister of Justice “regarding the investigation into allegations of abuse by former residents of Provincial youth facilities.” The Report outlined the IIU’s conclusions about the veracity and verifiability of the many claims of abuse levelled against both past and present employees of Shelburne, the Nova Scotia Residential Centre and the Nova Scotia Youth Training Centre. It was largely written by Frank Chambers, the IIU’s Director at the time, and David Baker, a former file assessor with the Compensation Program, and it is therefore sometimes referred to as the “Chambers - Baker Report.”

The IIU’s basic conclusion is stated in an early chapter of the Report:

To the best of our information and belief, neither credible nor reliable evidence exists to corroborate or substantiate the vast extent and severity of allegations made by adult complainants who were residents of institutions for the detention of juvenile delinquents/young offenders and other children, at about the time of the operation of the *Compensation Program* in about 1994-1999. The more that these allegations (including those made through the Stratton investigation) are strictly scrutinized according to the discovery of relevant information, the more that reasonable doubts are raised about their legitimacy. When assessed against the background of objective, confirmable information, most of the allegations are either unsustainable or implausible.

After Mr. Kaufman summarizes the controversy generated by the IIU Report, and the conflicting perspectives towards the report, he states:

Resolution of this debate – while no doubt of importance to the participants – does not advance the systemic focus of my review and, in any event, would require me to make findings which I am unable in law to make. After all, although there are ‘process’ issues associated with how and by whom this Report came to be written, the real debate is over its accuracy. Although it might be frustrating to some, I reiterate yet again that I am not in a position to determine the merits of individual claims of abuse or the prevalence of abuse generally.

That being said, I do, however, have some comments on the Report.

At times, undue emphasis is placed upon the failure to contemporaneously complain about abuse, given the institutional setting in which abuse allegedly occurred. The Report may be read as raising questions as to the guilt of MacDougall on some of the charges to which he pleaded guilty,

a view I do not share. The Report, while appropriately raising concern about the possibility of collusion and about how providing the chart of compensable abuse to former residents could produce exaggerated claims, is careless about ascribing improper motives to some claimants' counsel. The evidence disclosed in the IIU Report did not support their conclusions in this regard.

My staff and I have reviewed much of the documentation referred to in the IIU Report and conducted many interviews. There is significant evidence, direct and circumstantial, that false and exaggerated claims were made to the Government, and that these claims were motivated by monetary awards being offered by the Program and the known absence of a true validation process. There is significant evidence that some individuals colluded in making false claims. Indeed, some individuals have admitted that they participated in making false claims or that they are aware of false or exaggerated claims made by others.

The IIU also assembled materials that attempted to correlate inmates who had made claims, when those claims were made, what those claims alleged and what, if any, connection there was between the inmates prior to their incarceration together. In the least, these materials demonstrated that the opportunity for collusion by a number of inmates was substantial.

Finally, I note here that there also appears to be significant evidence that some contemporaneous complaints made by residents, or statements previously provided to the RCMP and others, are incompatible with claims later advanced by the same individuals within the Compensation Program. Although I recognize – as I have noted elsewhere – that it would constitute stereotypical thinking to conclude that the absence of any contemporaneous complaint compels the conclusion that no abuse occurred, the discrepancies noted here, in the least, invite close scrutiny and, in some cases, scepticism, about some of the claims now advanced.

There remain very different perspectives on the extent to which abuse claims made to the Compensation Program are true or false. The IIU Report represents one of those perspectives. I am convinced that, with limited exceptions (for instance, where admissions had been made, criminal convictions have been registered or where reliable, corroborative evidence exists), it is now extremely difficult, if not impossible, to reconstruct what abuse did or did not occur within the institutions. In part, this is a function of the passage of time and the unavailability of some witnesses. But of most importance to my Report, it also reflects the shortcomings of a Government response that failed to appropriately consider and address the interplay between the Compensation Program and the criminal process. Our inability now to effectively sort out true and false claims of abuse does a disservice both to true victims of abuse and innocent employees.

Recommendations

The Report contains 105 recommendations. Many are accompanied by commentary which explains or refines the recommendations. The commentary is not reproduced below.

GENERAL CONSIDERATIONS IN DESIGNING A GOVERNMENT RESPONSE

- 1. A government response should respect those who were truly abused, engage them in the creation and implementation of any redress process, and offer them comprehensive information throughout so they can make informed choices about their participation in the process.**
- 2. Where the government response involves monetary compensation for abuse and its effects, any validation process to determine whether, and in what circumstances, abuse occurred, must be credible and fair.**
- 3. Findings expressly or by implication made in prior judicial or administrative proceedings should generally obviate the need for further validation of those findings as a precondition to obtaining redress.**
- 4. A credible and fair validation process is one that credibly separates out true and false allegations of abuse, and is procedurally fair to those most affected by it, particularly claimants and those against whom abuse is alleged. This means that such a process must include procedural safeguards to protect against false accusations and appropriate measures to respect the dignity and legitimate privacy interests of both claimants and alleged abusers.**
- 5. A government response should strive to hold those who are responsible for abuse, if it occurred, accountable. Accountability extends to both abusers and those individuals, organizations or governments whose actions or inactions enabled abuse to occur. As noted by the Law Commission, these individuals may include “the actual abusers, co-workers who permitted the abuse to continue, supervisors or heads of institutions that failed to appropriately respond to complaints, or those who permitted institutions to operate without adequate oversight.”**
- 6. A government response should strive to address the full range of needs of those who were truly abused. Those needs – for example, the need to see that perpetrators are held accountable – will often not be exclusive to abuse victims, but coincide with the larger public**

or societal interest. The needs of abuse victims may be met, for example, by monetary compensation, counselling, education and retraining, medical or dental services, acknowledgments and apologies, and establishing a historical record of the abuse.

7. A government response must recognize and reconcile competing needs and interests. For example, the desirability that those victimized maintain their confidentiality may, at times, conflict with the societal need to prevent future abuse and prosecute the guilty. The desirability that the government adopt a process that does not compound the harm done to abuse victims may compete with the interest in ensuring that individuals are not falsely stigmatized as abusers. Ultimately, an appropriate balance must be struck.

8. A government response should strive to address the needs of the families and communities of true victims.

9. A government response, particularly where it involves a validation process, should endeavour to minimize the potential harm of the process itself upon those affected. This means that such a process should not unnecessarily or gratuitously compound the emotional, psychological or physical impact of prior abuse felt by true victims. This also means that such a process should not unnecessarily or gratuitously harm those who are innocent of abuse or of wrongdoing.

10. A government response should be enduring. That is, it should complement what must follow. This means that, where abuse has occurred, the response should contribute to reconciliation and healing. Whether or not abuse has occurred, the response should recognize the need for its institutions to operate safely and effectively in the future. It should promote a healthy environment at the institutions, both for their residents and for those who work there.

11. A government response should strive to prevent abuse from occurring in the future and contribute to public education and awareness.

12. A government response should, itself, be transparent; that is, it should permit the public to understand and evaluate it. Government and its officials should also be accountable for its design and implementation. This means, in part, that elected officials must be fully and accurately informed as to the available options and then provide appropriate direction and input into the design and implementation of such a response.

13. A government response must be fiscally responsible.

14. A government response should build in, from the outset, mechanisms to permit ongoing assessment and improvement. However, a response should be designed to avoid, wherever possible, changes mid-stream that may compound the harm to those affected.

15. A multi-faceted government response must be integrated and coordinated. This means, in part, that government ministries, social or investigative agencies and others should not operate at cross-purposes, unnecessarily duplicate efforts or waste valuable resources.

16. A government response should be mindful of an ongoing or contemplated criminal investigation or prosecution. Of paramount concern is that any government response not interfere with such proceedings. This means both that government should consult with law enforcement agencies in the design and implementation of its response and that the design should give appropriate recognition to such criminal proceedings.

17. A government response should strive to ensure that individuals who are similarly situated be treated similarly. Generally, there should be consistency in the compensation awarded to similarly situated victims. There should be consistency in the interim measures taken by government respecting alleged abusers who are similarly situated. Put simply, arbitrary distinctions should not be drawn between the treatment of affected parties.

18. A government response should be designed to prevent discriminatory treatment of claimants based on race, ancestry, place of origin, colour and ethnic origin, gender, sexual orientation, or disability. Equally important, consideration need be given to how a government response can ensure inclusiveness, respect and engagement of all claimants. Such consideration may extend to many aspects of the government response: for example, consultation or partnership with representative community groups, the selection of program designers, administrators and fact finders, and the formation of claimant advocacy groups or joint advisory or implementation committees.

INITIAL RESPONSE TO REPORTS OF INSTITUTIONAL ABUSE

19. In general, the initial response by government to reported institutional abuse by an employee on a resident should include:

- (a) documentation of the allegation;**
- (b) absent exceptional circumstances, removal of the alleged abuser from the immediate environment;**

- (c) relocation of the alleged victim(s) or witness(es), where a credible basis exists for believing that these individuals will otherwise not be secure or protected from employees or fellow residents;
- (d) appropriate reporting within the institution and to the Ministry involved;
- (e) fulfilment of any statutory reporting requirement;
- (f) where the allegation involves criminality, referral to the appropriate law enforcement agency for investigation.

20. Policies, procedures or protocols (“policies”) should exist to address all of these matters. As well, such policies should specifically articulate the obligation of all employees to intervene to protect residents from abuse.

21. Such policies should be created in advance rather than at the time of a crisis. They should be developed, where possible, after full consultation with affected parties. Employees should be fully educated and trained as to these policies. Institutions should ensure that residents are familiar with those policies that directly affect them.

THE INTERIM STATUS OF ALLEGED ABUSERS

22. Such policies should specifically address the status of current employees against whom allegations of abuse have been made, pending a determination as to whether abuse occurred. While the paramount consideration must be the safety and security of current residents, these policies should reflect a consistency of approach, procedural fairness to affected employees, recognition that no findings of abuse have been made, and sensitivity to the impact of allegations upon the affected employees.

23. In this context, ‘abuse’ includes, but may not be confined to, physical or sexual abuse. However, the term ‘abuse’ should not be so broadly interpreted as to trivialize its meaning and prevent the effective operation of the institution.

24. Generally, where physical or sexual abuse has been alleged against a current employee, that employee should not continue to work in the immediate environment in which the abuse allegations were made. This approach protects not only the residents, but also affected employees from false accusations.

25. Depending on the circumstances, removal from the immediate environment may involve re-assignment of the employee to other duties, suspension with pay, or, in limited

circumstances,¹ immediate termination. In determining which option to adopt, the government should not act arbitrarily. Similarly situated employees should be dealt with similarly. An employee's reassignment or employment status should generally be revisited upon completion of any police or children's aid society investigation, after any criminal charges are laid, after any criminal case is completed, and upon completion of any internal investigation.

26. Sensitivity to the impact of allegations upon affected employees means, in the least, that allegations be addressed discretely as circumstances permit and, where information pertaining to the allegations is disseminated, that the status of the allegations *as allegations only* be articulated. In particular, appropriate recognition must be given to the stigma visited on an employee by allegations of sexual or physical abuse.

POLICIES RESPECTING INTERNAL INVESTIGATIONS

27. Policies should specifically address how and when internal investigations of current employees are to be conducted and by whom. Such policies, which may be internal or joint policies shared with police, children's aid societies and others, should specifically address the interaction between internal and external investigations. Matters that should be addressed include:

- (a) how an initial report of abuse should be received and recorded;
- (b) the relative roles of police, children's aid societies and internal investigators in the investigation of abuse complaints;
- (c) interviewing techniques that enhance or detract from the accuracy, reliability and completeness of a resident's or witness' account;
- (d) the assignment of investigators with specialized training and skills respecting abuse cases, and where applicable, sexual abuse cases;
- (e) the desirability of early videotaping of interviews, subject to limited exceptions;
- (f) procedures for videotaping, and retention and access to videotapes;
- (g) medical examinations of the resident, where applicable;
- (h) the exchange of information between the police, children's aid societies and applicable institution and/or Ministry;
- (i) the status of any internal investigation pending an ongoing children's aid society or police investigation, or criminal charges;
- (j) when a support person will be permitted to remain with a resident or witness during interviews;

¹For example, where the employee admits the wrongdoing.

- (k) the manner in which a suspected employee is notified that an allegation has been made against him or her;
- (l) at what stage of the investigation should the suspected employee be given an opportunity to address the allegations, and what information should be provided to that employee and/or his or her counsel to enable them to address the allegations.

THE NATURE AND TIMING OF INTERNAL INVESTIGATIONS

28. Where criminal abuse is alleged, it should be investigated by the police, together with the local children's aid society, if the allegation falls within the society's mandate. *Generally*, any internal investigation should be deferred, pending conclusion of any ongoing or contemplated police investigation or resolution of any criminal charges.

29. Although an internal investigation should generally be deferred to await the completion of a criminal investigation, the decision by government as to whether an employee should be terminated or otherwise disciplined, and any disciplinary proceedings themselves, should not be so delayed as to irremediably prejudice the employee and prevent his or her re-integration into the work environment, if exonerated.

30. A full internal investigation of allegations of sexual or physical abuse may be required where:

- (a) no criminal investigation or prosecution is initiated;
- (b) criminal charges are withdrawn, stayed or dismissed;
- (c) further deferral of an internal investigation would irremediably prejudice the employee and prevent his or her re-integration into the work environment, if exonerated.

31. Any such internal investigation should be conducted by individuals with specialized training and skills respecting abuse cases and, where applicable, sexual abuse cases. This may mean that outside investigators need to be retained to conduct the investigation. Where the allegations are not isolated or raise systemic issues about the institution's conduct, outside investigators may also be desirable to foster independence.

32. Any such internal investigation should be mindful of the desirability of:

- (a) avoiding or reducing trauma to a resident or any witness through unnecessary or inappropriate questioning;

- (b) drawing upon pre-existing evidence, such as interviews already conducted by the police, where applicable;
- (c) respecting the privacy interests of all affected parties, to the extent possible and as not incompatible with any statutory duty to report suspected abuse;
- (d) ensuring fairness to any employee against whom a complaint has been made;
- (e) ensuring an accurate determination, free from stereotypical notions about abuse, residents or employees.

33. No individuals should be provided with assurances of confidentiality that are incompatible with any statutory obligation to report suspected abuse and that potentially expose others to the risk of abuse in the future. The desire for confidentiality can, of course, be considered in the exercise of discretion as to how and whether further proceedings will be conducted.

34. In reporting and describing alleged abuse, residents should be made to feel that their accounts will not be summarily discounted or minimized because they are residents and their alleged abusers are employees. Employees should be made to feel that complaints will not simply be accepted at face value because they are made by young people.

PROTECTING RESIDENTS FROM ABUSE

35. Protecting residents from abuse includes protection from the adverse effects of abuse and of having disclosed that abuse. This means that Government should ensure that abused residents have access to appropriate support persons. An appropriate support person may also foster an environment more conducive to full disclosure. Policies should address both the availability of support persons and of counselling and therapy for those who allegedly were victims of institutional abuse.

AUDITS OF EXISTING POLICIES

36. An audit of existing policies, procedures and protocols represents one appropriate way in which government can ensure that current residents are protected from abuse. The audit should not amount to, or substitute for, an investigation of specific allegations of abuse. It should be conducted by a person with experience and training in the auditing of youth institutions and in best practices concerning policies, procedures and protocols pertaining to abuse and its reporting.

TRADITIONAL LITIGATION AND OTHER ALTERNATIVES

Avoidance of Speculative Myths, Stereotypes and Generalized Assumptions

37. When a government receives reports of institutional abuse, it must approach these reports in an open-minded way. Government must avoid “speculative myths, stereotypes and generalized assumptions”² surrounding the credibility of young people, abuse or its victims: for example, notions that young people are inherently unreliable, or that only claims contemporaneously voiced are likely to be true.

38. At the same time, government must not substitute equally untenable assumptions or stereotypes: for example, notions that those who allege abuse almost inevitably were abused, or that traditional indicia of unreliability (such as past criminality) have no relevance to abuse allegations. The perpetuation of myths, stereotypes and assumptions – on either side of the abuse issue – may skew an investigative process and lead to unwarranted conclusions that abuse did or did not occur. Similarly, such perpetuation may prevent government from formulating an objective, open-minded and credible response to reported institutional abuse.

39. Further, government must educate the public to recognize, and avoid, myths, stereotypes and assumptions. Although government must be alert to public opinion, it cannot be swept away by an uninformed public. In this regard, it must lead, not simply follow.

Credible Validation within Either Traditional Litigation or Redress Programs

40. Whether a government responds to reported institutional abuse within a litigation framework or through a special redress program, its response can only be credible if the validation of individual claims is itself credible.

41. Procedures required to validate an abuse allegation in a criminal or civil court room, where liability must be publicly determined, may not be required to validate such an allegation in an ADR process, whether conducted within a litigation framework or as part of a redress program. It is relevant that such a process may involve no binding findings of legal liability, may be confidential, and may not require that the alleged perpetrator contribute to any financial settlement or award. This permits *some* relaxation of the validation procedures, but not at the expense of basic accuracy, as well as fairness to all affected parties.

²This phrase is taken from the Supreme Court of Canada’s judgment in *R. v. Mills*, [1999] 3 S.C.R. 668; 139 C.C.C. (3d) 321.

THE MINIMUM REQUIREMENTS OF A CREDIBLE VALIDATION PROCESS

42. Where serious allegations of sexual or physical abuse have been made,³ a credible validation process should generally involve, at a minimum, the following:

- (a) proof under oath, affirmation or an equivalent;**
- (b) the opportunity to challenge the account given by the claimant;**
- (c) the opportunity for the parties to tender witnesses and documents supporting or challenging the claimant's account;**
- (d) the obligation for government to consider whether there is available evidence, including that of the alleged abuser, to challenge the claim. Where credible evidence is available, the government must consider tendering that evidence in support of its position. Generally, the alleged abuser should be given the opportunity to provide his or her account;**
- (e) fact finding by one or more independent adjudicators experienced in evaluating credibility and reliability for these or analogous types of claims;**
- (f) an appropriate burden of proof to validate a claim;**
- (g) rules for the mutual disclosure of documentation, consistent with the practice in civil actions, or otherwise as may be agreed upon.**

43. Generally, a validation process should not rely upon a written record only. An oral hearing provides the fact finder(s) with an opportunity to assess the credibility or reliability of the witnesses, including the claimant. It facilitates any challenge to that evidence. As well, as the Law Commission noted, it provides an opportunity for claimants to describe directly in their own words the abuse they allegedly suffered and the impact it had on their lives. This can, itself, have a therapeutic value and contribute to the sense of respect and engagement that should be felt by claimants.

ACCOMMODATIONS WITHIN A CREDIBLE VALIDATION PROCESS

44. A credible, fair and accurate validation process can accommodate the needs and interests of affected parties, including true victims of abuse, in ways that include the following:

³As earlier noted, I need not address claims that are not dependent upon allegations of abuse specific to the claimant, but rather conditions or circumstances applicable to all residents – for example, a claim that residential schools for aboriginal children deprived them of their culture, families and language. If it were determined that such claims are compensable (which I gather is not the position of the federal government), validation would only require proof that the claimant attended the institution for a particular period of time. To be clear, I express no opinion on whether such claims are properly compensable.

- (a) it may be conducted in private;
- (b) it may provide for the disposition of documents, transcripts and notes following the completion of the validation process;
- (c) it may impose limitations upon access to confidential records, consistent with the principles enunciated by the Supreme Court of Canada in *R. v. O'Connor*⁴ and analogous legislation;
- (d) it may permit the presence of a support person during the claimant's testimony or at other times during the process;
- (e) it may limit the number of persons attending the fact finding hearing;

- (f) it may provide for an informal hearing room and other physical arrangements to minimize the adverse effects of the process;
- (g) it may limit the right of opposing counsel to cross-examine the claimant, provided that questioning can be directed to the claimant through the fact finder;
- (h) it may provide for arrangements to prevent a face-to-face encounter between the claimant and the alleged abuser, except where necessary to establish identity;
- (i) it may require undertakings signed by participants as to confidentiality, where not inconsistent with statutory obligations;
- (j) it may provide for evidence to be taken by video-conferencing or other comparable means;
- (k) it may allow claimants or analogous witnesses to adopt prior videotaped statements as their account, thereby reducing the need to fully recount their alleged victimization.
- (l) it may establish rules to encourage timely admissions of fact, and excuse witnesses from having to recount facts that have been agreed upon.

PRIOR VALIDATION OF ABUSE

45. Credible validation may be established through findings made in judicial proceedings or administrative hearings to which the alleged abuser was a party.

46. Where a trial judge has found in a criminal case that the complainant or other witness at trial has been abused by a government employee, at a proceeding to which the employee was a party, then it is appropriate for government to regard this abuse as validated for the purpose of determining whether compensation will be awarded. Such findings may be found in reasons for conviction or sentence or may be implicit in the verdict rendered.

⁴[1995] 4 S.C.R. 411; 89 C.C.C. (3d) 109.

47. Where a finding that the complainant has been abused by a government employee is implicit in a jury's verdict of guilt in a criminal case, then it is appropriate for government to regard this abuse as validated for the purpose of determining whether compensation will be awarded.

48. Where an adjudicator has determined, on a balance of probabilities, that the complainant or a witness has been abused by a government employee, at a proceeding to which the employee was a party, then it is appropriate for government to regard this abuse as validated for the purpose of determining whether compensation will be awarded.

49. Absent exceptional circumstances, such as the availability of fresh evidence that casts serious doubt upon the earlier findings of fact, government should not compel such complainants or witnesses to re-prove their own victimization for the purpose of obtaining compensation or other redress.

50. Where prior judicial or administrative findings obviate the need for further validation, government should strive to resolve outstanding issues in a way that does not compound the impact of abuse upon the complainants or witnesses. Non-adversarial means should be resorted to wherever possible.

LOWER VALIDATION REQUIREMENTS

Once Abuse Has Been Validated

51. (1) The validation requirements, earlier outlined, pertain to proof of the abuse alleged. Once abuse has been validated, an ADR process can be designed to facilitate the determination of what impact that abuse had, and what benefits should be conferred upon, the validated claimant.

(2) Given the diminished interest that employees have in these determinations, as opposed to a determination whether abuse occurred, a program is entitled to design a process that better accommodates a validated claimant, and further minimizes any potential harm from the process itself.

Where Allegations Do Not Involve Criminality

52. Where allegations involve non-criminal conduct or conduct regarded as acceptable when it occurred, validation may be less important, since the prejudice to those against whom these allegations are made is less palpable.

Where Counselling or Therapy is Sought

53. Interim counselling may be provided immediately to claimants, without true validation of the merits of their claims.

54. A program may provide long-term counselling to claimants, either as part of a larger redress package which includes monetary compensation, or on its own. A free-standing program which only awards counselling or therapy (or related non-monetary benefits) may reasonably do so without true validation of any claimed abuse.

DETERMINING WHEN TO ADOPT A REDRESS PROGRAM

Relevant Considerations

55. In determining whether a redress program should be adopted, rejected or deferred, the following should be considered:

- (a) the extent to which widespread or systemic abuse is involved;**
- (b) the status of criminal proceedings;**
- (c) the extent to which current employees are allegedly involved;**
- (d) the needs and interests of true victims of abuse;**
- (e) whether a redress program is fiscally responsible. This will depend, in part, on whether the government can credibly determine the likely outside limits of its financial exposure to potential claims.**

Widespread or Systemic Abuse

56. Widespread or systemic abuse is not adequately addressed solely through the criminal process or may not be adequately addressed through civil actions brought by individual complainants against government or their alleged abusers. Where a credible basis exists for believing that widespread or systemic abuse has occurred, a redress program may reasonably form part of a government response.

57. An evidentiary foundation for widespread or systemic abuse may be derived from all or any of the following:

- (a) prior criminal proceedings;**
- (b) prior administrative proceedings;**
- (c) a public inquiry;**
- (d) a police investigation;**
- (e) an independent investigation specifically mandated to address this issue.**

58. Generally, an independent investigation is not a preferred approach. It should only be undertaken, and relied upon, if:

- (a) no specific ‘findings’ of abuse are made;**
- (b) its limited objectives are explained by government to the public;**
- (b) the investigation is not viewed as a substitute for a credible, fair and accurate validation process to evaluate individual claims;**
- (c) the way in which it is conducted does not interfere with, or compromise, any existing or contemplated criminal investigation or prosecution; and**
- (d) it is conducted as part of an ongoing criminal investigation, or otherwise, with the assistance of investigators with specialized skills and training.**

The Status of Criminal Proceedings

The Extent to which Current Employees are Allegedly Involved

59. Generally, though not invariably, the investigation and validation of claims for compensation should be deferred to await the completion of related criminal investigations or prosecutions. In this context, the appropriate balancing of interests may not require that such deferral await the completion of any appellate criminal proceedings.

Fiscal Responsibility

60. Government should generally not commit itself to a redress program unless it is in a position to determine, on a credible basis, the likely outside limits of financial exposure to potential claims.

61. Government may determine, on a credible basis, the likely outside financial exposure to potential claims in a variety of ways:

- (a) the subject institutions may encompass a finite and limited number of potential claimants;**

- (b) by providing a deadline for the submission of notices of intended claims that predates a final determination of the precise components of the redress program;
- (c) by limiting the program, at least on a pilot basis, to a specific institution, specific years, specific age groups or other limiting criteria.

Balancing the Relevant Considerations

62. Where

- (a) an evidentiary foundation exists to believe that widespread or systemic abuse occurred,
- (b) no related criminal investigations or prosecutions exist or are contemplated, or such proceedings have been completed, and
- (c) government is in a position to determine, on a credible basis, the likely outside limits of financial exposure to potential claims,

a specially designed redress program may be an attractive option for a government to address reports of institutional abuse.

63. Where

- (a) an evidentiary foundation exists to believe that widespread or systemic abuse occurred,
- (b) related criminal investigations or prosecutions *do exist or are contemplated*, and
- (c) government is in a position to determine, on a credible basis, the likely outside limits of financial exposure to potential claims,

a specially designed redress program may be an attractive option for a government, provided that:

- (d) counselling or therapy is immediately available to claimants, without true validation of their claims, and
- (e) claims are processed in an expeditious way, once related criminal investigations or prosecutions relating to that claimant are completed.

INVESTIGATIONS TO VALIDATE ABUSE FOR COMPENSATION PURPOSES

64. The preceding Recommendations that govern the conduct of internal disciplinary investigations, particularly Recommendations 32 to 34, have equal application to investigations conducted to validate claims of abuse for the purposes of compensation or redress.

ACCOMMODATION WITHIN A LITIGATION FRAMEWORK

65. Where government chooses to respond to reported institutional abuse within a litigation framework, consideration should be given to how government litigators can accommodate and show sensitivity to the interests and needs of plaintiffs, who may be true victims of abuse, even while testing the veracity of their claims.

RANGE OF BENEFITS AVAILABLE TO REDRESS PROGRAMS

66. It is appropriate for redress programs to offer some or all of the following benefits:

- (a) monetary compensation;
- (b) financial or debt counselling;
- (c) psychological counselling or therapy;
- (d) treatment facilities, such as may be provided at alcohol and drug rehabilitation centres;
- (e) literacy training, educational upgrading or vocational training and rehabilitation;
- (f) educational or vocational assessments and counselling;
- (g) medical or dental services that either remove vestiges of a claimants' prior incarceration, such as tattoos, relate to the consequences of institutional abuse or mistreatment, or otherwise affect the claimants' emotional well-being;
- (h) payment of miscellaneous expenses, such as child care, transportation, computer and textbook costs, to enable claimants to obtain many of the above benefits;
- (i) an acknowledgment and apology, made publicly to survivors generally, privately to validated claimants, or both;
- (j) a telephone crisis line;
- (k) a historical record of abuse. The contents of, and access to, such a historical record must remain consistent with the fairness to be accorded to alleged abusers who may face criminal or disciplinary proceedings;
- (l) a memorial;
- (m) programs, actions or commitments that the government may undertake or foster which may provide benefits to survivors or the public generally, such as

legislative, policy or research initiatives, public education or the establishment of a healing centre or healing fund to be administered by the community.

MONETARY COMPENSATION

Compensation Grid

67. A compensation grid is one valid way to promote greater certainty and consistency in the monetary awards given to validated claimants. However, any program must recognize that there is no necessary connection between the nature, severity and duration of abuse, and the impact of that abuse upon its victims. It follows that monetary and non-monetary benefits should not be solely dependent upon the nature, severity and duration of abuse.

Monetary ceilings

68. A redress program should be designed to fairly compensate true victims of abuse, but remain mindful of the overall benefits offered by a redress program and the ways in which the needs of the claimant are better served through this program. It should also not be so generous as to provide an overly powerful incentive to the making of false or exaggerated claims.

Periodic Payments v. Lump Sums

69. A redress program may validly be designed either to provide monetary compensation through lump sum payments, periodic payments or a combination of the two. The needs of validated claimants must figure prominently in the determination as to how monetary compensation is to be paid.

70. Given that the needs of validated claimants will differ, any redress program that presumptively provides monetary compensation through periodic payments should have the flexibility to accommodate the specific needs of individual claimants.

71. It is generally preferable that discretion in individual cases as to the way in which monetary compensation will be awarded not be exercised solely by government officials.

COUNSELLING

72. It is generally preferable that a redress program not simply pay money to a claimant in the expectation that it will be used for counselling or therapy. Instead, the program may pay service providers directly or through a fund, administered by a designated committee or group.

73. A redress program may reasonably impose a maximum monetary value on the amount of counselling or therapy which may be obtained. It may also reasonably impose a time frame within which eligible counselling or therapy may be obtained. However, such a program should specifically provide a mechanism for relieving against these restrictions, based upon demonstrated need.

74. The discretion whether to relieve against restrictions on counselling or therapy should generally not be exercised by government officials alone, but rather by an advisory or implementation committee, including representatives of government and claimants.

75. A redress program can establish accreditation for eligible counsellors or therapists.

ADDITIONAL NON-MONETARY BENEFITS

76. (1) As earlier indicated, a redress program can provide for a variety of non-monetary benefits to validated claimants, such as educational, vocational or financial counselling, and medical or dental services.

(2) It is again generally preferable that a program not simply pay money to a claimant in the expectation that it will be used for such non-monetary benefits. Instead, the program may pay service providers directly or through an administered fund.

(3) Here too, determinations can be made by an advisory or implementation committee. A fund can be created to be administered by such a committee. As well, a fixed maximum sum may be designated as the amount that might be made available to individual claimants.

ACKNOWLEDGEMENTS AND APOLOGIES

77. A public apology made on behalf of government to abuse survivors, and apologies privately made to individual survivors, promote reconciliation and healing. It follows that such apologies may appropriately form part of a redress program.

78. The timing and the content of apologies, whether publicly made to survivors generally or privately made to individuals, should be mindful of outstanding disputes over the validity of claims of abuse.

79. Alternatively, a public apology should expressly recognize that:

- (a) some true victims of abuse have been identified and are therefore appropriately recipients of an apology from government at this time;**

- (b) the apology should not be regarded as an indication of the merits of any individual claims of abuse that remain outstanding.

BENEFICIARIES OF A REDRESS PROGRAM

80. Benefits may be restricted to those who were actually abused. Alternatively, they may be extended to their families, to those who have been adversely affected by the victims' destructive behaviour, or to witnesses adversely affected by abuse.

81. Generally, monetary compensation should be restricted to those who were actually abused. However, counselling or therapy may appropriately be extended to family members, particularly since such counselling may reasonably be expected to have a salutary impact on the victims themselves, as well as their families and communities.

CONDUCT ATTRACTING REDRESS

82. The breadth of compensable conduct is, ultimately, negotiable. However, some factors upon which this determination might be made include:

- (a) the evidentiary foundation for the conduct under consideration. For example, where there is extensive evidence of physical, but not sexual, abuse, it might be preferable to address only the former within a specially designed redress program;
- (b) the fiscal implications of such a determination;
- (c) how interrelated the types of abuse are. It may be impractical to separate out factually interconnected abuse into compensable and non-compensable categories;
- (d) the likelihood of facilitating an advocacy group for claimants: the more diverse the potential claimants, the less likely that they can speak with one voice;
- (e) the extent to which the different types of abuse generate significantly different issues;
- (f) the extent to which physical abuse is alleged to represent conduct which was lawful when it occurred. If this is to be regarded as compensable, it raises very different issues than conduct that was criminal when committed.

PROCESS ISSUES

The Administration of a Redress Program

83. Generally, government should retain responsibility for administering a program it is funding. Accountability to the public and fiscal responsibility make this approach an appropriate one. However, the concerns about a perception of conflict of interest can be addressed through the creation of an advisory body containing representatives of government and victims to address issues that arise in the administration in the program. Such a body should not address the merits of individual cases.

Informed Decisions

84. Potential claimants should be informed about available options in an understandable and thorough way.

85. Information should be disseminated about available options in a way that does not compel former residents to disclose their background to their families or friends.

86. This generally means that the media represents the best way to initially inform potential claimants about available options. Press releases, public announcements and advertisements need not be comprehensive, but merely alert the public as to how to initiate contact to learn more about the process.

87. Any agreement governing a redress program should be written, to the extent possible, in plain language or non-legalistic terms.

88. The formation of a claimant advocacy group greatly facilitates the creation and implementation of a successful redress agreement. It may provide a single point of access to claimants. It is capable of giving claimants ownership of the programs in a way that multiple lawyers, each representing one or more claimants at a negotiating table, might not. The direct involvement of such advocacy groups with government promotes a degree of trust, and facilitates reconciliation and healing. It also gives a sense of empowerment to the claimants.

89. Government should facilitate the formation of such claimant advocacy groups and their involvement in the creation and implementation of redress agreements. This should often include financial assistance, both to enable such groups to form, and to communicate with and offer support to their constituency. This should often also include financial assistance for legal counsel to advise and represent the group.

90. Where a redress program is under consideration, multiple claimants may have already retained their own counsel to advance potential lawsuits. It must be recognized that these claimants are fully entitled to pursue lawsuits, with the assistance of counsel. However, it may best serve the needs of claimants generally that their interests be pursued collectively, with greater prominence given to their advocacy group.

Consultation with Affected Groups

91. Where the government contemplates that its response to reports of institutional abuse may involve alternatives to traditional litigation, it should broadly consult with potentially affected groups to obtain input on the design of that response.

Relinquishing the Right to Sue

92. Generally, a redress program should require that claimants relinquish their right to sue the government as a condition of their participation in the program.

93. A redress program may provide that this right be relinquished at various stages in the process:

- (a) upon filing a demand or claim for compensation within the program;
- (b) when the demand or claim is submitted for an initial assessment as to whether it will be permitted to be processed within the program;
- (c) when the claim is submitted to a fact finder for binding determination.

94. The point at which the right to sue will be relinquished is appropriately the subject of negotiation between the parties. It may be dependent upon many considerations. However, a program that permits opting out after issues of credibility have been determined or after the amount of compensation has been fixed will lack credibility, waste resources, and fail to promote public acceptance of the process.

Dispute Resolution

95. An agreement governing a redress program should specifically address how disputes over its interpretation or generally in the implementation of the program are to be resolved.

The Deadline for Filing a Claim

96. In setting the deadline for filing a claim for compensation to a redress program, consideration should be given to:

- (a) the extent to which there are difficulties in making the program known to former residents;**
- (b) the recognition that former residents may no longer be in the jurisdiction;**
- (c) the recognition that true abuse victims may find it emotionally challenging to respond, may be at different stages in their personal recovery and, as a result, may require time and support in order to participate in a redress program;**
- (d) the desirability that government ascertain the scope of the potential program before proceeding;**
- (e) the potential number of claimants involved;**
- (f) the desirability that the redress program not be unduly delayed;**
- (g) the desirability of reducing the potential for collusion or contamination of claims.**

Promoting Consistency in Fact finding

97. A program may reasonably provide for processes that promote procedural and substantive consistency on the part of fact finders, without compromising their independence. Such processes may include:

- (a) creation of a template by fact finders for their written reasons;**
- (b) informal review of fellow fact finders' draft reasons by a designated fact finder, or by the full panel of fact finders;**
- (c) group meetings of fact finders to review the procedures that govern fact finding sessions, and the decisions that have been rendered.**

Training for Those Conducting or Administering a Process

98. Those involved in the design, administration or implementation of government responses to reported institutional abuse should, by prior experience or training, have an understanding not only of institutional abuse but, where applicable, of how credibility and reliability are to be assessed, free from speculative myths, stereotypes and generalized assumptions. Their experience and training should enable them to show sensitivity to the vulnerability of true victims of abuse, while remaining open-minded about the issues in dispute in a way that is compatible with a credible and fair program.

99. All or some of the fact finders should have specific experience and training pertaining to discriminatory treatment based on grounds such as age, race, ancestry, religion, creed, place of origin, colour and ethnic origin, gender, sexual orientation, or disability.

100. It may be appropriate that the experience and training of those involved in a government response should be supplemented by training specific to the redress program. Some programs will compel specialized experience or training.

101. The nature and contents of this training should be the subject of discussions among those who participate in the creation of the redress program.

102. Such training should extend to administrators of the program, those within government who may be mandated to initially vet claims, those who investigate claims and, ultimately, the fact finders.

103. Prior experience and training of fact finders in analogous areas will often be desirable and appropriate. For example, members of a criminal injuries compensation board, former members of the judiciary, human rights or personal injury claims adjudicators, are examples of individuals who are generally well situated, by experience and training, to address these issues. Legal training is generally desirable.

Appellate Review

104. Generally, determinations made by the fact finder(s) within a redress program should be final. The goals and rationale of a redress program are largely incompatible with an appellate process. A program may or may not provide for limited review to address jurisdictional error. Some limited mechanism may also be created to revisit decisions based on the availability of fresh evidence. However, there should be a high evidentiary threshold to overcome before a decision should be revisited. Demonstrable fraud may suffice, as may the availability of new evidence which could not have been discovered through the exercise of due diligence by the party seeking to tender the documentation.

Evaluation of the Government Response

105. A redress program should provide for its own evaluation by participants. This enables government in particular to assess the merits of such a program in the future and to correct any identified flaws in any future programs.

Conclusion

The Commissioner concluded his Report in these terms:

I end this Report where it began. Central to the Government's response to reported institutional abuse was a Compensation Program. It was seriously flawed. So flawed that it left in its wake true victims of abuse who are now assumed by many to have defrauded the Government, innocent employees who have been branded as abusers, 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.

I was to determine whether the Government response was appropriate, fair and reasonable. The simple answer is that it was not. It was commendable that Government was concerned about the plight of abuse victims and understood its obligation to rectify past wrongs and prevent future wrongs. However, it lost sight of its obligation to its own former and current employees. And fairness became yet another victim. And so did the credibility of the Program itself.

As Government recognized – albeit imperfectly – the flaws in its own Program, some changes were introduced. But the changes did not rectify the basic unfairness of the Program and, ironically enough, were at times unfair to those whom the Program was designed to help – the true victims of abuse.

It would be all too easy to find malevolence in a Government response so flawed. No doubt, some affected parties have formed their own conclusions in this regard. But every tragedy does not have a villain. The issues that confronted Government were not always free from difficulty. Nor was every Government official committed to, or equally responsible, for this flawed Program. The challenge here is to learn from the mistakes made and to avoid their repetition.

I have crafted 105 recommendations – a 'Blueprint for the Future.' This is somewhat of a misnomer, since there is no single blueprint that should dictate how Government should or can respond to reports of institutional abuse. However, I am hopeful that the concerns that motivate my recommendations may find expression in the approaches taken by this and other governments in the future.