III

Formulation of The Government Response

1. EVENTS LEADING TO THE GOVERNMENT RESPONSE

As discussed in the previous chapter, on February 5, 1993, Douglas Hollett, the former counsellor at the Nova Scotia School for Girls ("NSSG"), was sentenced for the crime of sexual intercourse with a female person 14 to 16 years of age of previous chaste character. On February 23, 1993, the complainant in the case, G.B.R., gave notice of an intended action against Hollett and the Crown.[1] On April 14, 1993, similar notices were given by the seven complainants in the cases against George Moss (the other former counsellor at NSSG who had been convicted of sexual offences in relation to former residents).

The plaintiff in the *Hollett* case alleged that Hollett had improperly touched her, fondled her on school premises, and convinced her to run away from school and live with him. She further alleged that during the 18 months they lived together, Hollett engaged her in frequent sexual activity, including intercourse. Her claim against the Province asserted negligent hiring, training and supervision. Prospects for settlement appeared attractive. The demands by the plaintiff were modest.

The complainants from the Moss prosecution commenced their action on July 30, 1993. It was directed solely against the Government, and litigators from the Department of Justice ("Justice") therefore assumed carriage of the case. Since the Department of Community Services ("DCS") was responsible for the institution where Moss had been employed, their input was sought. One of the responses by DCS came in the form of an August 13, 1993, memorandum to Reinhold Endres, Q.C., Director of Civil Litigation, from Martha Crowe, consultant on legislation/policy at DCS. Crowe referred to the fact that her Department was being sued for sexual assaults committed by three former employees, Cesar Lalo, Hollett and Moss. She suggested that a determination be made if similarities in the cases against the Government justified a common approach.

---

[1]Section 18 of the *Proceedings Against the Crown Act*, R.S.N.S. 1989 c. 360, stipulates that no action shall be brought against the Crown except on two months notice.

A further memorandum from Crowe to Endres, dated September 27, 1993, proposed a systematic approach to deal with cases where staff are convicted of a crime and there are consequent civil proceedings. She wrote:

> We wish to propose to you, for your consideration, that in cases where staff are convicted of a crime against a client, and that client subsequently sues for damages arising out of that crime, that we should have a mechanism to objectively assess their injury and the compensation that might be appropriate. We are not particularly interested in litigating the Moss, Hollett, or Lalo matters but we are open for your advice on that issue. We believe that there is some merit in recognizing that staff did commit a crime, that clients were injured and that injury occurred while they were "in our care". Therefore, we feel, rightly or wrongly, some obligation to compensate for that injury.

Counsel from Justice were cautious in exploring a settlement in *Hollett*, given the potential for other actions to be brought. Their advice was to work through the various files to develop a policy to permit consistent treatment, rather than move directly to settlement. This desire was communicated to plaintiff's counsel in *Hollett*.

DCS reluctantly agreed to postpone concluding any settlement until discoveries were complete. Defences were filed in the *Hollett* and *Moss* actions.[2] The defences were similar. The Province claimed that it was not negligent in the hiring, training and supervision of its employees, not vicariously liable for the acts complained of, and not in breach of any fiduciary duty to the plaintiffs. The Province also pleaded contributory negligence and the *Limitation of Actions Act*.[3]

Discoveries were held in the *Hollett* proceedings, but the case brought by the seven claimants from the Moss prosecution lay dormant for almost a year. On March 23, 1994, a little more than a year after the first conviction was entered against Patrick MacDougall, a notice of intended action by one of his victims was delivered to Justice. The notice was forwarded to DCS since it was responsible for operating Shelburne at the time of the conduct that led to MacDougall's convictions (and, indeed, until August 1, 1994, when the administration was turned over to Justice).

In late April 1994, Douglas J. Keefe, then Executive Director of the Department of Justice, received a draft memorandum from Martha Crowe directed to the Priorities and Planning Committee ("P&P").[4] The subject was a "Compensatory Scheme for Victims of Physical or

---

[2]The Province also named Moss as a 'third party' in the lawsuit, in an attempt to claim over against him for damages should the Province be found liable. This was unnecessary in *Hollett* since he was named as a Defendant.

[3]S.N.S. 1982, c. 33. The Act prescribed that an action must be commenced within two years of the event. However, it also endowed a court with a discretion to permit an action to proceed, in certain circumstances, even though instituted outside the prescribed period. The Act was amended in 1993 to provide that the limitation period does not begin to run where the plaintiff is not reasonably capable of commencing the proceedings due to a physical, mental or psychological condition caused by sexual abuse: see S.N.S. 1993, c.27.

[4]Priorities and Planning is a committee of Cabinet, established to oversee government policy. It is usually made up of senior members of Cabinet. Approval by P&P is a powerful indicator that the full Cabinet will likely adopt

Sexual Abuse Perpetrated by Former Staff of the Department of Community Services." Although this was purely a draft document, it is of importance since the Compensation Program that followed, at least in philosophical terms and rationale, reflected to some extent the ideas expressed in the memorandum.

By way of background, the memorandum stated as follows:

> The Department of Community Services is presently defending three civil actions by individuals who were abused by former staff.
>
> We have received a Notice of Intended Action in relation to a fourth victim of abuse perpetrated by a fourth staff member [MacDougall].
>
> In all four cases the staff persons involved have pled guilty to or have been convicted of the offense.
>
> The Department of Community Services is interested in establishing a mechanism to objectively assess the injuries suffered by the victims and to provide redress for these injuries through compensation and services.
>
> The Department believes, that since staff with the Department did commit a crime against these individuals and these individuals have suffered as a result, it is proper to recognize the harm suffered by these individuals and to attempt to redress that harm.

The memorandum then spelled out four options. The first was described as litigating every claim. This option was not favoured as it would make victims tell their stories again in a public forum to get redress. From a public relations point of view, it was thought that the Government would appear to have forced another travesty on the victims by requiring them to seek their redress in an arena not considered "victim friendly."

The second option was to settle each claim individually as it came forward. The draft identified one problem with this approach: it would be difficult to construct a mechanism that would be "fair" to all those who came forward. The Government would become the principal arbiter of what was fair, and that would put it in an awkward position, leading to a perception that it had embarked upon a 'divide and conquer' strategy. The memorandum suggested that the Government had to demonstrate credibility in whatever process it undertook.

The third option was described as lumping all the individuals together and settling all the claims at one time. This was seen as not serving the short and long term therapeutic needs of the victims. Furthermore, the Government would be perceived as being irresponsible. It was suggested the Government needed to be seen not only to have given some money in compensation for the wrongs done, but also to have made a proper attempt to heal the damage resulting from these wrongs.

---

the policy.

The fourth option was to appoint a facilitator, independent of the Government, to engage "all the parties" in a process that would allow for a resolution involving both monetary payments and Government support services. This was referred to as the model looked upon favourably in Ontario, British Columbia, Manitoba and Newfoundland. All parties would make independent submissions and be entitled to legal counsel. Consideration would be given to funding for medical and dental needs, further education, and counselling, administered by a public trustee, along with a screening process to "delineate the real claims."

This last option was considered a "win-win situation," with the Government being seen to have acted to meet the needs of the victims, yet ending up paying less money than in a process that would involve all victims suing the Government. This option was the recommended approach.

The draft memorandum did not result in immediate strategic planning on any of the options set out. Mr. Keefe cautioned the Deputy Minister, Gordon D. Gillis, Q.C., that it may be wrong to assume liability, and he added, somewhat prophetically, that the Department of Community Services may be setting up a rich obligation that Justice would have to pay for. He suggested that alternative dispute resolution ("ADR") was worth considering should liability be acknowledged, in which case it may offer significant advantages to both the Crown and the victims.

Nothing further was apparently done until Peter Felix Gormley, one of the victims of Patrick MacDougall, filed his Originating Notice and Statement of Claim and served it on Justice on June 22, 1994.[5] The claim set out allegations of sexual and physical abuse perpetrated on the plaintiff by MacDougall and others, and it asserted a claim for negligence and other breaches of duty by the Province. In addition to damages for pain and suffering and loss of income, Gormley sought $2,000,000 for punitive and exemplary damages.

Alison Scott, then Senior Solicitor in the litigation division of Justice, circulated the Statement of Claim within the Department. She noted that MacDougall had 10 other convictions respecting 10 other boys.[6] The Deputy Minister alerted the Minister, the Honourable William Gillis, that "this is a very small part of a very big problem." The Deputy Minister indicated he would endeavour to develop an overall plan rather than deal with one case at a time. Since there were no provisions in the budget, P&P would have to approve such a plan. Arrangements were made to try to work something out later in the summer.

In a memorandum to the Deputy Minister dated June 28, 1994, Ms. Scott set out the available defences and sought instructions on whether to handle the *Gormley* case by litigation or by an attempt to settle (or possibly both). She noted that, in most cases, general damages for

---

[5]By this time discoveries had been completed in *Hollett*, and the case was in the process of being set down for trial. DCS reasserted its desire for a settlement. Without detailing the various positions, settlement offers were exchanged, but the parties failed to agree.

[6]In fact, it was nine, not 10, other boys.

similar cases had not exceeded $65,000. One of the options identified was to make some sort of admission on liability, but refer the issue of damages to the Court. The Deputy Minister was committed to examining a new approach, but otherwise authorized the continuation of the litigation process for this claim. Approval was given to at least proceed to the discovery process to determine the extent of liability and the viability of any defences.

Ms. Scott attended Shelburne in search of records. She reported that no records were available except for those relating to admission and discharge of residents: retention practices then in force did not require that other records be kept. She promptly interviewed various DCS personnel to obtain their recollections of the events at the school. She spoke also with former staff from head office and from the school. She was told of the existence of shift log books and incident report forms, but obtained no hard information as to where they were. Nor was she able to determine what happened to records from the 'isolation unit' (purportedly a place where residents were housed either for their own protection or to protect others from them). She was advised that in the early 1960s the primary means of enforcing discipline had become the removal of privileges or assignment of work; physical force was only acceptable to protect a child from himself, others, or in self-defence.

Counsel for the plaintiff in the *Gormley* case wrote to Alison Scott in early August. In a detailed and forceful manner, he urged full public disclosure of the events at Shelburne, either through a public inquiry or in the course of a trial. Nonetheless, he suggested that if a proper offer was made it would be in his client's interest to settle the case. He set out a claim for slightly in excess of $1,000,000. Reference was made in the proposal to the apparent acceptance by the Province of an obligation, albeit non-legal, to provide compensation to Donald Marshall[7] and to the recent payment of $500,000 to the family of Donald Findlay, who was killed by a fellow inmate while at the Halifax Correctional Centre.

2. FORMULATION OF THE THREE-PRONGED RESPONSE

At a summer retreat, most likely in early August 1994, a strategic planning session was held to discuss the formulation of an overall plan. In attendance was the Deputy Minister of Justice, and the Department's Executive Director, Director of Policy, Executive Director of Correctional Services, and Director of Communications.

Out of this retreat emerged a draft memorandum to P&P. It was sent first to the Department of Community Services, and then, along with the response from DCS, to the relevant officials at Justice. The memorandum was submitted to P&P with some minor changes in wording on September 30, 1994. Due to its importance in understanding the Government's response, the full text of the memorandum is reproduced as Appendix "C".

---

[7]See Nova Scotia, *Royal Commission on the Donald Marshall Jr. Prosecution, Digest of Findings and Recommendations* (Halifax: The Commission, 1989).

The stated purpose of the memorandum was to evaluate and develop appropriate responses to incidents of sexual abuse at Shelburne. It set out the background as follows:

> A lawsuit has been commenced naming the Province as a defendant seeking damages for sexual assaults committed upon the Plaintiff, Peter Felix Gormley, while in the custody of the Shelburne Youth Centre. The assaults were committed by a staff member during the mid-to late-1960's (there was a conviction).
>
> .....
>
> In addition, two further Notices of Intended Action have recently been filed,[8] and it is expected that there will be a significant number of additional claims advanced within the near future.[9] There is a major difficulty in discovery and assessing the factual situation as some of these incidents are alleged to have taken place many years ago.

The stated objective was:

> To determine the cost-effective, timely process for responding to actual and alleged incidents of sexual abuse at the Shelburne Youth Centre which will be acceptable to victims and the public.

The memorandum went on to identify the factors that should be considered in developing an appropriate response:

> (a) victim & public confidence or satisfaction – there needs to be an assurance that justice has been done; that victims have been fairly treated through a process which is seen as fair and impartial.
>
> (b) the need to ensure that corrective actions have been taken with policy and procedure in place to ensure that future incidents will be prevented;
>
> (c) the reputation of the Government and the Department – their response to the issue is thorough and conscientious and that those responsible are held accountable for their actions;
>
> (d) the confidence and peace of mind for families of children currently in custody;
>
> (e) the time frame involved;
>
> (f) the cost of the process and compensation;
>
> (g) impact on staff currently employed.
>
> (Underlining in the original.)

---

[8]Both notices were given by complainants in the criminal prosecution of Patrick MacDougall.

[9]Indeed, five more notices of intended action were received over the next few months.

The memorandum identified three options: 1. traditional litigation, 2. a public inquiry, and 3. investigation, audit and an alternative dispute resolution process. In terms of assessing these alternatives, the basic premise was advanced that the Government is obligated legally and morally to respond to this issue and that

> ... it is essential that any process ensures that there be *proper accountability for actions,* that *the truth be ascertained,* that *fair compensation be paid* and that there are assurances that necessary or remedial action has been or will be taken. (Emphasis added.)

Option I – Traditional Litigation

This was described as denying liability and putting the plaintiff to strict proof of all allegations. It was considered that, compared with other options, costs would be controlled in terms of compensation and legal expenses. The time frame would be about two years. There would be some impact on staff, but not nearly as great as with an investigative process. However, it was anticipated that public satisfaction would be low as it may appear that the victims were being re-victimized by the process. The Government could be accused of taking a narrow perspective and of being unwilling to make a proactive positive response. It was asserted that the reputation of the Government and the Department of Justice would suffer, that more broad-based inquiries had occurred in other provinces and that Nova Scotia would be perceived as avoiding its responsibilities.

Option II – Public Inquiry

This was referred to as the traditional response and probably the safest for that reason. The victims, through their lawyers, would be perceived as having their needs addressed, but the spectacle of victim testimony might ultimately be damaging to them. Although the public might appreciate the visibility, the public would likely have a negative view of the expenditure of considerable public funds for legal services. The option would also have a negative impact on the reputation of the Government and the Department. Corrective action would have to be assessed after the inquiry. Attached as schedules to the memorandum were the time frames and costs of the public inquiries in Newfoundland (Mt. Cashel) and New Brunswick (Kingsclear).

Option III – Investigation, Audit and an Alternative Dispute Process

This was clearly the favoured option – one that was said "to achieve success at outcomes while avoiding the problems associated" with Options I and II. The investigation would be done by an independent fact finder, who would obtain and assess information with appropriate investigatory and legal assistance. The justification was that the Government officials "need to know what events took place, what information was shared with senior managers and what actions then occurred." It was expected that the investigation could be completed within 90 days. An independent audit of present practices would also be conducted to ensure that current policies and procedures were adequate to protect residents.

An alternative dispute resolution process would be available if liability was revealed through the investigation. Three methods of ADR were described as available: negotiation, mediation (a process where a neutral mediator assists the parties in arriving at a consensus), or adjudication (a process where a neutral third party is given the power to make a binding decision).

The most significant risk identified in proceeding with the third option was the public perception that the Government was being evasive in not having a public inquiry. This was dealt with in the following way:

> One of the major functions of the public inquiry is to establish responsibility. That would be acknowledged up front in option III. An appropriate communication strategy would reinforce the notion that Government is prepared to accept responsibility, and would prefer to expend limited resources on compensation for victims and improvements to the juvenile justice system rather than lawyers' fees. (Underlining in the original.)

It was recommended that Option III be approved in principle and that Justice be requested to prepare a detailed work plan containing the terms of reference for the process. The recommendation was approved by P&P on October 6, 1994.

3. ANNOUNCEMENT OF THE GOVERNMENT RESPONSE

An October 25, 1994 memorandum prepared by Kit Waters, Director of Policy for Justice, was submitted to Cabinet by the Minister of Justice. The objectives of the memorandum were stated to be: 1. to advise the Executive Council regarding the recommended course of action; 2. to seek approval for the Minister of Justice to initiate an independent investigation of alleged incidents of sexual abuse at the (former) Shelburne School for Boys; and 3. to seek approval for the Minister to initiate an independent audit of present practices at the Shelburne Youth Centre.

The memorandum recommended that a judge be appointed to undertake the independent investigation. It was recognized that the person chosen must be well respected and perceived as neutral and at arms length from the Government. In the event that the investigation was unable to obtain sufficient information to make recommendations to the Minister, the investigator could urge the Government to establish a public inquiry. It was also recommended that the report of the investigation be made public within two weeks of its receipt by the Minister, and that the identities of the complainants be protected.

In relation to the proposed audit, it was recommended that the terms of reference require the auditor to inquire into, report on and make recommendations in relation to the protection of persons held in custody at Shelburne. In particular, it was suggested that the auditor examine the

complaint procedure and that an assessment be made of the mechanisms in place "to ensure proper communication and follow-up within responsible departmental authorities and police agencies in the event of allegations of sexual or other abuse of young persons held in custody." The Minister was advised to retain an independent auditor *with acknowledged expertise in custodial institutional policy and procedures*,[10] and to make the report public within two weeks of receipt.

These proposals were approved by Cabinet on October 27, 1994.

On November 2, 1994, the Honourable William Gillis, then Minister of Justice, 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 to be an independent audit of current practices at the Shelburne Youth Centre and other young offender institutions operated by Justice. This was 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, then Assistant Manager, Employment Equity, with the Atlantic Regional Office of the Bank of Nova Scotia, agreed to undertake this audit.

To demonstrate the government's accountability in this process, the Minister undertook to make the results of the audit public. It was to start on or before December 1, 1994, and its projected completion date was February 28, 1995. The projected cost was $36,000.

The second step was to be 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

[10]In Chapter IV, the qualifications of the person who was chosen as auditor are discussed.

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."

This investigation was to be directed by a person completely independent from the Government of Nova Scotia, given "the allegations of misconduct against Government officials." The findings of the investigation would be made public, although the identity of the complainants would be protected. The investigation would include, at a minimum, interviews with police officers involved in the criminal investigations, victims, employees at the school during the period in question, medical staff responsible for the treatment of victims, and government officials and administrators.

It was recognized that witnesses would "have the prerogative of refusing to assist the investigation, leaving us with the option of proceeding via the public inquiry route." However, the Minister stated that many people had already indicated their willingness to speak with an independent investigator.

The investigation was to start on December 1st, with a targeted completion date of March 31, 1995. The budgeted cost of this investigation was $75,000.

The third step was to be the offer of compensation to victims through an alternative dispute resolution process if liability was revealed through the investigation. Models of such processes in other jurisdictions were being examined.[11] The contemplated process was to bind both parties: the victims and the Province. The adjudicator was to be selected based on experience and independence. 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 to be free to pursue this matter through civil litigation. The reports of the adjudicator would be made public.

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.

---

[11]As early as the fall of 1993, Barbara Patton, an articling clerk at Justice, spoke with Thomas C. Marshall, Q.C., General Counsel with the Ministry of the Attorney General of Ontario. She requested information about cases in that Province where non-traditional responses had been considered.

In favouring this alternative approach, the Minister cited the costs of the New Brunswick and Newfoundland public inquiries, and the lengthy delays in compensating victims resulting from these inquiries. He stated that "the timetable for this three-step process should see us in a situation where compensation negotiations with victims can start approximately six months after this process begins." He advised that the expected costs involved in the investigation and the audit would be a fraction of the cost of a public inquiry. As well, the proposed approach, unlike a public inquiry, would not require victims to testify again in a public setting. Many of the Shelburne victims had already testified at the trial of Patrick MacDougall. The government wanted to provide those who had been gravely injured the opportunity to tell their stories without a public spectacle that would re-victimize them.

The Leader of the Opposition, Terence Donahoe, responded to the Minister's announcement with the following words: "Overall, I am absolutely delighted and I say sincerely, I applaud the Minister for proceeding in the fashion he has." At the same time, he expressed some concerns. He was worried that the allotted time frame might not allow the investigators sufficient time to perform their tasks. He also offered that "we may be selling ourselves short in terms of having a full, complete and total analysis of the events if we do not have those who are conducting the investigations able to compel the attendance of a witness or witnesses as required."

The Leader of the New Democratic Party, Alexa McDonough, also applauded the Minister's statement and the direction he took. She said "the general thrust of the Minister's announcement is to be welcomed. It seems to me it is sensitive, it has due regard for the range of matters that need to be addressed in public policy, as well as in terms of personal compensation." She expressed some concern over the Minister's "pre-occupation ... with cost-effectiveness," but she also declined to reject out of hand the suggested alternatives to a public inquiry. However, the following day she said that the Government's response had unleashed a number of very angry phone calls from victims and their lawyers "who have experienced to date nothing but total obstructionism from this Government in regard to claims for compensation that they have already tried to make." She suggested that the victims could have no confidence in the sincerity of the Government when it had used "every kind of delaying tactic, stalling tactic and attempt possible to frustrate the bid for justice that has been launched by some victims already."

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 DCS, as well as an examination of the Cesar Lalo case. (Lalo was a probation officer who had been convicted of sexual offences against young persons under his supervision. Although he did not work in a residential facility, recent media reports had cast suspicion on the way the matter was handled by the Government once allegations of sexual misconduct on Lalo's part became known.[12])

The Minister also informed the House that he had appointed Ross Dawson to conduct an operational review of centres operated by the Department of Community Services. The Minister said:

> I wish to advise the members of the House that my department has asked Mr. Ross Dawson, an internationally-recognized expert in the development and provision of child abuse services, to conduct a full operational review of the Nova Scotia Residential Centre. Mr. Dawson's review will be much broader in scope than an examination of the procedures in place to ensure the safety and security of the residents. It will include a review of the current practices and procedures at the centre to ensure an appropriate standard of care is being provided. As part of his review, Mr. Dawson will also examine the policies and procedures of the Nova Scotia Youth Training centre with particular emphasis on the safety and security of the residents.

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. He noted that Mr. Stratton had recently chaired a review panel which examined allegations of abuse at the reformatory in Kingsclear, New Brunswick, leading to the establishment of the Miller Inquiry into those allegations. Mr. Stratton would retain and direct qualified and experienced investigators.

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. Due to the expanded nature of the investigation, the report was now expected by June 30, 1995. The budget was increased to $140,000. Mr. Stratton would take such measures as he felt necessary to protect the privacy of the victims.

---

[12]Dr. Smith further advised the House that, contrary to media reports, immediately upon hearing rumours of a possible criminal investigation into Lalo, the Department of Justice contacted the RCMP to confirm that such an investigation was underway. Once this was confirmed, the Department carried out its own investigation that resulted in Lalo being assigned new duties and, within approximately four months, his employment terminated. The termination was grieved, and ultimately there was agreement to accept his resignation.

Mr. Stratton asked the Minister to point out that "the success of this innovative process will require the cooperation of all those people who were, or are, involved in any way." The Minister assured Mr. Stratton of the Government's complete cooperation and expressed his confidence that others will be equally cooperative. The Minister concluded that "[t]his plan, of course, leaves us with the option of proceeding with a public inquiry, should that prove necessary."

Mr. Donahoe welcomed the breadth of the new Terms of Reference, but expressed concern that the Minister might have been better advised to confer upon Mr. Stratton powers under the *Public Inquiries Act,* including the power to subpoena and compel the attendance of witnesses. He questioned whether some individuals who would surely be found to have been involved in some of these matters were likely to cooperate. The Government's approach, he said, "may prove to, almost inevitably, lead us to the situation where a great deal of information will be gathered, but that a conclusion may well have to be reached as was the case in the Kingsclear situation, where a very difficult, protracted and contentious review of this kind was then, in fact, followed by a full scale inquiry."[13]

Ms. McDonough also expressed her lack of faith in the sufficiency of these procedures and the powers of Mr. Stratton in the face of "reluctance to fully cooperate, because of people who will surely incriminate themselves or be in a position of pitting themselves against others, in some cases others under whom they have served in previous or current employment situations." She did not foresee how Mr. Stratton's task could be completed without a public inquiry. Indeed, she reflected that the Government may have created a situation that will be more costly, even more time consuming and even less likely to protect the interests and privacy of the victims.

Ms. Samuels-Stewart's 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*, was made public on March 19, 1995. It is discussed in detail in Chapter IV.

On June 30, 1995, Mr. Stratton submitted his report to the Minister of Justice. It is dealt with at length in Chapter V.

---

[13]The review referred to by Mr. Donahoe was conducted by a three person committee composed of the Honourable Stuart G. Stratton, Q.C., Wade McLaughlin, then Dean of the New Brunswick Law School, and Harry Nason, Secretary to the Executive Council. It was given the responsibility to prepare a report on whether there were reasonable grounds to believe that government employees failed to take appropriate action. It met over a period of five weeks and filed a report on November 12, 1992, recommending a public inquiry.

4. ANALYSIS

Much of my evaluation of the Government's three-pronged response will be found in subsequent chapters, where the Samuels-Stewart audit (Chapter IV), the Stratton investigation (Chapter V), and the creation and implementation of the Compensation Program (Chapters VI to XII) are described in detail. However, some early comments are warranted here.

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 DCS 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.

In designing the investigation to be conducted by Mr. Stratton, the Government was obviously seeking to avoid resort to a public inquiry. This may have been understandable, given the Government's perception that public inquiries elsewhere into institutional abuse were expensive, time consuming and unnecessarily delayed the compensation of true victims of abuse. However, these very attributes reflect, in part, that findings of credibility cannot accurately and fairly be made without certain procedural safeguards – some of which are time-consuming and costly. Sometimes, justice requires no less. The September 1994 memorandum to P&P contemplated a communications strategy that would stress that a public inquiry's main function, establishing responsibility, was unnecessary since the Government was prepared to accept responsibility "up front." But responsibility for what? The suggestion that, before the extent of abuse and the involvement of senior management had been determined, the Government would accept some sort of open-ended responsibility may have foreshadowed the later design of a Compensation Program that too readily was prepared to accept abuse allegations without meaningful verification.

None of this is to say that the Government was compelled to establish a public inquiry. I later discuss other more nuanced options than those adopted by Nova Scotia. For instance, the Government could have moved immediately to a compensation regime for those shown to be true victims by the criminal process. As for other claims, the Government might have simply allowed the Stratton investigation to collect evidence to assist it in designing its further response, recognizing the investigation's inability to make contested findings of fact. Or it might have dispensed with such an investigation altogether in favour of reliance upon further criminal or disciplinary proceedings or a true arbitration process that was procedurally fair to all interested parties.

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. As well, there appears to have been little or no consideration given to the implications of the Stratton investigation upon any future police investigation. Indeed, there is no indication that the RCMP was consulted on the impact of the Government's three-pronged response on its ability to further investigate criminality. This theme is revisited when I later discuss Mr. Stratton's and the Government's commitment to allow complainants to decide whether their statements would be provided to the police.

Similarly, there appears to have been little or no consideration given, when the Stratton investigation was formulated, as to how it would interrelate with future disciplinary proceedings against current employees or management. Put simply, 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.

It is also surprising (as earlier noted) that a clear distinction was never drawn in the formulation of the Government strategy between claims already found to be valid within the criminal process and other claims. From the outset, these situations should not have been lumped together. Almost invariably, where criminal liability has been found beyond a reasonable doubt, the facts pertaining to the abuse itself need not be re-investigated. The facts are known. The three options developed for Cabinet's consideration failed to articulate a strategy that drew this important distinction.

One has to question generally how the various options were presented to the Government. For example, Option I – 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 Option I 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. Furthermore, while investigations play an important part in the administration of justice, in and of themselves they are inadequate to address issues of public accountability or to make definitive findings of fact.