VI

The Origin of the Compensation Program

1. BACKGROUND

As outlined in Chapter III, on November 2, 1994, the Minister of Justice announced that the Government would be prepared to offer compensation through an alternative dispute resolution ("ADR") process "if liability is revealed through the [Stratton] investigation."

In December 1994, Douglas J. Keefe, then Executive Director, Legal Services, of the Department of Justice ("Justice"), asked his staff to prepare for the Minister a short outline of the available options for an ADR process pertaining to the sexual abuse cases. This was done in a memorandum dated January 6, 1995, prepared by Alison Scott, a lawyer in the Department. It described the processes available both within and outside the judicial system. It was provided to Mr. Keefe and to D. William MacDonald, Q.C., Deputy Minister of Justice.[1]

Ms. Scott wrote that, outside the judicial system, the parties could adopt whatever arrangements they wanted to resolve disputes. These included mediation and binding or non-binding arbitration. Different combinations of alternatives could be used at different stages. For example, there could be binding arbitration for liability issues, but mediation to resolve the amount of damages. If mediation failed, the parties could agree to judicial intervention.

Scott noted that all aspects of ADR could be the subject of negotiation between the parties: whether arbitration or mediation would be adopted, who would conduct the mediation or arbitration, when and where it would take place, which issues would be subject to which process, what rights of appeal or other access to the courts would be available.

Scott referred to a model adopted in Ontario which had involved approximately 400 claimants participating in an arbitration process, with an agreed upon ceiling on damages. Those who participated in the process had agreed to give up their right to litigate in exchange for a

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[1]Mr. MacDonald replaced Gordon Gillis as Deputy Minister of Justice in January 1995. Mr. Gillis moved to the Department of Labour as Deputy Minister. He remained there until April 1, 1996, when he became Deputy Minister of the Department of Community Services. He rejoined the Department of Justice as Deputy Minister in June 1997.

private arbitration process. If the claim was not substantiated, no award was made. If the claim was substantiated and the claimant proved damages, the damages ranged from a nominal amount to the ceiling amount.[2]

Scott advised that the Province could offer to use one form of ADR for all litigants, or it could tailor the ADR process to particular circumstances. She noted, for example, that some plaintiffs had already testified in Patrick MacDougall's criminal prosecution, and that their evidence had been accepted as true by the Court and had formed the basis for MacDougall's convictions. She further suggested that if the Province could determine liability from the Stratton investigation and Report, it could concede liability and either arbitrate or mediate the issue of damages with a ceiling. Where there was doubt about liability, the parties could agree to arbitrate or mediate both liability and damages or, if no agreement was reached, proceed to litigation.

In April 1995, Ms. Scott and Paula Simon, Director of the Victim Services Division, Department of Justice, attended a conference in Toronto on sexual abuse in institutional settings. After their return, Keefe advised the Minister of Justice in a memorandum dated April 28, 1995, that officials in the Department would like to emulate the models established in Ontario to resolve the St. John's/St. Joseph's and Grandview claims of abuse. He noted that the program in Ontario for St. John's/St. Joseph's had processed 383 claims, and that 600 additional claims had been made. He understood that Grandview had 500 claims or more. He said the "validation rate" for claims was 97%.[3] *As I later discuss, some of those involved in the design and implementation of the Nova Scotia Compensation Program failed to appreciate that a validation rate does not represent some immutable truth about the percentage of individuals who can be expected to make false claims, regardless of the design of the program.*

In his memorandum, Keefe noted that, at this point, there were 70 claims of abuse reported to Mr. Stratton. He suggested that three times that many claimants could come forward during the compensation process if the Ontario experience held true in Nova Scotia. He expected the validation rate would be nearly 100%. Keefe recommended that a working group be established to: 1. develop a strategy to deal with the anticipated compensation process following the release of the Stratton Report, 2. determine whether all cases of alleged abuse, including foster care situations, ought to be included in this process, 3. develop an immediate response to the Stratton Report, and 4. draft a memorandum to the Policy and Planning Committee of Cabinet ("P&P").

A working group was subsequently set up consisting of Justice employees Keefe, Scott, Simon, Fred Honsberger, Brian Norton and Peter Spurway. Its work appears to have been spearheaded by Scott and Simon.

In early June 1995, Simon spent three days in Toronto with staff of the Ontario Ministry

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[2]All of the Ontario compensation programs are discussed later in this Report.

[3]Though "validation rate" is not explained in the memorandum, it would appear to refer to the percentage of claims found to be valid for the purposes of compensation under the programs.

of the Attorney General, researching the St. John's/St. Joseph's and Grandview ADR models. On June 26, 1995, Thomas Marshall, Q.C., senior counsel with the Ontario Ministry, came to Nova Scotia to present the Ontario models to the Justice Coordinating Committee of Justice.[4] The next day he presented the models to the Nova Scotia Cabinet.

Meanwhile, Simon and Scott prepared a detailed draft memorandum, dated June 22, 1995. With some minor changes in wording, it was signed by the Ministers of Justice and Community Services on June 30, the date the Stratton Report was released. The memorandum was considered by Cabinet on July 6.[5]

The memorandum referred critically to the approaches taken in Newfoundland and New Brunswick to reports of institutional abuse of children in provincial settings. It was complimentary of the approach taken by Ontario in the St. John's/St. Joseph's and Grandview matters. It identified four options and the likely cost of each. The options presented were based on the following assumptions:

- There were indications from Mr. Stratton that he had identified approximately 85 victims;
- Given the experience in other jurisdictions, the number of victims might at least double once the government began to compensate;
- There was no easy or inexpensive solution to the issue. Whatever option was chosen would take substantial resources and time;
- Some victims might choose to litigate despite the offer of ADR.

The four options were:

I Adopt an ADR process, wherein victims would participate in negotiating the terms of settlement. This would involve a time frame of two years and eight months, and an estimated cost of $13,157,000.

II Determine the compensation package unilaterally (the New Brunswick model). This would have a time frame of three years and a likely cost of between $10.8 million and $21.1 million.

III Remain silent and deal only with the lawsuits as they proceed through court. The time frame for this option was considered to be five years with a likely cost of

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[4]This is a committee of senior managers of the Department.

[5]A copy of this memorandum is included as Appendix "E".

$11.395 million.

IV Litigate the first few claims and settle the rest based on court rulings. The estimated time frame was three years with a likely cost of $22.05 million.

In considering these options, the two Ministers – of Justice and Community Services – argued that one of the most important issues for the victims would be their need to feel heard by the Government. They said the ADR process would recognize this and, in fact, would engage the victims in the process by allowing them to participate in the negotiation of an agreement that would attempt to meet their needs. It was expected that there would be complaints regardless of the process selected. However, the ADR process gave the Government "its best defence": it would be hard to find fault, given that the Government was attempting to have an open, honest dialogue to reach an agreement that met all the parties' needs. Accordingly, the Ministers recommended that the Government accept social and moral responsibility for the abuse, adopt Option I, and move forward to assist victims of institutional abuse by:

- Agreeing in principle to ADR, understanding the potential costs;
- Establishing an Institutional Abuse Unit for a three-year period with the resources necessary to undertake the ADR process and manage the claims;
- Providing immediate counselling to victims;
- Immediately retaining the Family Service Association to administer the interim counselling agreements and commence an assessment of the likelihood of the victims being willing and able to structure themselves into a group; and
- Authorizing a budget allocation to Justice to cover the anticipated cost ($13.157 million).

The presentation materials prepared on overheads for Cabinet made reference to Mr. Stratton's "findings" that there were "89 identified victims" and more than "27 perpetrators." One overhead summarized Mr. Stratton's conclusions that:

- By 1975, staff and management at the institutions and in Community Services' Head Office knew of abuse;
- Ministers responsible failed to provide the necessary resources to the institutions;
- No public inquiry was needed;
- There was a high moral obligation on the part of the Government to assist the victims;

- The Nova Scotia response should be guided by experiences in other jurisdictions.

ADR was explained to Cabinet as being a negotiation process wherein the parties (namely, the victims' group and the Government) would engage in a series of meetings to reach an agreement "respecting a decision-making mechanism and outcomes." It was indicated that the decision-making would be done by an adjudicator based upon evidence under oath, validation, and outcomes with agreed-upon parameters. ADR was favoured because: 1. it would engage the victims in the process and give them some control, 2. it would create a healing package that would meet the victims' needs, 3. it would limit legal costs, 4. the victims wanted confidentiality, and 5. victims would have quick access to counselling services.

It was proposed that victims would be organized into an advocacy group by March 31, 1996, and that organizational and legal skills would be provided to the group. Negotiations would then begin between the Government, represented by a chief negotiator and legal counsel, and the victims, represented by legal counsel and one or two individuals from the advocacy group. This negotiation phase would be completed by March 1997. There would then be an adjudication phase wherein victim claim files would be assessed by an adjudicator who would determine the award and whose decision would be final. This adjudicative phase would be completed by March 1998.

Cabinet approved Option I, the ADR process.

On July 13, 1995, letters were sent to counsel representing plaintiffs and to individuals who had spoken to Mr. Stratton, advising them that the Minister of Justice would make an announcement on July 20th. They were invited to attend a meeting on that date to discuss compensation for victims. The meeting took place as scheduled. The Deputy Minister outlined the details of the Government's plan to compensate victims of abuse through an ADR process.

On July 17, 1995, an agreement for funding was signed by the Family Services Association ("FSA") and the Minister of Justice. In this document, FSA agreed to develop and administer an interim counselling service for anyone who was abused in the institutions covered by the Stratton Report, and for the victims of Cesar Lalo, the probation officer referred to in previous chapters. FSA also agreed to assess the viability of the victims forming one or more groups (for the purpose of negotiating appropriate compensation), to assist with the formation of such groups, and then to provide them with resources. The agreement stipulated that FSA, while independent, shall be financially accountable. It was to be the front-line agency that would have first contact with unrepresented potential claimants.

2. THE ANNOUNCEMENT OF JULY 20, 1995

On July 20, 1995, the Minister of Justice held a press conference at which he outlined the ADR option that had been approved by Cabinet. A press release was also issued, in which the

Minister stated:

> Mr. Justice Stratton's investigation was just what the Government had hoped it would be – far-reaching, exhaustive, and respectful of the right to privacy of the victims. His findings – although not a total surprise, given the allegations and events at similar institutions in other jurisdictions – nevertheless, were shocking.
>
> There is no question that former residents of three provincially-operated institutions – the Nova Scotia School for Boys, the Nova Scotia School for Girls and the Nova Scotia Youth Training Centre – were victims of abuse at the hands of some of the people entrusted with their care.
>
> It is the opinion of the Government that the province of Nova Scotia has a special obligation – a moral responsibility – to the men and women who, as children, suffered abuse while in the care of publicly-operated institutions.
>
> The process I am announcing today cannot undo past wrongs. Rather, it is intended to help victims recover and rebuild lives that were damaged by the abhorrent and heinous acts of a few people, who grossly betrayed the trust they were given.
>
> The province undertook an innovative process in investigating these incidents. It was a process that first and foremost respected the rights of those individuals who had suffered. It respected their right to be heard, and their right to privacy.

The Minister then announced the components of the third phase of the Government's response:

- Counselling services for victims, already in place, would be expanded. The Family Services Association had been retained to provide interim counselling 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 counselling 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.[6] 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

[6]Mr. Stratton actually only found abuse at three of these institutions.

agreement regarding compensation and other assistance for victims of abuse would be one objective of those discussions. Determining compensation and other assistance for victims would be done through negotiation and adjudication. An advantage of the ADR process was that those who had been injured would be "at the table" when compensation and other responses to their victimization were put together. They would help determine the shape of that package;

- 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;

- This process would be focussed on the needs of the injured parties. The ADR model was designed to help those in need quickly and to ensure that public resources would benefit the victims, rather than be consumed by expensive legal processes. The Government's response throughout reflected an attempt to proceed always with the interests of those who were victimized in the forefront. This process was sensitive to their needs. It protected their privacy, offered immediate counselling assistance and would result in equitable compensation;

- 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.

The Minister of Justice noted that the Government had first focussed on safeguarding present residents. There had been dramatic improvements in staff training and procedures in the years since the incidents that Mr. Stratton investigated had occurred. The Departments of Justice, Education, Community Services and Health were going to examine all policies and procedures

concerning the protection of children in provincial care. Current procedures at provincial facilities for children had already been the subject of two independent studies. Viki Samuels-Stewart's examination of Waterville and Shelburne had resulted in changed procedures at both institutions. Ross Dawson's report on current procedures at the Nova Scotia Youth Training Centre and the Nova Scotia Residential Centre was expected any day.

3. ANALYSIS

This section of the Report describes the internal discussions that preceded the Minister of Justice's announcement on July 20, 1995 that the ADR process would go forward, in the aftermath of the Stratton Report. Some of my analysis here repeats, and builds upon, comments I made earlier when evaluating that Report.

*It is clear that the Government was largely committed to an ADR process **before** Mr. Stratton even began his work. The previous year, the Government had publicly announced its three-pronged response to reports of institutional abuse, which included an ADR process. Proceeding with an ADR process was said to be contingent upon a finding of "liability" by Mr. Stratton. However, the Government proceeded with the process even though, to be precise, Mr. Stratton did not find liability either on the part of individual employees or on the part of Government. Of course, he was not in a position to do so, given his mandate and the way in which his investigation was conducted. He did, however, articulate the Government's moral responsibility to provide redress for abuse perpetrated by its employees.*

*It is probably more accurate to say that the Government intended to proceed with an ADR process if Mr. Stratton found that **abuse** had occurred. However, it was inevitable that Mr. Stratton would find that physical and sexual abuse had occurred. Such findings had already been made in the criminal courtroom. As well, there was general agreement among former employees and residents that physical force had been used in the past by employees to control residents, although the nature and extent of that force remained in dispute.*

Beyond those conclusions – which were already known to Government – Mr. Stratton could not find abuse unless he resolved issues of credibility. His Report does appear to do just that but, as I earlier noted, both his mandate and the form of his investigation prevented him from fairly and accurately doing so. Indeed, these limitations were so fundamental that no general conclusions as to the residents' allegations should have been drawn by the Government. Nonetheless, the Government used Mr. Stratton's Report to confirm that widespread abuse had occurred, and to support the adoption of an ADR process.[7]

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,

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[7]The criticism here is not so much that ADR was a bad idea, but rather that the Government's decision-making process was flawed.

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. Ms. Scott's memorandum in January 1995 contemplated a validation process for disputed claims and noted that the process could be tailored to particular circumstances. She hinted that liability could be conceded in relation to plaintiffs whose evidence had been accepted in MacDougall's criminal prosecution. Implicit was a recognition that liability respecting other claims might have to be disputed. 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.

As will be developed throughout this Report, I am not satisfied that Cabinet always had a full and accurate presentation of the available options. However well-intentioned, the presentations to Cabinet at times virtually compelled rejection of alternatives to the ADR program that were worthy of greater consideration.

For example, Ms. Simon's July 1995 memorandum to Cabinet presented four options and their estimated costs. The cost of Option III, litigating all cases, was anticipated to be $11.395 million (based upon $145,000 per case for two lawyers, a secretary, a paralegal, an articling clerk and disbursements). This estimate ignored the high probability that the Province would settle those cases (involving 15 complainants) in which convictions had already been entered. Option IV, litigating the first few claims and settling the rest based on court rulings, was expected to cost approximately double the amount of Option III, an estimate which, in my view, was unsupportable.

Furthermore, recognizing that in July 1995 Cabinet was only approving an ADR process that had yet to be negotiated, there nonetheless appeared to be little direction or consideration given to what impact this process might have on parallel disciplinary or criminal proceedings or on accused employees. This was a pattern which repeated itself over time as the ADR program was designed and implemented. As I later note, it had a significant impact on the ultimate success (or lack thereof) of the Compensation Program.

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. I further consider this issue in a subsequent chapter.

4. NEGOTIATIONS

On August 11, 1995, a group of 15 lawyers, representing 65 claimants, rejected the Government's offer to negotiate with a *single* lawyer representing an advocacy group of claimants. They informed the Minister of Justice that they – the lawyers – had formed an "advocacy group" and were prepared to enter collectively into discussions with the Government to determine an appropriate compensation mechanism. They sought a convenient date and time to begin discussions.

Alison Scott responded on behalf of the Department of Justice by letter dated September 21, 1995. She advised that the Province intended to honour its commitment to negotiate a framework with a lawyer representing an advocacy group to be formed with FSA's assistance. Negotiating with 15 lawyers would detract from the announced process. Therefore, the Province would not be complying with the request to commence discussions.

Scott's letter sparked highly critical correspondence from counsel in the group representing claimants. They asserted that the Government's rejection of their proposal to negotiate was injurious to victims, and demonstrated a callous disregard for the injuries already suffered by victims. Derrick Kimball, counsel for a number of claimants, advised the Minister of Justice that they would make the matter a public issue and consider jointly advocating a full public inquiry of the events and the Government's conduct if the Government did not change its position by September 27th.

The Minister of Justice responded on September 27th, confirming the Government's commitment to its earlier announced process. It was said to be based on the Grandview experience, which had proven successful in Ontario.

This, in turn, led to a press release by Mr. Kimball dated September 28th, stating that the Minister of Justice had "refused to negotiate a compensation package with lawyers representing 93 survivors of abuse suffered while residents of provincial institutions as young children." Mr. Kimball added:

> I am shocked that the Minister of Justice of this Province would refuse to acknowledge that these victims of the most horrendous and dehumanizing abuse imaginable, would be denied their right to legal representation of their choice in dealing with the Province of Nova Scotia. Bill Gillis admits the Province has a moral responsibility to compensate these innocent victims of abuse, but refuses to negotiate with their representatives ... Bill Gillis won't negotiate with these people because they have the temerity to have their own lawyers. This demonstrates a shocking lack of fairness on the part of the Minister of Justice.

On October 17, 1995, the Minister of Justice issued a press release, providing a progress report on the Government's response to the Stratton Report. He referred to the announcement of July 20th, and the acceptance of "moral responsibility" by the Province to help victims of abuse. He also acknowledged that the Government had an obligation to keep people informed regarding the progress being made on the Government's response to the Stratton Report. He advised that, to date, 134 individuals had contacted FSA regarding the ADR process. Of that number, 69 had indicated their desire to participate in the process. FSA had advised the Government that 76 individuals had been referred to counselling services.

In July 1995, Paula Simon was appointed Manager of the Compensation for Survivors of Institutional Abuse Program (the "Compensation Program"). In response to the position being voiced by counsel for claimants, she wrote detailed letters to the counsel involved, explaining the role of FSA and the commitment of the Government to assist survivors of abuse and work toward an ADR process that adequately dealt with the interests of survivors. Simon also met personally with a number of these counsel. It was suggested to her that claimants be allowed to have funded counsel represent them both in the negotiation of the framework agreement and in the arbitration of the claims for compensation.

A meeting was held on November 28, 1995, involving officials from Justice and FSA. Materials prepared for the meeting by Justice defined the "parties" having an interest in the formulation of a compensation program to be: the Government, survivors, lawyers for the survivors, FSA, the public and the media; employees – the individuals accused of abuse – were not mentioned. The materials indicated that there were now 21 lawyers representing 109 clients. FSA had more than 165 clients.

At the meeting, Dr. Elsie Blake, President of FSA, expressed her opinion that, due to a variety of factors, FSA was not likely to be successful in forming one advocacy group to represent all the interests of the various claimants. It was recommended that the Government meet with FSA and the lawyers for the claimants in an effort to negotiate a framework agreement. The process would then move to step two, wherein claimants would have the option to either have a

lawyer present their claim or have a compensation consultant (a provincial staff employee) gather the necessary information, complete the file and appear before the adjudicator. If the award was unacceptable, the claimant could still proceed to litigation. It was also recommended that, if no framework agreement could be negotiated with counsel for the claimants, the above proposal be put to claimants directly. It was believed that most claimants would accept the proposal, regardless of the views of their counsel.

This meeting led to a Government decision to abandon its requirement that the framework agreement be negotiated with one lawyer representing an advocacy group of claimants. On December 4, 1995, counsel for claimants were advised that the Government was prepared to negotiate with multiple counsel, as well as a lawyer to be retained by FSA to provide representation for those claimants who did not wish to retain their own counsel or who had not yet done so. It was suggested that a meeting could be held near the end of January 1996.

On January 29, 1996, FSA retained Anne Derrick to represent survivors[8] of institutional abuse who had not yet retained, or had discharged, counsel, but who wanted to participate in the compensation process.

Ms. Simon and counsel for the claimants agreed to conduct negotiations commencing in February 1996. Two co-facilitators, J. Mark McCrae and Francine MacIntyre, were selected to assist in the process. Both were lawyers with recognized expertise in mediation and arbitration.

Government officials met on January 18 and 19 to prepare for the negotiations. These meetings were designed to be an exercise in team development, to educate the participants about interest-based negotiations, and to update them on recent developments. Those in attendance attempted to identify the interests of the survivors and the Government. The latter's interests were identified as follows:

- Fair compensation
- Meet victims' needs
- Spend as little as necessary
- Put money into survivors' pockets
- Litigate high end or complex cases
- Quick resolution
- Avoid things that make claimants distrustful of the Government
- Be a good listener
- Build positive relationships – be responsive/sympathetic
- Avoid litigation
- Avoid bad press
- Avoid a public inquiry

The Government negotiation team's goals for the first day of the upcoming negotiations

[8] I use the term "survivors" to reflect the language employed by the parties at the time. I am mindful, however, of the issues associated with this term, as discussed in Chapter I.

were to know all the issues, obtain a 'wish list' from claimants, determine their level of commitment to the process, estimate how long the process would take, and ascertain what kind of result would likely emerge from the negotiations. In the detailed agenda documents (which reflected what was contained in the materials prepared in November), the parties to be considered were identified as follows:

- Government
- Survivors
- The survivors' lawyers
- Family Services Association
- Public
- Media

The focus on these parties and their interests was confirmed in follow-up notes distributed on January 22, 1996. The documentation does not indicate that any role was considered for former and current employees accused of abuse. In interviews with my staff, the Government negotiators confirmed that the interests of employees were not considered in the run-up to, or during, the negotiation process.

The Province's negotiating team was headed by Ms. Simon. It included Alison Scott, from Justice, Amy Parker and Mark Covan, then relatively junior lawyers with Justice, and an advisor, Heather de Berdt Romilly, Senior Policy Analyst with the Department of Human Resources.[9]

Initially, negotiations were scheduled for three days, February 3, 10, and 17, 1996. Ultimately, seven meetings were held. The last two were primarily devoted to legal fees and the timing of payment to lawyers.

In describing the negotiations, I have relied upon the interviews conducted by my staff with all members of the Government's negotiating team, as well as with two of the counsel for the claimants, Anne Derrick and John McKiggan. Also available to me was a mass of documents, including: 1. agendas of meetings, 2. informal minutes maintained by Justice, 3. correspondence amongst counsel for claimants, the Government and the co-facilitators, 4. multiple drafts of a framework agreement, and 5. notes of departmental meetings and briefings. It is unnecessary to describe each of the many positions advanced during the negotiations. I am, however, able to reconstruct the important features of the negotiations.

At the first meeting on February 3, 1996, 24 claimants' counsel were present. Three others could not attend. These 27 counsel represented at least 212 claimants. In keeping with the Government's stated goal that the process be 'survivor driven,' its negotiators asked claimants'

[9]Ms. De Berdt Romilly is a lawyer with an interest and expertise in mediation and arbitration. Although she did not take an active part in negotiations, she attended the meetings and provided advice to the Government team.

counsel to provide them with their 'wish list.' Claimants' counsel presented a draft of a compensation package that was stated to be based loosely on the Grandview agreement. The key features of this preliminary document were:

- Victims of physical and/or sexual abuse were to be eligible for compensation where it was established that the abuse occurred;

- The Government would have 30 days to respond to a demand for compensation. If the parties could not agree, then the claimant could either refer the claim to binding arbitration or pursue litigation;

- The arbitrator would have jurisdiction to decide all questions of fact, in particular whether physical or sexual assault had occurred and the appropriate quantum of damages. There would be a list of 20 arbitrators (lawyers or retired judges) with the claimant having the right to select the arbitrator from the list. Monetary compensation would be based on the seriousness of the harm caused;

- Any amount left over from the $10 million the Government had set aside for survivors of institutional abuse would be divided pro rata among compensated survivors and proportioned to the awards received.

Notes made by the Government negotiating team on February 6, 1996, identified the following as issues that needed to be addressed:

Compensation

Does it include physical, psychological and sexual abuse?

What constitutes abuse (is racism abuse)?

What institutions would be covered by the framework agreement?

Is abuse by other residents compensable?

Abuse of authority.

Will compensation include aggravated or punitive damages?

Validating Claims

How to establish facts/claims – arbitration, negotiation or mediation.

Arbitrators to make decisions.

Who will be on the list of arbitrators.

Access to Records (Institutional and Medical)

Claimants will need access to evidence and documents to prepare their claims.

The role of expert's reports.

Payment for medical reports to be used in the claim process.

The injury to be compensated would necessarily be connected to abuse at an institution.

Release.

In preparation for the second meeting, notations made by the Government officials reflect that the status of the criminal investigation and the investigation being conducted by the Internal Investigations Unit ("IIU") were to be discussed.[10] The Government was to propose that no validation of a claim would be needed if there had been a related criminal conviction. Otherwise, the Government would accept statements taken by the Stratton investigators (the Murphys) or the IIU. The Government would have to confirm that the claimant and employee attended the institution at the same time, and might also have to look for medical records. However, 30 days was an acceptable time frame in which to respond.

On February 10, 1996, the second meeting was held. The unofficial minutes kept by the Government negotiating team reveal that the following discussions took place at that meeting:

- There were now 309 claimants, with eight counsel who had not responded to inquiries as to the number of clients they represented.

- The Government would not be prepared to go higher than a cap of $120,000 compensation. However, counselling would be in addition to that amount. The cap was based upon a proposed summary validation process and the amounts conferred by compensation programs in other jurisdictions. In addition, compensation would be paid for both sexual and physical abuse.

- The Government wanted to have a quick process. If claimants wanted to have higher amounts of compensation, they would still have the option of pursuing their claims in court.

- The Government said that it was looking for a summary validation process. If there was a criminal conviction, no more validation would be necessary. In addition, the Government would be willing to accept the Murphy reports or the IIU reports.

[10]This was a unit created to investigate complaints against current employees. The creation and early operation of the IIU is described later in this chapter.

- There was discussion as to what would be involved in arbitration. Would it be a mini-trial or a file review by an adjudicator without a hearing?

- The Government team was aware that the IIU had collected a lot of records unavailable to Mr. Stratton, and so informed claimants' counsel.

- Claimants' counsel were concerned over the proposed $15,000 cap on physical abuse. They proposed a compensation matrix with a cap of $150,000 for sexual abuse and $60,000 for physical abuse, if there were long term or psychological injuries.

- Claimants' counsel believed that the majority of claims would be for physical abuse. In contrast, the Government negotiators stated that, based on information from the Murphys, 75% of the claimants alleged sexual abuse.

The fact that there were now at least 309 identified individuals who would be seeking compensation was going to have a significant impact on an earlier budget based on 170 potential claimants. Ms. Simon drafted an options paper for the Deputy Minister, dated February 13, 1996. In it, she set out the factors that were at play in reaching the decision to offer an ADR process for survivors of abuse:

- The Government should move quickly to respond to survivors' needs;

- The litigation process would re-victimize survivors;

- The ADR process would give survivors an opportunity to tell Government how their needs could best be met; and

- Quick action might lessen the call for a public inquiry.

Simon expected the number of identified survivors to grow. While the extent of anticipated growth was difficult to estimate, she presented cost projections based upon 500 "clients." She then identified four options:

I Continue with the ADR process (based upon a $120,000 cap with an estimated average award of $60,000) and increase the budget allocation;

II Terminate the ADR process and offer a cap of $60,000, as was imposed for Grandview. This would reduce the budget estimate from 30 million to 15 million dollars;

III Take the present allocation of 12 million dollars and divide it between the survivors (thereby giving each survivor $25,000 immediately);[11] and

[11]Cabinet had approved a budget of $13.157 million. It is unclear why Ms. Simon referred to an allocation of $12 million.

IV Discontinue negotiations and litigate claims.

Simon recommended Option I. She concluded: "it is my opinion that we are too far into this process to back away now without causing serious damage to the survivors and to the perceived good will of Government."

Given the increase in the expected number of claimants, the Minister decided to seek further instructions from Cabinet. In order for Cabinet to make an informed decision, Simon requested that the parties continue with the planned meeting of February 17th. In particular, the input of counsel for the claimants would be sought on the development of the compensation matrix and where their clients would fit within it.

By the meeting of February 17th, Government negotiators understood that 317 claimants had been identified. In addition, eight or nine counsel had not provided them with client numbers. Ms. Derrick advised us that Government officials were cautioned that the numbers of claimants could easily exceed 1,000. Ms. Simon acknowledged that the Government team did not know where the numbers would end up, but made the assumption, given the amount of publicity about the program, that the vast majority of individuals who had been victimized had come forward by that time.

A further meeting was scheduled for February 24th. Prior to that meeting, counsel for the claimants revised their February 3rd draft framework agreement. The new draft provided for a three-step process of negotiation, mediation, and arbitration. The Province would have 30 days to respond to a claimant's demand. If the parties had not reached a negotiated agreement within 30 days of the initial demand, or such further time as the claimant might agree to, then the claimant could submit the claim for summary mediation, if the Province consented. Written materials would be filed by the parties. After hearing from the claimant and the Province through counsel or otherwise, a mediator would render a summary recommendation for settlement without reasons. The claimant would also have the option, either immediately after failed negotiations, or where the mediator's recommendation was not accepted by either party, to submit the matter to binding arbitration. The arbitrator would be required to adhere to strict time lines in holding a hearing and rendering a decision.

The unofficial minutes of the meeting reflect that the Government advised it would be able to respond to a demand within 30 days. However, it objected to a proposed model that included an arbitration hearing. The Government negotiators proposed a "simplistic" validation process wherein adjudicators would conduct binding file reviews that would not involve hearings. The Government would be prepared to rely on the Murphy statements. Counsel for the claimants supported arbitration, believing there would be some cases where the investigators may not be satisfied as to the truthfulness of the claim; the Government's proposed summary process would dispense with the usual testing of evidence. The Government negotiators took the position that, with only a couple of exceptions, they regarded the statements of abuse as true and did not, therefore, generally anticipate disputes over whether abuse occurred. The exceptions cited were

those cases where the alleged perpetrator or victim was not at the institution at the time. The Government was concerned that arbitration hearings would be time consuming and add to the costs of the process.[12]

Given the differences between claimants' counsel and the Government negotiators, the former took the position that, although they were participating in the process and might have to live with the terms imposed by Government, they were not parties to an agreement. Hence, a consensus was reached to call the governing document a Memorandum of Understanding ("MOU").

The next meeting date was set for April 3, 1996, to allow sufficient time for Cabinet to consider the matter. Ms. Simon advised the participants that the Government negotiating team would be making their own recommendations to Cabinet. These recommendations would take into account the positions developed in the meetings, but would not include the latest MOU draft submitted by claimants' counsel. It was agreed, however, that Ms. Derrick and Mr. McKiggan would draft a proposed description of the healing and restorative components of the program for inclusion in the MOU.

After the meeting, claimants' counsel circulated a revised Memorandum of Understanding that added a preamble and further terms to the document. Counsel for the claimants still proposed a three-step validation process of negotiation, mediation and binding arbitration. However, it was now provided that the arbitration hearing would not exceed three days in length. Derrick and McKiggan also wrote to Simon recommending counselling in the amount of $5,000 for every survivor, renewable as needed, to a maximum of $20,000. They further proposed that substance abuse treatment and crisis intervention be provided, and that the Government fund a professionally produced video of survivors' testimonials to honour their struggles, provide recognition of the wrongs done to them, and educate against such abuse occurring in the future. Alternatively, the Government could fund and facilitate the preparation of a public report containing testimonials from survivors.

On March 7, 1996, Chief Superintendent D. L. Bishop of the RCMP wrote to the Deputy Minister of Justice regarding the status of the police investigation into the allegations stemming from the Stratton Report. He indicated that the police had identified 410 alleged victims and 206 suspects. Those numbers were expected to increase as the investigation progressed – a process which Bishop estimated would take at least two years.

Ms. Simon and Ms. Scott prepared a memorandum for Cabinet, dated March 8, 1996. The memorandum advised that there were now 43 lawyers representing approximately 350 survivors. It described the degree of goodwill developed during the meetings with claimants' lawyers and lauded their demonstrated commitment to making the ADR process work for their clients. They said there was no question that there was a strong shared interest in quick resolution. The issue was described for Cabinet as follows:

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[12]Other non-monetary items were also discussed at the meeting, including the cut-off date for claims to be submitted.

The Government has made a number of public statements committing itself to the ADR process. The number of survivors coming forward has dramatically increased, thereby substantially increasing the resources needed to compensate the survivors. It is difficult to estimate precisely how many more survivors will come forward. However, the present cost projections are based upon 500 survivors, which will increase the budget estimate from $12 million to $33.3 million.

Cabinet's options were listed as these:

- Option I – continue with the ADR process presently under way and increase the budget allocation. This was said to involve a time frame of eight months, with a cost of $33.295 million;

- Option II – offer ADR, but make payments over time. This option was estimated to cost $50.63 million plus interest, and take five years;

- Option III – discontinue ADR and litigate claims. This option was estimated to cost $61.1 to $66 million, and take 5 or more years.

The Memorandum then made these recommendations:

- The Government should continue with the existing ADR process and allocate the necessary resources to compensate the survivors at a total estimated cost of $33.295 million (Option I);

- The Government should provide a public apology as well as a written apology to survivors;

- Survivors' awards should be exempt from income for the purpose of calculating social assistance benefits;

- The cut-off date for applications for compensation should be six months;

- The Government should fund the Family Service Association to administer the counselling program;

- A fund should be established for a crisis intervention help line for one year;

- The Government should fund the recording of survivor stories in a manner to be agreed upon by the parties;

- The Government should pay the survivors' legal costs based upon negotiated caps that will not exceed 10% of the compensation agreement.

The memorandum was later submitted to Cabinet by the Minister of Justice. The Deputy Minister also submitted an accompanying memorandum. In it, he said:

> I think it is important for this Government to compensate fairly for abuse that has occurred in the past. I think it is possible to reach an agreement with the lawyers representing victims if Cabinet approves the recommendations in the attached memorandum. If we are unable to resolve this in a satisfactory manner soon, I am concerned there will be significant negative comment in the press and negative editorial comment fuelled by the large number of lawyers and victims.

At a meeting on March 21, 1996, Cabinet adopted the recommendation to move forward with the ADR process and to compensate survivors as proposed. It must be noted that Cabinet had not been presented with any proposed MOU or with any final position as to the levels of compensation for individual claimants.

When Government negotiators and claimants' counsel next met on April 3, 1996, the Government presented a draft MOU. It provided, amongst other things, that survivors whose claims were determined to be valid either through negotiation or file review would be compensated for both sexual abuse and physical abuse perpetrated, condoned or directed by employees of the Province while the survivors were resident in the institutions. Disputes respecting the truth of the allegations of abuse or the quantum of compensation would be resolved either through negotiation or through the file review process. The Government was to respond to a demand within 45 days.

The unofficial minutes of the meeting reflect that counsel for the claimants were assured that the Government would have to have a concrete reason for doubting a claim. Such situations would be few in number. Generally, the Government would take the survivor's word that he or she had been abused. As a result, medical and psychiatric reports would be unnecessary. Although the Roseway Hospital had some medical records, the Government would not be testing claims (presumably against those records) to any great extent. Various other issues were also discussed, including the meaning of condonation, when a release had to be signed by a claimant, and the payment of legal fees incurred by claimants in initiating civil litigation, participating in the negotiations, and pursuing the compensation process contemplated by the MOU.

The sixth meeting was held on April 10, 1996. It dealt almost exclusively with the payment of legal fees. According to the unofficial minutes kept by the Government team, Ms. Simon stated that 10 hours was a reasonable limit for claimant legal fees incurred during the compensation process, given its summary nature. The minutes also record her commenting that if the Government proceeded with the proposed process, it would be very open to invalid claims. There would be a need to ensure that people coming into the process were telling the truth. She stated that the Government expected a lower percentage of invalidated claims than the three percent reported in Ontario. However, the minutes also indicate that Ms. Simon suggested "an onus need be placed on clients to be valid." *I am not convinced that these minutes, which appear to record somewhat inconsistent comments made by Ms. Simon, are entirely accurate. In some respects, they also do not appear to conform to comments made by Ms. Simon to my staff. It seems clear, from the totality of materials and witnesses available to me, that Ms. Simon was a*

strong proponent of the proposition that the vast majority of claims were valid and rigorous verification was not required.

The seventh and final meeting was held on April 20, 1996. The principal topics of discussion were legal fees and the timing of payments to the claimants' lawyers.

On May 2, 1996, Mr. McCrae and Ms. MacIntyre circulated the final version of the Memorandum of Understanding to the claimants' lawyers. As noted in their cover letter, a signature by counsel signified consent as to form only. Each claimant would decide individually whether or not to participate in the process set out in the MOU. The effective date of the agreement was June 17, 1996, with a cut-off date of December 18, 1996 for filing claims.

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 this apology:

> At this time, formally and publicly, I want to apologize to the victims. They were in no way responsible for what happened to them. On a personal level, and on behalf of the Government of Nova Scotia, I want to say sincerely, I am sorry. Also, I will be conveying my apology to the victims in writing. We cannot change the past. We cannot make up for the suffering that has been inflicted but we can help victims to rebuild their lives and their futures.

Terence Donahoe, then justice critic for the Official Opposition, responded to the announcement by applauding the Government. He said it appeared that a "very serious, legitimate and sensitive approach [had] been taken to respond" to the problem. He also extended his party's apology to the victims of abuse.

Throughout the discussions leading up to the MOU, there appeared to be little discussion of the legal status of the end product. The Minister referred to it as an agreement. As earlier noted, claimants' counsel may not have regarded it in the same way. Interestingly, the status of the MOU was later revisited (as discussed in a later chapter) when the Government made unilateral changes to the program mid-stream.

5. ANALYSIS

This section of the Report documents the discussions that led to the creation of the MOU. 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.

It is well recognized that the trial process can have a potential adverse effect upon those who have truly been the victims of sexual and physical abuse. Government negotiators, and others who designed the Government's response to reports of institutional abuse, had a legitimate concern that victims not be re-victimized through highly adversarial litigation that would force them to re-live their abuse, see the veracity of their claims disputed and, in some cases, endure public shame, embarrassment and even ridicule. The latter was of particular concern for those who had put their prior lives as young offenders behind them. A public airing of their claims might expose their past to those close to them.

These concerns justified consideration as to how the emotional well-being and privacy interests of claimants could be sensitively accommodated. I have no doubt that, in designing its response, the Government was also motivated by concerns over its finances and public perception of its attitude to abuse and abusers. These concerns made it predisposed to an approach that would avoid a public inquiry, and dispose of the issue expeditiously and in a way compatible with fiscal constraint.

However, in addressing its concerns, the Government fell into fundamental error.

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.

This somewhat rigid perspective to the credibility of claimants may be viewed in the context of how the credibility of sexual abuse complainants had been addressed in the past.

In times gone by, the credibility of sexual abuse complainants was often discredited based upon a notion that such complainants were presumptively unreliable. Some time ago, the Criminal Code removed requirements that sexual offence complaints be corroborated in order to be relied upon in criminal proceedings, or that mandatory directions as to the dangers of acting upon uncorroborated complaints be given to juries. Now, the presence or absence of corroborative evidence is merely a circumstance to be considered in assessing the veracity of any witness. It is accurate to say that "[t]he removal of statutory provisions that these witnesses need be corroborated or need to be the subject of a caution recognizes that they are not presumptively unreliable but should be evaluated on the basis of the strength or weakness of their evidence in each case."[13]

Similarly, sexual offence complainants were historically discredited based upon stereotypical notions or myths as to how true victims of sexual abuse could be expected to act. For example, it was felt at one time that an allegation of sexual abuse was inherently unreliable unless the complainant made a complaint or disclosure immediately or shortly after the event. Indeed, judges were obligated to instruct juries that an adverse inference could be drawn against a sexual offence complainant who did not make a 'recent' or 'fresh' complaint. Again, legislative and judicial interventions have now made clear that the importance to any complainant's credibility of the absence of a timely complaint should be decided on a case-by-case basis. "[T]he significance of a complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based on now-rejected stereotypical assumptions of how people, particularly young people, react to being sexually abused."[14]

Judicial and legislative developments 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.

This point can be illustrated in a variety of ways. Sexual abuse claimants should not be regarded as immune from the temptations and incentives – particularly monetary – that move human beings generally, just because they allege sexual abuse. The fact that young offenders may be targeted for abuse because of their vulnerability, and because they are less likely to be believed, does not mean that their institutional history for deceit or criminality should be discarded in evaluating their credibility. The fact that abused young offenders may be reticent

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[13]Robins, *supra*, at p. 270

[14]*Ibid.* at p. 273

to report their victimization while in an institutional setting should be considered in assessing the importance, or lack thereof, of an untimely complaint, as should the fact that their complaints may only have been forthcoming after the Government created expectations of compensation for abuse.

Much of this was lost upon those who designed the Government's response and who negotiated the Compensation Program. Perhaps this is explained, in part, by the undeniable fact that young people had been abused by MacDougall and others within the Province's institutions. It might also be explained by the revelations of institutional abuse in other provinces. There is no doubt that Paula Simon, who came to the program as Director of Victim Services, was predisposed by her background and training to accept allegations of abuse as valid. The Reports of Mr. Stratton and Ms. Samuels-Stewart contributed to the problem. As well, in fairness, it must be noted that even a number of IIU investigators, who later came to regard the majority of claims as false, believed during this critical period of January to May 1996, that the vast majority of claims were true.[15] *For these and other reasons, some of those who designed the Government's response and negotiated the Compensation Program assumed uncritically that those who would claim they had been abused, were abused. It was thought that one could predict the likely percentage of false claims – expected to be minute in number – as some sort of objective fact,*[16] *as if the design of any program that invited claimants to come forward was irrelevant to how many false claims would be generated. As a result, verification assumed little or no importance in the design of the Compensation Program. In turn, I am convinced that the unimportance of verification created a climate conducive to false and exaggerated claims to being made.*

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. As I earlier noted, their counsel urged the Government to adopt a more stringent verification process, albeit out of concern that valid claims would otherwise be discarded.

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

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[15]In the internal memorandum from the IIU investigators to Mr. Barss of March 27, 1996, after conducting approximately 35 interviews of claimants, the only investigative concern raised by the investigators was the volume of documentation. In our discussions with Staff Sgt. Frank Chambers he described that in this early time period, Government workers whom he encountered presumed the guilt of former and current employees. They felt it was simply a matter of going through the formalities. Chambers did not think he got caught up in that mind set; he wanted to see how the evidence bore up to scrutiny. He said it was hard to believe that these people had all come forward if the complaints were not true, but if true, it was also hard to believe that they had not surfaced before.

[16]In a number of interviews by my staff with both claimants' counsel and Government negotiators, there were varying recollections as to the likely percentage of fraud – 3%, 5% or 10% – that would be regarded as tolerable by the Government.

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.

I will later address how the needs of true victims can be accommodated in ways that nonetheless remain consistent with the obligation of Government to ensure that the compensation process is credible and fair. There is no doubt that true victims can be better accommodated as one moves away from formal litigation and towards private arbitrations and specially designed compensation programs. The parties can craft their own rules to appropriately balance the interests of affected parties. For example, the parties may agree that the fact-finding remains confidential, an important consideration for complainants who would otherwise risk public exposure as former offenders.

Of course, in some respects, that is what the Government negotiators thought they were doing in designing and implementing the Compensation Program: moving to an ADR process that sensitively served the interests of the complainants and prevented their potential re-victimization through traditional litigation. However, fundamental in any balancing of the interests of both claimants and adverse parties, is a recognition that the process must resolve disputed facts in a way that is credible and fair.

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.

But leaving aside prejudice to employees for a moment, in my view, adoption of a process that did not credibly evaluate the legitimacy of individual abuse claims undermined the integrity of the process itself. It violated Government's moral and fiscal responsibility to the public. Arguably, it also violated Government's duty of care towards its own employees. And ultimately, it harmed those true victims of abuse whose victimization is now uncertain in the minds of the public.

The March 8, 1996, memorandum submitted to Cabinet presented two alternatives to continuing with the ADR process: making payments over time, at an expected cost of $50.63 million, or litigating, at an expected cost of $61.1 to $66 million over five years. They were presented as more costly and lengthy than ADR. But were they? The numbers associated with the option to litigate assumed that 450 of the 500 anticipated claimants (90%) would pursue litigation. The numbers also assumed that 100 cases would be fully litigated, with in-house counsel legal services costing $145,000 and damage awards ranging from $88,000 to $102,000 per case. It was assumed that the remaining 350 cases would settle within the same range. Added to the cost of this option were estimates for a public inquiry. I recognize the difficulties in accurately predicting the costs of litigation. However, the available documentation did not reasonably justify an estimate of $145,000 for in-house legal services, or that 90% of claimants would pursue litigation. For example, the assumption had been in July 1995 that only 50% of claimants would pursue litigation. This is not to say that the ADR process, with a fair and accurate verification process, should not have been pursued. Rather, it is to say that the memorandum virtually made continuation of the ADR process the only sensible option.

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.