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IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Walter Swetlishoff on behalf of the New Denver Survivors Collective

COMPLAINANT

A N D:

Her Majesty the Queen in Right of the Province of British Columbia as
represented by the Ministry of Attorney General and Ministry Responsible for
Treaty Negotiations

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Enid Marion

Representative for the Complainant: Walter Swetlishoff

Counsel for the Respondent: Robert Horricks

Hearing Dates: January 16-19, 2012, Nelson, B.C.
January 30 - February 3, 2012, and
February 6, 2012, Vancouver, B.C.

The Complaint

[1] In the 1950s, the British Columbia Government ordered the apprehension and confinement of Sons of Freedom Doukhobor children in a residential school/dormitory in New Denver, B.C. For ease of reference, I will refer to the facility at which they were confined as “New Denver”.

[2] In 1999, then Ombudsman Dulce McCallum issued a report regarding the apprehension and confinement of these children entitled “*Right the Wrong - the Confinement of Sons of Freedom Doukhobor Children*” (the “Report”). As the Ombudsman was careful to point out at the beginning of her report, it was not about legal liability. The Report was “solely about the effect on the children of the actions taken by government.” In particular, the Ombudsman stated:

In the end, the primary focus of this Report is on the children, now adult survivors, and the manner in which government should respond to a claim of physical and psychological maltreatment resulting from institutional confinement. The response must be given in a manner that promotes healing, forgiveness and well-being for the individuals and the community. The manner in which the Report is received is as important as its contents. The way in which government responds and the way in which compensation is proposed by this Report are based on a model of restorative justice. It is my hope that this Report provides insight into what transpired and a vision as to how government can right the wrong.

[3] The Report contained numerous recommendations for Government action in response to the Ombudsman’s findings. The Government did not accept all of the Ombudsman’s findings, or her recommendations, which included the issuance of an unconditional apology. In particular, the Government did not issue an apology, but eventually did make a statement of regret in the Legislature. The statement of regret included reference to bombings and burnings, and was perceived by many of the persons who had been confined in New Denver as blaming them for events over which they, as children, had no control.

[4] On September 28, 2004, Walter Swetlishoff, on behalf of the New Denver Survivors Collective (the “Survivors”), filed a complaint alleging that Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Attorney General and Ministry Responsible for Treaty Negotiations (the “Ministry”)

discriminated against the Survivors on the basis of race, ancestry, and religion, contrary to the *Human Rights Code*. While I have defined the respondent as the “Ministry”, this term is also used to refer to the Government as a whole.

[5] The complaint was subsequently amended, and in the last amendment to it, the Survivors summarized their allegations as follows:

- a) The Ministry discriminated against the Survivors contrary to ss. 7 and 8 of the *Code* when it proceeded with the construction of a historical site and proposed memorial monument notwithstanding their opposition to the project. The Survivors do not believe in erecting monuments for memorial purposes. The Survivors, as Doukhobors, believe that the spirit of God is within people, not edifices;
- b) The Ministry discriminated against the Survivors contrary to s. 8 of the *Code* when it refused and continues to refuse to implement the Ombudsman’s recommendations;
- c) The Ministry discriminated against the Survivors contrary to s. 8 of the *Code*, when it refused to address and redress the government’s historical wrongdoing to the Survivors in a timely, effective and meaningful way;
- d) The Ministry discriminated against the Survivors contrary to ss. 7 and 8 of the *Code* when it continued to justify or sanction the government’s historical wrongdoing to the Survivors because of the alleged conduct of their parents or other adult members of the Doukhobor community at the time.

[6] The Survivors also particularized those allegations as follows:

- a) The Ministry has failed or refused to acknowledge unequivocally that the confinement of the Survivors in New Denver was wrong;
- b) The manner in which the Ministry acknowledged the confinement of the Survivors in New Denver had the effect of minimizing or diminishing the wrongdoing;
- c) The manner in which the Ministry acknowledged the confinement of the Survivors suggested that their mistreatment was justified or excusable;
- d) The manner in which the Ministry chose to acknowledge or compensate the Survivors was hurtful, insulting and demeaning;
- e) Specifically, without limitation, the Ministry’s decision to construct a park and erect a monument on the New Denver site was unacceptable and demeaning to the Survivors;
- f) The Ministry knew or ought to have known that the park and monument was unacceptable and demeaning to the Survivors;

- g) Despite the Survivors' rejection of the park and monument, the Ministry continued with its construction plans;
- h) The Ministry has failed or refused to fully disclose to the Survivors why they had been confined in New Denver;
- i) The Ministry has access to historical records, documents and archives which would have provided an explanation as to why the Survivors had been confined;
- j) The Ministry has refused to provide the Survivors with an unconditional, clear and public apology on behalf of the government, in the Legislative Assembly, for the means by which they were apprehended and for their confinement in New Denver;
- k) The Ministry has failed or refused to engage in meaningful consultations with the Survivors about an appropriate form of compensation for their apprehension and confinement in New Denver;
- l) The Ministry has failed or refused to provide the Survivors with an appropriate form of compensation for their apprehension and confinement in New Denver;
- m) The Ministry, through its actions and inactions, have treated the Survivors differently and adversely with respect to righting the historical wrong against them as compared to others who had been subjected to historical wrongs perpetrated by the government of the day;
- n) The Ministry, through its actions and inactions, has cultivated and/or perpetuated the view that the Survivors are unworthy or less worthy than others who had been subjected as children to maltreatment in public institutions;
- o) The fact that the Survivors are Doukhobors and children of Sons of Freedom Doukhobors is the reason, in whole or in part, for their adverse treatment;
- p) The Ministry's actions and inactions with respect to the implementation of the Ombudsman's Recommendations, have exacerbated the Survivors' hurt, humiliation and suffering;
- q) The Ministry's actions and inactions with respect to the implementation of the Ombudsman's Recommendations has and continues to perpetuate the historical injustice to the Survivors as a result of their wrongful incarceration in New Denver in the 1950s.

[7] The Ministry denies any discriminatory conduct, and says that the Tribunal lacks jurisdiction over certain of the allegations.

[8] At the outset, I wish to clarify some issues with respect to the language used in this decision. The parties differed on the use of the term "survivor". At times, it was used to describe any child who had been institutionalized in New Denver in the 1950s. At other times, it was used to refer to the group of individuals who brought this complaint and who were part of the New Denver Survivors Collective. I have defined the New

Denver Survivors Collective as the “Survivors”. When referring to the children who were confined in New Denver, I have used the term “survivor.” The Ministry consistently referred to these persons as “residents”. The Survivors considered this term to be offensive, and an inaccurate and diminishing reference to their actual situation. I have endeavoured to be respectful to their personal experience in this decision.

[9] The Survivors also referred to being “incarcerated” in New Denver. The Ministry referred to them being “placed”. The Ombudsman referred to the survivors being confined in New Denver and I have utilized that term in this decision.

[10] There was also interchangeable reference to a commemorative site, monument, historic site, and memorial project. I have used the terms historic site and sculpture in this decision.

[11] I will first review certain aspects of the procedural history of this complaint to the extent necessary to put my decision in context. I will then review the evidence, the legal framework for analysis and my decision.

ASPECTS OF PROCEDURAL HISTORY

[12] In *Swetlishoff v. B.C. (Ministry of Attorney General)*, 2008 BCHRT 83, despite an extensive amount of documentation and legal argument submitted by the parties, the Tribunal declined to answer certain preliminary questions posed to it by the Survivors on the basis that it was necessary to hold an evidentiary hearing.

[13] Those questions were:

- a) Can erecting a monument and/or constructing a memorial site constitute activity proscribed under s. 7 of the *Code*?
- b) Is erecting a monument and/or constructing a memorial site a service which the Government customarily makes available to the public pursuant to s. 8 of the *Code*?
- c) Does addressing the historical wrongdoings by the Government against an ethnic minority constitute a service customarily available to the public pursuant to s. 8 of the *Code*?
- d) Does the Tribunal have jurisdiction to order the Government to implement all or any of the recommendations of the Ombudsman, Dulce McCallum, set out in her Public Report No. 18 “Righting the Wrong – The Confinement of Sons of Freedom Doukhobor Children”, dated April 1999?

[14] The Ministry sought judicial review of that decision. In *HMTQ v. Swetlishoff*, 2010 BCSC 1252, the B.C. Supreme Court dismissed the petition for judicial review.

[15] As a result, those questions are still before the Tribunal for determination.

[16] On the Friday before the hearing was to start, legal counsel for the Survivors withdrew from the case. Regardless, the Survivors advised the Tribunal that they were prepared to proceed and Mr. Swetlishoff presented the case on their behalf. As well, the Tribunal ruled, after hearing from the parties, that it would benefit from the material (including legal argument) already submitted by the parties on the preliminary questions and that material was introduced into evidence. To the limited extent it was necessary to consider any of the documentary material, the hearsay nature of documentation that was not properly identified by a witness during their evidence at the hearing has been taken into consideration in reaching my decision in this case.

[17] As well, when making this ruling, I advised the parties that the complaint before the Tribunal concerned events that occurred between 2000-2004 regarding the Ministry's response to the Report. My findings are related to the allegations of discrimination before the Tribunal. I make no findings about any historical wrongdoings, or review the Ombudsman's findings as set out in the Report.

WITNESSES AND CREDIBILITY

[18] In the limited instances where it was necessary to assess credibility, I have had particular regard to the test set out by the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354:

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (page 357)

[19] I have also considered that I can accept some, all or none of the evidence of a witness.

[20] Mr. Swetlishoff called four witnesses: Mr. Joseph Sherstobitoff, Ms. Elsie Erickson, Ms. Christine Elkins and Ms. Naida Hamoline.

[21] Mr. Sherstobitoff described himself as a Doukhobor. As a child in the 1950s, he was removed from his family and confined in New Denver. He described that experience as traumatic. As an adult, he was part of a group of approximately 84 survivors that contacted the Province's Ombudsman about the events of the 1950s. After the publication of the Report, he was actively involved in trying to persuade the Ministry to implement the Report's recommendations. It was evident from his testimony that he has a deep distrust of government and that this influenced his reaction to the Ministry's efforts to reach a resolution with the Survivors. It did not, however, influence the quality of his evidence and I find that he gave it to the best of his ability and memory. While I have not accepted all of his evidence, it is not because I found him to be untruthful. Rather, in considering all the surrounding circumstances, it is my view that he misinterpreted or misheard what was being said at the time.

[22] Ms. Elsie Ericksen is a survivor who gave evidence about her involvement in several meetings leading up to a statement of regret in the Legislature.

[23] Ms. Christine Elkins described her personal experience as a young child being forcibly removed from her family and confined in New Denver. She was offended by the statement of regret read in the Legislature and felt that the Ministry had blamed the survivors for the events of the 1950s. She was also offended at being labelled a "Sons of Freedom Doukhobor" child and felt she should be known simply as an ordinary Canadian citizen. She testified about her personal experience and her reaction to the statement of regret.

[24] Ms. Naida Hamoline is a survivor who attended meetings with Ministry representatives in Agassiz and Surrey, B.C. She gave evidence about those meetings and her reaction to the historic site and sculptures made for that site.

[25] The Ministry called seven witnesses.

[26] Ms. Linda Neville was, at the material time, a senior policy analyst with the Ministry and was described as the "lead public servant on the file". She organized and attended numerous meetings with survivors throughout 2000-2004 in various locations throughout the Province to address the Report's recommendations. She described the

Ministry's position in respect of the Report's recommendations and the various initiatives undertaken by the Ministry in response to it.

[27] Mrs. Helen Freeman is retired and lives in Agassiz, B.C., where she has resided since coming there as part of the Doukhobor trek from the Interior to Agassiz in 1962-63. She described the Doukhobor trek as a protest against a prison that was built in Agassiz to house Doukhobor men and women who were "causing disturbance" in the Kootenays. Mrs. Freeman was confined in New Denver from December 1955, when she was 8 years old, until August 1959. She testified that she adheres to Doukhobor spiritual beliefs and described a Doukhobor as someone who is at spiritual peace with themselves. She gave evidence about her experience on a survivor committee and her reaction to the historic site and sculptures.

[28] Ms. Kathleen Makortoff is a retired licensed practical nurse. She described herself as a Doukhobor and explained that this meant she is a Christian who believes that God is in everyone. She was confined in New Denver on May 20, 1956 when she was eight years old and remained there for approximately three years. The New Denver facility was ultimately converted to a health care centre, where she worked for approximately 15 years. Ms. Makortoff testified about touring Ministry representatives through the New Denver facility, meetings she attended and a committee that she served on.

[29] Dr. Gregory Cran is a professor at Royal Roads University. He has extensive knowledge of Doukhobor history and, at the material time, was employed by the Ministry. He reviewed his involvement in meetings with Ministry representatives and survivors and provided some historical evidence about the 1950s. I have not considered it necessary to detail his perspective of the events of the 1950s in this decision. I found Dr. Cran to be knowledgeable, detailed and to have a firm and clear memory of events. Where there was a difference between his evidence and that of Mr. Sherstobitoff, I have preferred the evidence of Dr. Cran.

[30] Mr. Manfred Burandt was a senior manager with B.C. Buildings Corporation at the material time. He was involved in the planning of the historic site. I have not considered it necessary to review most of his evidence in this decision.

[31] Mr. Eric Lees was a landscape architect retained by the Ministry to develop plans for, and build, the historic site. He testified about his work in that regard. I have not considered it necessary to review his evidence about the concept plans for the historic site in detail.

[32] Mr. Geoff Plant was the Attorney General (“AG”) at the material time. He testified about his communications with various survivors, his involvement in the issuance of a statement of regret and comments on a subsequent radio program.

[33] I found all witnesses to be honest, straightforward and to give their evidence to the best of their recollection and ability. Where I have rejected someone’s evidence, I have provided my reasons for doing so.

[34] I have not reviewed all of the evidence of the witnesses, but have included the evidence that I considered important to put my findings in context.

The Report

[35] In the 1950s, the provincial government apprehended and confined children of the Sons of Freedom Doukhobors in New Denver, B.C. As adults, a group of these children complained to the Ombudsman.

[36] In 1999, Ombudsman Dulce McCallum issued her Report. It contained the following findings:

1. The government’s decisions, acts and omissions that resulted in the institutionalization and maltreatment of the children of the Sons of Freedom Doukhobors violated subsections (a)(ii), (a)(v), (a)(vi) and (b)(iii) of s. 23 of the *Ombudsman Act*, particulars of which include:
 - a) Alienating the children of the Sons of Freedom Doukhobors from, and denying access to, their parents, religion, culture and language;
 - b) Allowing the children of Sons of Freedom Doukhobors to suffer significant harm as a direct result of being confined in New Denver, forced to live in an institutional setting, being removed from their communities, and abused through neglect, lack of love and nurturing and harsh discipline;
 - c) Failing to counsel or assist in healing the trauma of the children of Sons of Freedom Doukhobors who were subjected to harm by being witness to a serious confrontation between their parents and public officials at Perry Siding, BC;

- d) Permitting the children of Sons of Freedom Doukhobors, through no fault of their own, to be treated as if they were criminals, many of whom, now adults, continue to suffer the long-term effects of arbitrary, discriminatory and unjust confinement.
2. The actions, decisions and omissions of the government caused irreplaceable loss to the children of New Denver by removing them from parents, alienating them from family and community life and forcing them to live in an institutional setting, particulars of which include:
 - a) loss of love and nurturing;
 - b) loss of parental and community guidance;
 - c) loss of childhood;
 - d) loss of dignity from living in an institutional setting, from suffering abuse and neglect, and from deprivation of affectionate caregivers;
 - e) loss of self-respect from unfair and harsh punishment and living conditions and being denied access to parents and family;
 - f) loss of privacy from living in an institutional setting;
 - g) loss of individuality from living in an overcrowded institution and having significantly restricted access and visiting to parents and family; and
 - h) loss of civil liberties, including loss of language, religion, and culture.
 3. As a result of the maltreatment, those who were institutionalized in New Denver suffered harm and continue to suffer from the long-term ill effects of this trauma.
 4. The acts and omissions of the government in relation to the 15 children confined in New Denver under the incorrect provision of the *Protection of Children Act* were contrary to law and/or based on a mistake of law once the parents of these children had returned to their homes. (pages 69-70)

[37] Based on these findings, the Ombudsman made the following recommendations:

1. Provide a clear acknowledgement that the government was wrong in the manner in which it apprehended and confined the children of the Sons of Freedom Doukhobors in the New Denver institution.
2. Provide the complainants with as full and adequate explanation as is reasonable and appropriate, given the passage of time, for why, as children, they were apprehended and confined in New Denver.
3. Make an unconditional, clear and public apology to the complainants on behalf of the government, in the Legislative Assembly, for the means by which they were apprehended and for their confinement in New Denver. The essential elements of the apology include:
 - a. An acknowledgement by the government that the children were, by being institutionalized in New Denver, treated unfairly and unjustly both as a group and as individuals, and that harm resulted;

- b. A full and comprehensive explanation of why the children were institutionalized and detained in New Denver;
 - c. Acknowledgement that the harm was not intended and that the government expresses regret for the harm done; and
 - d. A clear statement that government offers reparation for the harm done.
4. Consult with the complainants as a collective to determine the means by which they want to be heard, and the appropriate form of compensation. The consultation will:
 - a. Instruct government as to the manner by which compensation will be provided and designed for both individuals and the group;
 - b. Enable the complainants to construct the way in which compensation and support should be dealt with, to enable them to make choices and to heal; and
 - c. Be designed in such a way as to avoid any third party that is neither a complainant nor part of the group of complainants nor part of government being responsible for the design of the form of redress.
5. Refer this Report to the Commanding Officer “E” Division and urge him to consider the role of the RCMP in the matter and the appropriate action to take.
(page 71)

Advance Copy of Report

[38] Prior to the Report being publically released, the Ministry received an advance copy of it. It struck an interministerial committee (“IMC”) to consider its response to the Report. It advised the Ombudsman that it was reviewing the Report, and was not yet in a position to provide her with its formal response.

[39] Based on its initial review, the IMC was critical of the Report. Ms. Neville explained the IMC was concerned that the Report lacked sufficient context about what was happening at the time. For example, the Report spoke about the children being apprehended and confined in New Denver but, from the IMC’s perspective, did not talk about why the children were confined in New Denver or why only those particular children were treated in that manner. The IMC also felt that a comprehensive archival review had not been undertaken by the Ombudsman and that there were limited interviews of persons other than complainants. As well, the IMC was critical of the Ombudsman’s reference to the UN Convention on the Rights of the Child which was not in force at the time of the apprehensions.

[40] The IMC also considered the possibility of utilizing the services of a third party, as it had done in the Jericho Hill school situation, to assist the Ministry in formulating a response to the Report.

[41] Ms. Neville testified that the Ombudsman was advised of these concerns and, as a result, the Ombudsman recommended in the final Report that an independent third party not be used to address her recommendations, and also stated that she had accessed certain governmental materials.

[42] The IMC considered several responses to the Report including a letter of regret, a statement in the Legislature, and counselling. As will be discussed later, the Ministry did offer counselling services to survivors and their families. Individual financial compensation remained off the table, however, particularly since a group of survivors had commenced a civil action against the Ministry.

Release of the Report

[43] The Report was tabled in the Legislature on April 8, 1999.

[44] Shortly thereafter, in accordance with the last recommendation, the AG forwarded the report to the Commanding Officer RCMP “E” Division and urged it to consider the role of the RCMP in the matter and any appropriate action that may be required.

[45] As well, in July 1999, the Ministry retained the services of Dr. Cran, who had experience as a mediator and negotiator for government on issues relating to the Doukhobor community.

[46] The Ministry did not, however, accept the conclusions or recommendations of the Ombudsman. As noted in a letter dated February 7, 2000 to the Ombudsman:

The government values and respects the role of the Ombudsman in investigating public complaints of unfair treatment, and we appreciate the opportunity to comment on this public report. There are many regrettable circumstances related to this troubled period of our provincial history. Communities in an entire region of the province were in a state of societal upheaval and became adversely affected by the events of that era. In our own generation, when societal values have evolved and government policy and legislation reflect that progress, British Columbians would undoubtedly expect a different historical picture to emerge from similar circumstances.

...

Although the government does not agree with the recommendations set forth in the report, we would like to take this opportunity to thank you and your staff for the investment of time and resources on behalf of citizens who grew up during a very difficult time. The government hopes that those concerned individuals with distressing childhood memories may be able to find a measure of healing and closure in the days ahead.

[47] Regardless of its views regarding the Report's conclusions and recommendations, the Ministry commenced a dialogue with survivors about implementation of certain of the recommendations. Ms. Neville took a lead role in those discussions. She acknowledged that the Ministry was initially resistant toward the Report's recommendations, primarily because of concerns about liability. However, she explained that even if the government did not have legal liability towards the survivors, it had a moral obligation toward them. She asked the Ombudsman for assistance in contacting the survivors and, as a result, received the following response from the Office of the Ombudsman:

We agreed that we would facilitate the initial meeting between the complainants and government representatives. We identified four complainants and said that we would ask them to consider the structure of the meeting, who should speak and who would attend as observers. This meeting would provide the first opportunity for the complainants to be informed of government's response to the report. It is our understanding that government is prepared to acknowledge the difficulties some of the children experienced as a direct consequence of the conflict that was occurring at that time. Government is also prepared to hear from the complainants with respect to establishing a specific program for those complainants who may require mental health support.

[48] A list of ten individuals who would attend this first meeting was provided to the Ministry. The list included Mr. Sherstobitoff and Mr. Fred Konkin, amongst others.

First Trip to Nelson

[49] A meeting of Ministry representatives and several survivors was held in Nelson, B.C. on July 20, 2000. In attendance at that meeting, amongst others, were: Ms. Gillian Wallace (the Deputy AG), Ms. Linda Neville, Mr. Fred Makortoff, Dr. Cran, and Mr. Sherstobitoff. Mr. Sherstobitoff recalled that Ms. Neville asked the survivor group what they wanted and that he replied they wanted the Ministry to implement the Report's recommendations. However, he also advised her that he needed to canvas the views of

other survivors. Mr. Sherstobitoff testified that he was the contact person for survivors at this point in time.

[50] Ms. Neville described the meeting with survivors as a “very respectful meeting”. She described it as an opportunity for those who attended to tell the Ministry representatives about what had happened to them as children and stated that it was very difficult to hear about some of the experiences. She saw it as the first step in demonstrating goodwill to work together toward healing and reconciliation. She recalled that Ms. Wallace made it clear that the Ministry was not supportive of individual compensation and that those persons who sought individual compensation would have to do so through the courts. Ms. Wallace also indicated that community compensation was something that could be discussed.

[51] Also on that date, Ms. Wallace and Ms. Neville met with Ms. Makortoff to tour the site of the former New Denver facility where the survivors had been confined in the 1950s. They listened to personal stories about Ms. Makortoff’s childhood during her confinement in New Denver. As well, they met with an RCMP representative and reviewed a pictorial history of the events of the 1950s.

[52] On July 21, 2000, Ms. Wallace wrote to Mr. Sherstobitoff thanking him for the meeting, confirming that he was going to consult with other survivors and expressing hope that they could work together to develop an appropriate response to the Report. She also summarized her understanding of three proposals arising from their meeting:

1. With respect to an explanation of what happened to you, you have agreed to consider sending a representative to work with us to access archival material. This would assist all of us to further understand the reasons which led to you, as children, being placed in New Denver. It would be helpful if you could identify specific areas you would like clarified.
2. We have agreed to identify an independent qualified person to undertake an assessment of possible counseling needs in your community. You may wish to offer suggestions about who would be appropriate to provide this service.
3. I have agreed to discuss with my colleagues ways in which government may be able to provide an acknowledgement about these events.

[53] She asked Mr. Sherstobitoff to respond directly to Ms. Neville.

[54] Ms. Neville also wrote to the Ministry of Education and Ministry of Children and Families advising of the meeting. She informed them that the survivors' representative needed to consult with a group of approximately 50 survivors to discuss and respond to the three summarized proposals. She expected a response shortly.

[55] Shortly after receipt of this letter, Mr. Sherstobitoff and Mr. Konkin wrote to Ms. Wallace on July 28, 2000 advising that the survivors had recently held a meeting at which they discussed the Ministry's response to the Report. They advised Ms. Wallace that it was their impression that the Ministry did not support the Report's recommendations and sought clarification of how the Ministry intended to resolve the issues identified in the Report.

[56] The Ministry responded to Mr. Sherstobitoff and Mr. Konkin on August 3, 2000. It advised them that the Ministry did not believe that the Report provided a complete picture of the events of the 1950s. Regardless, it wanted to work with the survivors to address several of the Report's recommendations. In particular, it confirmed that it was willing to fund a survivor representative to work with a researcher and Provincial archivist to review documents and materials which would assist in an understanding of that period of history.

[57] The Ministry also requested that Mr. Sherstobitoff and Mr. Konkin provide it with suggestions about an appropriate, qualified professional to support survivors and help them heal.

Discussion with Mr. Fred Makortoff

[58] On August 28, 2000, the Ministry spoke with Mr. Fred Makortoff about ways to respond to the Report. Mr. Makortoff had spent part of his childhood confined in New Denver, and had a relationship with Dr. Cran. They discussed contacting Mr. John J. Verigin Jr. of the Union of Spiritual Communities of Christ, which was described as an organization representing "mainstream" Doukhobors, to serve as an intermediary between the Ministry and survivors in developing a plan about such things as arranging counselling services and making archival materials available. Mr. Makortoff agreed to

meet with Mr. Verigin. It does not appear that there was any prior discussion with Mr. Sherstobitoff or Mr. Konkin about this plan.

[59] On September 1, 2000, Mr. Makortoff called Dr. Cran to advise that he would be meeting with Mr. Verigin that afternoon. He suggested that the Premier or AG consider if they could acknowledge:

- That it was a difficult time in the Province's history;
- Offer an apology;
- Indicate that the government, like the survivors, want to know more about why it happened the way it did; and
- Propose that they work together to ensure appropriate measures are taken to help bring about a better understanding as well as to assist those in need of counselling.

Letter to AG about Mr. Makortoff's Involvement

[60] On September 5, 2000, Mr. Sherstobitoff and Mr. Konkin wrote to the AG stating that they had recently been advised that the Ministry had "arbitrarily chosen" Mr. Makortoff to assist it in responding to the Report. They expressed their concern that they were not consulted about that decision and that it was not consistent with the Ombudsman's recommendations. They asked the AG to confirm whether Mr. Makortoff had been appointed or hired by the Ministry and, if so, for a description of his role.

[61] They also advised the AG as to their understanding of a new proposal that they said had been suggested for their consideration, which included an apology and the establishment of a \$5 million fund to administer Doukhobor Archives at Selkirk College in Castlegar, B.C.

[62] Mr. Sherstobitoff also testified that Mr. Makortoff advised him that Dr. Cran had stated that the Ministry would offer them \$2 million to do research in Victoria, that they had ten days to accept the offer and that each survivor would then get \$20,000 to do research. He testified that most survivors considered the offer to be against their religion and rejected it. They believed that the research would be "phoney" and that it would be a lie to accept money on that basis.

[63] Ms. Neville denied that any financial proposal had been made by a Ministry representative. She also testified that Mr. Makortoff had not been hired or appointed by the Ministry, but that the Ministry was speaking to him as a New Denver survivor.

[64] Dr. Cran also denied having offered Mr. Makortoff \$2 million on behalf of the Ministry to conduct a research project.

[65] I accept that no such financial offer was made by the Ministry. Mr. Makortoff did not give any direct evidence of such an offer, and Ms. Neville and Dr. Cran were not challenged in cross-examination on their evidence that no financial offer was extended to survivors.

Reply from the Deputy Attorney General

[66] On September 8, 2000, Ms. Wallace replied to Mr. Sherstobitoff and Mr. Konkin advising that Mr. Makortoff had not been appointed or hired to assist the Ministry with the Ombudsman's recommendations, but that the Ministry was talking to several persons in an attempt to resolve the matter, including Mr. Makortoff.

[67] Ms. Wallace also advised that, as a result of their discussions with former survivors, it was clear to them that there were varied views about how to address the Ombudsperson's recommendations, including a commission of inquiry or court action. She reiterated that the Ministry would like to explore options that included:

- 1) providing access to archival materials for those interested in understanding the reasons for the apprehension and confinement in New Denver;
- 2) assisting those requiring counselling services; and
- 3) having the Province deliver an appropriate acknowledgement.

[68] Ms. Neville testified that the Ministry was not prepared to appoint a commission of inquiry for a variety of reasons, including the expensive cost and that there had been other committees that had looked at Doukhobor history in B.C., including the Hawthorne Committee and the Kootenay Committee on Intergroup Relations.

[69] Ms. Neville noted that the Ministry continued to work with survivors in an effort to reach a mutually satisfactory resolution, and that over a four-year period, met approximately four times per year with various survivors, in addition to other types of

interactions. She also testified that the Ministry endeavoured to be inclusive by meeting with survivors residing in various parts of the Province.

[70] Regrettably, as will also be noted later, this approach was perceived to be a form of “divide and conquer” by the Survivors. For example, Ms. Ericksen testified that despite the Survivors having obtained the agreement of 90-95% of the survivors to represent them in their dealings with the Ministry, the Ministry still told them that there was a group of survivors in Agassiz and Vancouver that they did not represent and who expressed different views regarding the Ministry’s proposals. Ms. Ericksen felt that the Ministry was trying to create a wedge between these groups.

[71] On the other hand, Ms. Neville testified that it became clear that there were divergent views amongst various survivor groups as to the appropriate form of resolution. For example, one group wanted a public inquiry, another group wanted personal compensation, and another group wanted community compensation. She testified that the Ministry tried to consult broadly with all survivors and to reach a consensus by discussing ideas generated in one group with the other groups, and that there was no “divide and conquer” strategy.

[72] I accept that there were divergent views about the appropriate form of resolution amongst survivors. This was reflected in the evidence of the various witnesses, two surveys which will be discussed later, and the fact that certain survivors sought compensation through the courts. I also accept that the Ministry was endeavouring to be inclusive in speaking to as many survivors as possible. This approach was consistent with the Ombudsman’s Recommendations. It was also clear, however, that the Ministry may have failed to develop a clearly-articulated communication plan with all survivors to keep them fully apprised of the various meetings, outcomes and decisions, and that this may have contributed to a lack of trust and breakdown of communication with certain survivors.

Retention of Mr. Jack McIntosh and Counselling Services

[73] On October 16, 2000, Ms. Wallace invited Mr. Jack McIntosh to attend a meeting with survivors in Castlegar on November 2, 2000 for the purpose of providing a historical explanation as to what had happened surrounding the apprehension and confinement of

the survivors in New Denver from 1953-1959. He was advised that the presentation should include a summary of events taking place prior to, and during the period that the survivors were confined in New Denver.

[74] Mr. McIntosh was a librarian at UBC, who was knowledgeable about Doukhobor history and had compiled a provincial historical collection at the UBC library.

[75] Ms. Neville testified that, consistent with the Ombudsman's recommendations, Mr. McIntosh had been retained to present a historical perspective, rather than the historical overview coming from the Ministry.

[76] Prior to the Castlegar meeting, the Ministry also contracted with a health care centre to provide counselling services to survivors.

Notice of Selkirk Meeting and Retention of Mr. Allan Specht

[77] On October 24, 2000, Ms. Wallace sent a notice to survivors inviting them to a meeting at Selkirk College on November 2, 2000 for the purpose of discussing the Report. In the invitation, Ms. Wallace noted that the Ministry was trying to contact as many survivors as possible, but that its list was not complete. Therefore, she invited people to share the invitation with other survivors who may not have been contacted directly.

[78] Also on that date, Ms. Wallace invited Mr. Allan Specht to attend the Castlegar meeting as a consultant/advisor for the purpose of providing advice and guidance to both Ministry officials and survivors with respect to the collection and maintenance of historical information (such as an oral history project or special collection).

[79] Ms. Neville testified that the idea of an oral history project had originated from discussions with the survivors. She noted that their stories were not particularly well-documented, and she considered it important that there be a record of the survivors' experience so that researchers could look at history from their perspective as well.

Castlegar Meeting

[80] About 150 persons attended the Castlegar meeting on November 2, 2000, including survivor family members. Ms. Wallace made some introductory remarks, and

expressly acknowledged that the survivors had no blame for being apprehended and confined in New Denver.

[81] After her introductory remarks, Ms. Wallace introduced Mr. McIntosh to speak about the reasons why the survivors were apprehended and confined in New Denver. He had prepared extensive written remarks and also made available three historical articles about the events of the 1950s to those in attendance.

[82] In the course of his presentation, Mr. McIntosh referred to bombings and burnings that had occurred in and before the 1950s. Many survivors, including Mr. Sherstobitoff, took deep offense to this. As Mr. Sherstobitoff testified, they were children at the time and not responsible for those incidents, yet felt they were being “painted with the same brush”. They felt as if they or their parents were being blamed for their confinement, rather than the Ministry taking responsibility for the forcible removal of young children from their families and confining them for years away from their culture and the warmth and love of their family and home.

[83] Mr. Sherstobitoff also felt that there were historical inaccuracies in the archival records and history being presented. He testified that one of the reasons the Survivors wanted a public inquiry was to “set some of the records straight”. He reiterated his deep and sincerely-held view that the Ministry had to first acknowledge the harm that was done to the survivors before they could move forward towards reconciliation and healing.

[84] Needless to say, the meeting tone deteriorated and eventually it ended, without any extensive discussion about proposals to resolve the situation.

Letter to the Premier from Messrs. Sherstobitoff and Konkin

[85] On November 17, 2000, Messrs. Sherstobitoff and Konkin wrote to then Premier Dosanjh expressing disappointment about the November 2 meeting, and emphasizing that they were committed to having the Ministry implement all of the Ombudsman’s recommendations. They also described their intense disagreement with the historical review provided at the meeting, which they considered to be inaccurate and hurtful.

[86] As well, they indicated their disagreement with the establishment of an historical archive in the Kootenays, and requested a public commission of inquiry to provide a

meaningful resolution to the Ombudsman's recommendations. The letter was signed by approximately 36 survivors.

[87] At this point in time, Mr. Sherstobitoff felt that the Ministry was trying to break up the survivors into small, disparate groups and that this was one reason why the Ministry had asked for the assistance of Mr. Cran and Mr. Makortoff. Mr. Sherstobitoff did not trust Mr. Makortoff, and it is fair to say that he did not believe that there was a sincere attempt on the part of the Ministry to explore ways to implement the Ombudsman's recommendations. He also felt that the meetings brought back the trauma he experienced as a child upon being forcibly removed from his home and confined in New Denver.

[88] I note, however, that the evidence was clear that the Ministry committed both financial and human resources to consult with as many survivors as possible about a mutually-agreeable resolution to the situation. It was also evident that there was a large gap between what the Survivors and the Ministry considered an appropriate or fair resolution. The Survivors consistently requested a formal apology as a first and necessary healing step, and full implementation of the Report's recommendations. The Ministry, on the other hand, was consistent in its position that individual financial compensation was not on the table, and that it was not prepared to implement all of the Report's recommendations.

Letter from Deputy Ministers to Survivors

[89] On November 22, 2000, the Deputy Ministers of the AG, Ministry for Children and Families and Ministry of Education wrote an open letter to survivors to thank them for meeting on November 2 and again expressing regret for what had happened to them. In particular, they stated:

We appreciate your sharing your very personal experiences with us. We recognize the courage it has taken for you to disclose your memories to the Ombudsman and to speak openly at the meeting. It is of great assistance in furthering our understanding of the profound impact of this period in our history. It is impossible to hear your stories without being deeply touched. As mothers and fathers, sons and daughters ourselves, we heard your stories about the profound impact on families. It is also clear that your stories need to be told and recognized from the perspective of you and

your family members. What happened to you and your families is deeply regretted.

Although this is a difficult meeting for everyone, we hope it can be viewed as a successful step in a cooperative effort to identify and create opportunities for healing and reconciliation. We encourage you to consider ways in which we can provide support for projects that promote healing and reconciliation and that will help to ensure that your experience does not happen to others. Examples might include an oral history project to document your experiences associated with New Denver. This would ensure that your stories are preserved. We would also consider opportunities to fund or support projects which can serve as a legacy within your communities. We are asking your assistance in identifying appropriate projects and activities.

[90] Ms. Neville explained that at the November 2 meeting, the Ministry had intended to make a statement of regret, to put forward certain proposals, such as an oral history project, and to provide an explanation through Mr. McIntosh's presentation. She also testified that it remained the government's consistent position that any request for individual compensation must be sought through the courts.

Further Open Letter to Survivors

[91] On January 3, 2001, Ms. Wallace wrote a letter to the Survivors in response to criticisms about the Castlegar meeting. In it, she responded to the criticism of Mr. McIntosh's historical review, and noted that he was attempting to respond to the Ombudsman's recommendation to provide a full and comprehensive explanation of why children were institutionalized and confined in New Denver, which included a consideration of the government policy of the day. She further noted that there have been many changes in government policy and practice since the 1950s.

[92] She reiterated her hope that they would continue to work together to find a mutually-acceptable response to the issues raised in the Report.

Repeated Requests for Public Inquiry

[93] The Ministry continued to reach out to survivors and discuss ways in which to implement certain of the Report's recommendations. In particular, it continued to discuss things such as counselling, course development and an oral history project with various persons.

[94] On March 20, 2001, the Survivors wrote to Ms. Wallace advising her that they continued to support the Report's recommendations and that, in their view, a public inquiry was the only means by which "we want to be heard". They also advised Ms. Wallace that they considered the Ministry's proposals to date to be unacceptable and requested a formal letter outlining the specific steps that the Ministry was prepared to take in regard to the Report's recommendations. There were over 20 signatures on the letter.

[95] On March 28, 2001, Ms. Wallace responded by confirming that Mr. Makortoff had invited Ministry representatives to attend a meeting with survivors on March 31, 2001 in Nelson, B.C. She expressed optimism that the meeting would be an opportunity for mutual problem solving. She also reiterated that the Ministry was committed to finding ways to address the issues raised in the Report, but believed that working with the community would be more beneficial than a public inquiry.

Nelson Meeting

[96] Ms. Neville attended a meeting with Mr. Makortoff, Mr. Swetlishoff and others in Nelson on March 31, 2001. She recalled that approximately 60-90 people attended the meeting. At that meeting, a psychologist retained by the Ministry to provide counselling services to survivors was introduced to the attendees. After he had spoken, Ms. Neville recalled that there was a break and approximately 20 people left the meeting. It was her impression that they were unhappy with the Ministry's response to the Report. In particular, she recalled hearing a strong request for an apology.

[97] She also recalled that a survivor committee (the "Committee"), which included Mr. Swetlishoff and Ms. Freeman, was created at the meeting to look at three proposals in the area of community compensation: a historic site, an oral history project and the development of learning materials.

[98] Dr. Cran recalled that the idea of a historic site or commemorative project came out of a discussion with survivors who said that in New Denver there was an acknowledgement of the Japanese internment, but no mention whatsoever of the survivors ever having been there. He also recalled that the idea for a Doukhobor curriculum and oral history project also arose out of discussions with survivors. This

evidence was not challenged, and I accept that these ideas originated out of discussions with survivors.

Ministerial Update to the Ombudsman

[99] On April 4, 2001, the AG responded to a request by the then Ombudsman for a review of the Ministry's response to the Report. He summarized the various steps taken to date, including its attempts to identify survivors and the November 2, 2000 Castlegar meeting with approximately 150 survivors, the retention of a registered psychologist to provide support services to survivors, and the March 31, 2001 Nelson meeting with survivors.

[100] The AG summarized the various solutions discussed at the March 31 meeting as follows:

Several possible solutions were discussed at the meeting including such things as commissioning a commemorative work of art, an oral history project, curriculum development, and family therapy. Although consensus was not reached about how to proceed with all suggestions, government agreed to fund counselling and to work toward the other activities identified. A committee of former residents was selected to organize a meeting for all former residents to formalize their requests. Government agreed to assist by working with the committee to enhance the mailing list for former residents, covering the cost of mailing invitations and funding reasonable meeting costs.

[101] It was also noted in the letter that, while some survivors had advised that they intended to pursue a remedy through litigation, the meetings and discussions with survivors would continue independent of any legal action.

Meeting Follow-Up

[102] On April 12, 2001, Ms. Wallace wrote to Mr. Makortoff regarding the March 31st meeting and the Ministry's understanding arising out the meeting. In particular, she advised him that the Ministry had "very strongly heard" the Survivors' request that government apologize and that this request was being given serious consideration. She testified that while there may have been divergent views amongst survivors as to other forms of resolution, there was unanimous agreement at that time that a sincere, meaningful apology was necessary for healing.

[103] She also expressed her understanding that the Committee was going to organize a meeting of all survivors with a view to reach consensus on certain proposals, such as a historic site, an oral history project and the development of curriculum materials on Doukhobor history in British Columbia communities.

[104] Finally, she reiterated that even though some survivors had commenced legal action against the Ministry, it would continue to work with survivors toward a satisfactory resolution.

[105] By June 15, 2001, one of the Committee members had forwarded a comprehensive list of survivors and contact information to the Ministry.

The Survey

[106] On June 18, 2001, the Committee circulated a survey to survivors asking them to prioritize a series of possible Ministry responses to the Report. The choices included that the Ministry implement the Report's full recommendations and that it commence a public inquiry in the events of the 1950s. These were not choices presented by the Ministry to the Committee.

[107] Another choice included on the survey was that the Ministry make funding available for a commemorative project (which I have referred to as a historic site in this decision) "to recognize the placement of Sons of Freedom Doukhobor children in New Denver". There was no reference to the site being religious in any way, and the survey records some positive support for such a project amongst those persons who expressed a view on it.

[108] On August 20, 2001, the Committee submitted what was described as a brief to the then AG, Mr. Plant, which included the results of the survey conducted by it. In particular, out of the 60% of the survivors who had returned the survey, a majority placed priority on the full implementation of the Report's recommendations. The Committee reiterated its request for an apology, and also for "some type of restitution". The brief was signed by five of the Committee members.

[109] Ms. Neville testified that the Ministry had understood that the Committee was going to look at three specific projects and provide information to it about whether there

was collective support amongst survivors for any of those projects. She also noted that most of the survey respondents indicated that they would like to see the Report's recommendations implemented in full. She found this discouraging as discussions with survivors to date had focussed on the identification of specific projects that could meet the needs of the community and accomplish those recommendations that the Ministry was able to commit to at the time. She felt that the survey was a step backward.

[110] Ms. Freeman recalled being on the Committee, and testified that it was her understanding that there were three proposals put forward by the Ministry for consideration by the survivors. She only attended a few Committee meetings and then resigned because she felt that the Committee had overstepped its mandate by asking additional questions.

[111] I accept that it was the Ministry's understanding that the Committee was to canvas the survivors' views towards its three proposals. I also accept, however, that the Committee interpreted its mandate as more expansive and encompassing different possible resolutions. In my view, this was indicative of the divide and miscommunication between many survivors and the Ministry as to the appropriate response to the Report's recommendations.

Letter to Premier Gordon Campbell and Ministry's Response to the Brief

[112] On August 21, 2001, Mr. Swetlishoff wrote to then Premier Campbell urging him to apologize to the survivors as a healing first step in resolving the issues identified in the Report.

[113] On October 1, 2001, Ms. Wallace wrote to the Committee in respect of its brief. She reiterated the proposals that the Ministry had put forward at the March meeting, and the Ministry's commitment to proceed with the community projects if the survivors agreed the projects would "achieve our mutual goal of reconciliation". She also clarified that the Ministry would not be offering personal compensation or a public inquiry.

[114] She further stated that the Ministry was willing to continue discussions regarding an apology.

[115] On October 9, 2001, Mr. Plant personally responded to the Committee's brief. He reiterated much of the information contained in Ms. Wallace's October 1st letter, including the advice that the Ministry was willing to continue discussions about an apology.

[116] Also on that date, Mr. Plant wrote to the Ombudsman providing updated information about the steps taken by the Ministry in response to the Report's recommendations. The Ombudsman replied by letter acknowledging the steps that the Ministry had taken to date, and advising that he would continue to monitor the Ministry's response to the recommendation that it provide a clear acknowledgement that the Ministry was wrong to confine the children and the recommendation regarding an apology to the survivors.

Update to Ms. Wallace from Mr. Cran

[117] On behalf of the Ministry, Mr. Cran travelled to the West Kootenays in November 2001 and met with a number of survivors. He advised Ms. Wallace that counselling was still a priority for the survivors, but that the counsellor retained by the Ministry was perceived by many survivors to be "government imposed". Therefore, he requested other choices be provided.

[118] He also noted that there continued to be differing opinions amongst the survivors as to an appropriate resolution to the Report's recommendations. He suggested a further meeting with survivors in Castlegar in the next few weeks.

Letter to Ms. Wallace from Committee Members

[119] On November 26, 2001, certain Committee members, including Mr. Swetlishoff, wrote to Ms. Wallace with a review of the results of their survey and expressing their disappointment with her October 1, 2001 letter. They expressed their disagreement with the narrow mandate she described for the Committee, and advised that it was their understanding that the Committee was to ascertain, by means of a broad survey, the feelings of the survivors in response to the Report's recommendations.

[120] The Committee advised that the majority of respondents to the survey favoured full implementation of the Report's recommendations and that "no other aspect" of the Report's recommendations could be dealt with until the issue of an apology was resolved.

[121] They also expressed the view that they were being treated differently than Japanese Canadians who were interned during WWII and who had received an apology and compensation.

[122] Ms. Neville testified that the Ministry had understood that the survey was limited to assessing the survivors' position in regard to three specific projects and that it had not expected the survey to canvas a broader range of options. She denied that the Ministry was trying to delay any resolution, and emphasized that it was committed to a timely resolution.

[123] Ms. Wallace responded to the Committee on December 28, 2001, requesting a meeting in Nelson in January or early February 2002 to discuss progress and outstanding matters. She emphasized the Ministry's commitment to work with survivors to reach "mutual goals and address specific issues", and specifically stated that the Ministry was willing to continue discussions about an apology.

Next Nelson Meeting

[124] Ms. Neville met with approximately 30 survivors in Nelson on January 22, 2002. She recalled that during that meeting, there was discussion of providing additional counselling services to survivors, further consideration of an apology, and discussion about an oral history project.

Ombudsman's Progress Report and Survivors' Response

[125] In March 2002, the Ombudsman released a Progress Report on the implementation of the Report's recommendations. The Progress Report summarized many of the steps taken to date by the interested parties to address the recommendations and concluded by stating:

While the response by government to date does not fully address the recommendations in Public Report No. 38, I am pleased with the efforts undertaken by government officials to explore creative means of addressing the outstanding recommendations. I remain optimistic that this

ongoing process will lead to the full implementation of all of the outstanding recommendations contained in *Righting the Wrong*. I intend to continue to monitor and report publicly on the progress of the Ombudsman's recommendations.

[126] In late April 2002, Mr. Sherstobitoff and Mr. Konkin, after reviewing the Progress Report, and on behalf of persons whom they referred to as the "Former Inmates of New Denver", wrote to the AG expressing disappointment that the Report's recommendations had still not been fully implemented, and reiterating their request for a sincere apology.

[127] Ms. Neville testified that the Ministry was unaware who was in the group that Mr. Sherstobitoff and Mr. Konkin were representing at that time, but that it was aware that survivors continued to express their need for an apology. She also noted that the Ministry continued to fund counselling services for survivors during this period.

[128] Mr. Sherstobitoff and Mr. Konkin, on behalf of certain survivors, again wrote to the AG on July 19, 2002, expressing their disappointment at what they described as being "cast aside" since they did not file a civil claim against the government. In particular, they stated:

As your government claims in the courts that the government in charge at that time, took children away from their parents to provide them a better life. The witnesses interviewed by the B.C. Ombudsman reveal the contrary. Research at that time was well known that humans or animals raised in confinement will lack normality. The law was clear at the time, that if a child was to be removed from the parents, they must be fostered out to other families to retain a "normal" life. This was not done! Instead, the intention was to punish the parents, who the government claimed to be non-conformists, by keeping innocent children at their arm's length. How cruel and uncivilized humans can become to achieve political gain through innocent infants.

...

Your Honourable Geoff Plant, please "walk the talk", stop spending tax payers money in courts on illusionary arguments and get down to earth. Apologize to the children that the previous government abused on B.C. soil. It is shameful to refuse, to wiggle out, to point fingers, to pass the buck when you are in charge and your Ombudsman gave you a task to oblige. Please do your government duty as we have voted you in and continue paying our taxes for your livelihood.

[129] They received a response to this letter in late October, which I will describe shortly.

Historic Site

[130] Meanwhile, the Ministry moved forward with a plan to create a historic site. In particular, it engaged the services of Mr. Manfred Burandt from BC Buildings Corporation to assist in the planning and Mr. Erik Lees, a Vancouver Landscape Architect, to prepare concept drawings.

[131] Ms. Neville travelled to Nelson in late July 2002 and, with Mr. Makortoff, looked at a potential historic site. While there, she also visited Selkirk College to explore options regarding an oral history project, and attended a meeting on July 23 with approximately 35 survivors, including Mr. Sherstobitoff and Mr. Konkin.

[132] Ms. Neville recalled that the positive tone of the meeting deteriorated once the discussion turned to the subject of a historic site and plaque. Ms. Neville testified that the survivors at the meeting were adamant that an apology was a necessary first step toward resolution. She advised the meeting attendees that she would communicate their “strong message” to the Ministry. She noted that it was difficult to obtain consensus amongst the survivors as to how to proceed, and that she was surprised by the reaction to the historic site. She recalled that no one expressed cultural or religious opposition to the historic site. Rather, it was the condition precedent of an apology that was the survivors’ clear demand.

[133] After the meeting, seven survivors, including Ms. Ericksen and Mr. Sherstobitoff, wrote the Ministry advising that they considered a “plaque” to be premature and that they wanted an acknowledgement that harm was done, an apology in the Legislative Assembly, a public inquiry and compensation. After those actions were taken, they were then prepared to “talk about a plaque and what should be written on it”.

[134] I note that there was no expression of opposition to the historic site or the plaque contained in this letter based on culture, race, ancestry or any other prohibited grounds of discrimination.

Report to Ms. Wallace

[135] On July 26, 2002, Ms. Neville sent an email report about the July 22 and 23 meetings to Ms. Wallace.

[136] In regard to the July 23 meeting, Ms. Neville noted once the discussion turned to the proposed historic site, the meeting “deteriorated”. She noted divergent views were expressed about the historic site, including the need for an official apology before any other steps were taken by government. Given the “intensity of the discussion”, the meeting concluded without discussing the oral history project. Ms. Neville honoured her commitment to the survivors and specifically advised Ms. Wallace that:

We guaranteed that we would bring back a message to you and the other deputies that they want an apology in the House on record in Hansard and that the formality of an apology is necessary in order to proceed.

[137] However, Ms. Neville also expressed her opinion that this was the view of a “limited number” of survivors and that there were approximately 15 survivors who lived in the lower Mainland and Agassiz that might have a different view. As well, she advised that she had received feedback from “others” since the meeting that the historic site should proceed regardless of an apology and that perhaps an apology should accompany the dedication of the site. She did not identify who the other persons were that provided this information.

[138] I consider it surprising that Ms. Neville was of the opinion that the request for a formal apology as an initial first step was the view of a limited number of survivors, since it had been a consistent request of the Survivors during the consultation process. In my view, this is another example of the miscommunication and what could be described as a lack of attentive listening that occurred on both sides throughout their discussions.

[139] Ms. Neville also noted that a new psychologist had been retained to provide counselling services to survivors. The Ministry subsequently sent a letter to approximately 180 survivors about the availability of the new counselling services, together with contact information.

[140] Also on July 26, 2002, Mr. Burandt notified Ms. Neville about his continuing efforts to organize the historic site, and that he expected it could be completed within 3-4 months.

[141] Ms. Neville continued to communicate with Mr. Burandt regarding the historic site and plans were made for Mr. Lees, the landscape architect, to visit the site. On August 25, 2002, Mr. Lees submitted a detailed site proposal to Mr. Burandt.

[142] On September 10, 2002, Ms. Neville advised Mr. Burandt that funding had been received for the historic site. She also advised him that the funding meant that they “would have to move right along”, as the funding was available in that fiscal year. There was optimism that the project could be completed in the fall.

[143] At this point, however, there had been no agreement or commitment to the historic site from the survivors in the area in which it was to be located. It is clear that despite the opposition expressed by many survivors both orally and in writing, the Ministry intended to proceed with the historic site in the absence of any commitment to a formal apology.

[144] Mr. Burandt travelled to New Denver at the end of September, toured the proposed historic site with Mr. Makortoff, and then updated Ms. Neville about progress on obtaining the necessary approvals and concept designs for the site. Ms. Neville thought the site description provided by Mr. Burandt sounded “excellent” and would achieve the “ambience we are looking for”.

AG’s Response to Mr. Sherstobitoff and Mr. Konkin

[145] On October 25, 2002, the AG replied to Messrs. Sherstobitoff’s and Konkin’s July 19th letter. He started by noting that since some former survivors had chosen to seek resolution through the courts, it would be inappropriate for him to comment on matters before the courts.

[146] He then went on to advise that:

Discussions are ongoing with respect to other ways in which mutually agreeable resolutions can be accomplished. Government has responded to the many requests for counselling. We continue to offer the services of [name] to provide family therapy to former residents and their families. In

addition, we have put into place a program through which funding is made available for individuals who wish to utilize the services of private counsellors or healers. Other resolutions requested by the former residents are also under development.

Our ongoing discussions involve many former residents, a significant number of whom have advised us that they wish to speak for themselves. We will continue to consult former residents as appropriate, including yourselves as we proceed in the development and implementation of resolutions.

[147] Ms. Neville testified that, at that time, several persons had come forward purporting to speak on behalf of the survivors and other persons would disagree with that representation. She said that there was no consensus about how to proceed amongst the survivors, and that the Ministry continued its efforts to consult with all survivor groups.

Continued Work on the Historic Site

[148] Regardless of this lack of consensus, work continued on preparing the historic site design and securing the resources to build it, with efforts focussed on trying to “get something in the ground” before mid-December 2002. The landscape architect, Mr. Lees, was particularly sensitive to the need for consultation and wrote to Mr. Burandt on October 28, 2002 inquiring about a consultation strategy. In particular he stated “I can just imagine starting to build this thing and the residents and/or Doukhobors get up in arms. What is your/Linda’s strategy re consultation”.

[149] On November 12, 2002, Mr. Lees provided detailed plans for the historic site just prior to a site visit. On November 18, 2002, Mr. Burandt advised him that Ms. Neville was meeting with Ms. Wallace for direction on how best to proceed, and “guessed” that there were some “political optics” that required consideration.

[150] Mr. Lees provided some further suggestions for the historic site and also recommended that the design process be amended to include Ms. Nadia Stoochnoff, a sculptor and survivor, who had presented some artistic ideas during a meeting with survivors in Agassiz.

Further Nelson Meeting

[151] Ms. Neville recalled a November 2002 meeting at the Heritage Hotel in Nelson that was attended by approximately 60 people. The purpose of the meeting was for Mr.

Lees and Mr. Burandt to talk about the historic site, to present the concept drawings, and to further discussions that had been held with survivors in Agassiz.

[152] Ms. Neville recalled that when she entered the meeting room, someone had placed flip charts around the room with various negative comments about the historic site and further demands for an apology and public inquiry. She described the meeting as “awful”, almost impossible to chair, with very angry messages being communicated by the participants. She testified that she could not even introduce Mr. Lees or Mr. Brandt, and that people would not look at the concept drawings. She described it as an “unhelpful process” and unpleasant experience.

Continued Site Work

[153] Despite this significant opposition having been expressed by survivors towards the historic site, work continued on the site preparation, including obtaining wording for markers. In this regard, Ms. Neville wrote Mr. Burandt advising that:

Greg, Richard and I are likely going to Nelson next week to work with a “select” group of former residents and others on the wording for the markers. We have drafted a letter which will be sent to the lawyer who represents the 50 litigants advising him about the project and welcoming comments from his clients.

[154] There was also a suggestion of including comments from the RCMP, and confirmation that the RCMP had committed to participate in a site dedication ceremony.

[155] Ms. Neville further noted that:

I was hoping to encourage the former residents to provide small vignettes which would capture the emotions they experienced as children. We’ll see how successful we are. I will suggest that they be in both languages.

[156] Ms. Neville testified that she had encouraged survivors to provide small vignettes for display at the site and that some survivors submitted poetry and stories in that regard.

[157] On December 31, 2002, Ms. Wallace wrote to the lawyer representing the litigant group. She reviewed the proposed historic site, and noted:

It is possible to develop the site and have a dedication ceremony in the spring at which appropriate people from government would gather with former residents to acknowledge the events that occurred. Former

residents are in the process of putting together information for inclusion in the site which will reflect the experience of children and parents associated with New Denver. With the help of the former residents we believe we can create an atmosphere conducive to reconciliation.

Other projects under consideration include an oral history project, the development of a Web site and the development of an educational curriculum.

[158] She welcomed his clients' comments and suggestions, and believes that she included the concept drawings for his review. She testified that even though approximately 50 survivors had opted to pursue personal compensation through a civil action, the Ministry continued to try to include all survivors in the healing and reconciliation process. Ms. Neville did not recall receiving a response to this letter.

Mr. Michael Verigin's Involvement with the Historic Site

[159] The Ministry continued to move forward with plans for the historic site, including involving Mr. Michael Verigin to obtain vignettes and support. Ms. Neville described Mr. Verigin as "very outspoken", with different views than some of the others they had spoken to, and felt that they could work with him. She saw him as someone who had credibility within the Doukhobor community and that survivors might turn to him for advice from time to time.

[160] Ms. Neville invited Mr. Verigin to tour the province with them to areas where they had been meeting with survivor groups to talk about different ways to reach a resolution. She testified that they were still struggling with whether to build the historic site, and if so, what it would look like.

The Meetings

[161] In addition to the Nelson meeting, Ms. Neville recalled meeting in Agassiz with about a dozen persons at Ms. Freeman's house. Her group also met with about 20-30 people in Surrey, 15 or 16 persons in Kelowna, and about 10 persons in Grand Forks. Mr. Verigin attended these meetings. He did not, however, represent any particular group of survivors.

[162] Ms. Neville testified that the purpose of the meetings was for the Ministry to provide information about the proposed site, share information from one group to

another, and gain input from the participants as to what they wanted to add to the site. She recalled that the consistent message received from the survivors at these meetings was that they needed a “statement” for healing.

[163] She also recalled that she had not expected Mr. Verigin to be adversarial, but that when he spoke at the meetings, he argued for personal compensation. Ms. Neville had not anticipated he would do so, but had expected him to be conciliatory and work with them to find mutual solutions. She described feeling betrayed and specifically recalled that Mr. Verigin had previously been advised that any request for individual compensation was a matter that needed to be decided by the court.

[164] Ms. Neville also noted that the Ministry continued to provide funding for counselling services throughout this period.

Further Survey

[165] On February 26, 2003, Mr. Makortoff emailed Ms. Neville advising that a meeting of the New Denver Survivor’s Volunteer Committee (“NDSVC”) had been held in Nelson on February 21, 2003 with numerous representatives from various areas. These representatives included, amongst others, Mr. Makortoff, Ms. Freeman and Mr. Verigin.

[166] It was decided that a telephone survey should be conducted in order to “finally determine” the wishes of the survivors in relation to the Report. Agreement was reached on specific questions, and it was decided that the questions should be communicated to Ms. Neville for her review and comment. The survey was to be conducted between March 4-10, 2003 and the results would be shared with Ms. Neville.

[167] The questions focussed on an apology and whether a historic site was needed at all, by June 2003, or after other issues were resolved.

[168] Ms. Neville responded that she would not comment on the specific wording of the questions, but expressed her view that the questions went “beyond anything we can reasonably expect to accomplish given our current mandate”. She agreed, however, that she would communicate the preferences to the Ministry, but could not anticipate or guarantee how the Ministry would respond.

Funding for the Site

[169] At the end of the fiscal year in March 2003, funding for the historic site would be lost. Therefore, in order to retain access to the funds, Ms. Neville made arrangements to transfer the funds to a non-profit society that would administer the funds. The cost of the project was estimated to be approximately \$70,000 in total.

Survey Results and Apology

[170] On March 13, 2003, the AG also wrote to Messrs. Sherstobitoff and Mr. Konkin about the site and its appropriateness for an apology. In particular, he stated:

Our government is currently working with the former residents of New Denver to attempt to achieve consensus as to how to respond to the recommendations of the Ombudsman's report "Righting the Wrong – The Confinement of the Sons of Freedom Doukhobor Children." A process is being developed through which the views of former residents can be considered. In response to previous requests, we have put two programs into place to ensure counselling is available for those who are experiencing emotional turmoil. I can confirm that our discussions about reconciliation with the former residents include the possibility of a historic site. However, it is important to note that the dedication of this site would provide an appropriate forum for an apology and acknowledgement to take place.

[171] It is clear that an impression was being created at this time that the Ministry was entertaining extending a formal apology to the survivors.

[172] On March 14, 2003, an unsigned letter from the NDSVC was forwarded to Premier Campbell. The letter outlined the NDSVC's requests regarding implementation of the Report's recommendations. It noted, in part, that certain of the counselling services provided were always available through MSP, and that, in any event, psychologists were not available in the smaller rural areas.

[173] The NDSVC also advised that a statement of regret was seen as "totally meaningless" to them, and that an apology was essential. As well, it noted that there was opposition to the historic site. In particular, based on the results of the phone survey, 30% of the survivors contacted were against the site based on religious beliefs and 90% felt they had not been consulted on any of its features or location. The NDSVC also noted that some survivors had commenced a petition against the site.

[174] After setting out its position in detail, the NDSVC concluded by noting that the “first meaningful step is an apology”. It requested a response by April 30, 2003.

[175] I note that this was the first evidence of a written or oral expression of opposition to the historic site based on religious grounds. I also note that the poll question set out in the letter was “do you need a Doukhobor historic site build at ND?” and that 17% said by June 2003, 55% said “at a future date – after other ND issues resolved”, and 28% said no. There was no indication in the actual poll results as to where the percentages were obtained about opposition based on religious belief or lack of consultation.

[176] Ms. Neville testified that she disagreed that the counselling program was of little benefit to the survivors. She noted that she had received numerous comments from people attesting to the beneficial impact of the program, and requesting that it continue. I accept that the counselling program was utilized on an ongoing basis by many survivors and was considered by those who utilized it to be a beneficial service.

[177] As well, Ms. Neville noted that, based on the survey results, 17% of those canvassed felt they would benefit by having the site built by June 2003, 55% said they would in the future after other issues had been resolved, and 28% said they did not need the site at all. She also testified that she had not been previously advised that survivors were opposed to the historic site on religious grounds, and noted that some survivors, such as Ms. Stoochnoff, were supportive of the site.

[178] After receiving a copy of the letter, Ms. Neville spoke to the Makortoffs. She noted that she would not proceed with arranging the transfer of funds to the non-profit society if the community did not want the site. It was agreed that the funds should be let go. The Makortoffs each encouraged the Ministry to continue with the counselling program as they felt it was benefitting those who accessed it.

[179] On March 23, 2003, the Makortoffs wrote to Ms. Neville regarding the letter sent to Premier Campbell. They noted their disagreement with the tone of the letter, and certain of its contents, and encouraged the Ministry to continue funding counselling services, and pursue an apology, despite the setbacks regarding the historic site. They were also complimentary of the Ministry’s commitment to date:

Linda, please remember that yours, Greg's, Richard's, Gillian's and other's efforts, certainly far beyond the call of duty, towards making the apology a meaningful experience are very much appreciated by many. The emotional investment is considerable. I am sure you also realize that no matter what you do, many of the people you are trying to help will continue to find fault and blame and continue with the rest of the emotional, co-dependent package that prevents the understanding and healing needed to achieve the peace they so desperately seek. It takes enormous effort to break out of a cultural mindset permeated with fear and mistrust of government and each other. Be patient and kind as you usually are and know that time heals all wounds.

[180] Mr. Makortoff also withdrew from the NDSVC at this time.

[181] Ms. Neville replied to the Makortoffs on March 25, 2003. She noted that it was regrettable that Mr. Verigin's participation in the Ministry's meetings with various representatives had resulted in increased tension, and that this had not been their intention. She also noted that Mr. Verigin had advised her that the number of people surveyed was 90, which represented a majority of the approximately 150 Survivors. As a result, it was her view that they could not proceed with the site development in light of that strong opposition. She stated that:

We do not want to risk being accused of forcing this project on folks. We will of course pursue with the Deputy Ministers and Ministers, the possibility of an apology according to the preferences in the survey. It remains to be seen as to how the government will choose to proceed.

[182] She further stated:

I feel a great deal of personal frustration and disappointment that we are unable to support those who were ready to engage in a dialogue to promote healing and reconciliation. Whether it was the development of a historic site at New Denver, or another identified process, I believe government was ready to participate. I hope this momentum will not be lost by this apparent setback.

[183] She thanked the Makortoffs for their participation and support, and confirmed Mr. Makortoff's withdrawal from the NDSVC.

[184] Ms. Neville testified that work on the site was stopped at this point in time.

AG's Response to the March 14 letter and Work Stoppage at the Historic Site

[185] On May 7, 2003, the AG wrote to the NDSVC in response to the March 14, 2003 letter, and confirmed that work on the historic site would not proceed. He noted that over the last three years, Ministry representatives had been meeting with survivors to address the Report's recommendations. In particular, he stated:

Based on input from the former residents and others, Government attempted to address the Ombudsman's recommendations by creating a forum in which Government, the former residents and other community members could begin a meaningful dialogue toward reconciliation and healing. The development of a historic site near New Denver was intended to provide such a forum and in addition to provide a legacy for British Columbians as a reminder of these events.

You advise that the majority of residents do not want Government to proceed with this plan. You also advise that your committee speaks for the majority of the former residents of New Denver. Based upon your advice we will not be proceeding with the development of a historic site at this time.

[186] The AG also confirmed that the counselling program would continue given the positive feedback received to date from participants in that program.

[187] In regard to an apology, the AG stated:

We are anxious to proceed in a way that is respectful of your wishes. We do not wish to continue discussions that have "created anger, pain, resentment and mistrust." Your survey indicates that the majority of former residents favour a formal apology. We will take the matter of a formal apology under consideration.

[188] Ms. Neville testified that after work had stopped at the site, she continued to receive calls from survivors who wanted to continue to find a way to reach consensus. As a result, she invited a select group of people, who she described as representing different views amongst the survivors, to meet with the Ministry with a view to moving forward.

AG's Response to a Letter from Mr. Verigin

[189] On September 24, 2003, the AG wrote to Mr. Verigin advising as follows about the Ministry's response to the Report, the request for an apology, and individual compensation:

As mentioned in my previous correspondence to you dated September 2, 2003, we have consulted over the past three years with many of the people who were placed in New Denver and with various others who were impacted by these events. I believe we have been responsive to the needs identified by the former residents. For example, after meeting with former residents and hearing your concerns, Government provided family therapy. When individual counselling was requested, Government responded by putting in place a program to provide individual counselling to former residents of New Denver. In response to recent requests, we have just finalized arrangements to extend individual counselling to siblings, spouses, ex-spouses and children of former residents.

In consultation with former residents we have spent considerable time, and resources developing a comprehensive plan for a historic site to be developed near New Denver. This was meant to be the location of a dedication ceremony to acknowledge the past and advance healing and reconciliation for those who were placed in New Denver. At your request we have put that project on hold indefinitely. You have advised us that an apology in the Legislature is crucial to many before healing can commence. We are currently considering whether, and if so how, this could be done.

With respect to personal compensation, I can only reiterate that the appropriate process for those seeking personal compensation is through the courts. Government has provided community compensation to the former residents of New Denver by implementing a program of counselling and adjusting this program to meet needs as they arise. The development of a historic site to promote healing for the former residents and harmony with the community is another form of community compensation which Government has offered to provide. As you know, other projects are also under consideration.

With regard to alleged abuse at Woodlands, Glendale Lodge, Tranquille and Endicotte Centre, I can advise that Government deals with each situation on its merits. A blanket apology was provided to the former residents of these institutions along with a fund to provide support and counselling. Individual compensation has not been provided.

I can assure you that Government has heard your concerns and we are working to accommodate your request.

[190] There was no evidence about whether the contents of this letter were communicated to any Survivors. There is no dispute about the apology that was extended to the children noted in the letter. I also accept that no individual compensation was provided to those children.

Ministerial Statement Rather than an Apology

[191] On November 12, 2003, Ms. Neville provided an update to the then Deputy AG, Mr. Allan Seckel, about a conversation she had recently had with Mr. Verigin on November 4, 2003. She described him as the “leader” of the litigant group, and that he had contacted her requesting information about the status of the apology and community compensation. She had advised Mr. Verigin that the issue of an apology was not resolved and that if it was possible, it would be a ministerial statement rather than an apology “as such”. She also expressed her suspicion to Mr. Seckel that Mr. Verigin wanted the apology to further the litigant group’s legal position.

[192] Ms. Neville also reported that she had advised Mr. Verigin that community projects such as an oral history project were still possible. She further stated that Mr. Verigin was not pleased to learn that the Ministry did not recognize him as the spokesperson for the survivors as a whole. She explained that they had received a number of calls from persons stating that they did not wish him to speak on their behalf, and they had a responsibility to listen to those views.

[193] She advised that she would be meeting with certain survivors on December 1, 2003 and would be inviting Mr. Verigin to that meeting.

[194] I note that while the AG had been advising certain survivors that an apology was under consideration, Ms. Neville had now advised Mr. Verigin that it would take a different form, and she also expressed suspicion about the motives for requesting an apology. I also note that the “litigant group” was not comprised of all survivors, and accept that the repeated request for an apology arose from a real and sincere need for recognition of the harm done to the survivors as children in order to facilitate the healing process. I also accept that the Ministry was concerned about the impact of an apology on the outstanding litigation in which it was taking the position that it had no liability to provide individual compensation to the survivor litigant group.

Further Meetings with Select Survivors – December 2003 to May 2004

[195] Ms. Neville met with select survivors on December 1, 2003 in Nelson, B.C. Mr. Swetlishoff and Mr. Verigin attended the meeting. Ms. Neville testified that several suggestions for resolution were put forward at the meeting, including

- An apology in the Legislature;
- Counselling;
- A website;
- A place where cultural activities could take place; and
- A trust fund.

[196] Ms. Neville noted that details were not discussed and it was understood that if the suggestions were approved for further consideration, a process would need to be established for the Ministry and survivors to develop a detailed proposal. She also noted that the topic of a historic site did not come up for discussion.

[197] Ms. Neville also met with another group of survivors at Agassiz.

[198] A further meeting was held with Ministry representatives and certain survivors in Nelson on March 4, 2004. Survivors in attendance included Mr. Swetlishoff, the Makortoffs, Ms. Ericksen and Mr. Verigin. Various projects were discussed which might advance healing and reconciliation, on the understanding that there was no commitment to proceed with any or all of the proposals.

[199] The proposals included an apology (which the survivors who attended that meeting saw as a pivotal component of a healing and reconciliation package), continued counselling, a website, community centre, trust fund, oral history project and historic site.

[200] Ms. Neville specifically recalled that when the issue of a historic site was raised, there was no objection to it expressed from any of the survivors based on ancestry, race, religion or cultural sensitivities. She noted that some survivors considered a historic site to be very important and saw it as a legacy and a place for the Ministry to acknowledge what had happened in New Denver.

[201] Further meetings with survivors were held in Agassiz on April 28, 2004 and Nelson on May 13, 2004.

[202] As a result of these meetings, Ms. Neville testified that consensus was reached that the historic site would proceed only if a statement in the Legislature went ahead. In furtherance of this objective, she subsequently met with the Mayor of New Denver to discuss the site, and testified that the Mayor was excited about the project and would speak to his Council about it. The Council subsequently agreed to pay an annual fee to maintain the site if it was built.

[203] As well, the Ministry sought and obtained an updated cost estimate from Mr. Lees for the historic site in the amount of approximately \$54,000.

[204] Ms. Neville was not challenged on her evidence that consensus on the historic site was reached with the survivors at the Nelson and Agassiz meetings. I accept that the Ministry proceeded with plans for the historic site based on this understanding and that, in the absence of believing there was survivor support for the historic site, would not have taken further action in that regard. As will be discussed, however, the Survivors were of the view that an apology would be forthcoming, whereas Ms. Neville understood it to be a “statement of regret”.

Briefing Note

[205] On June 29, 2004, Ms. Neville prepared a briefing note for the AG. The briefing note provided some historical background, a review of options that had been considered, and recommendations.

[206] The briefing note stated that following meetings with survivors in Agassiz and Nelson, it appeared “that there is consensus about a package to facilitate healing reconciliation” and that one of the components of that package was a “statement of regret”. I note, however, the evidence was unequivocal that the Survivors had consistently and emphatically been asking for an apology. Indeed, later in the briefing note, Ms. Neville referred to consensus on the part of survivors that an “apology” was essential to enable them to move forward with their lives, and that the Ombudsman had reinforced this point. Regardless, the draft statement to be read in the Legislature that was attached to the briefing note referred only to a statement of regret.

[207] The briefing note also referred to plans being in place for a historic site, counselling and an oral history project.

[208] The briefing note further stated that although 49 persons had sought personal compensation through litigation, the Supreme Court of British Columbia had dismissed the action as statute barred and that decision had been upheld by the B.C. Court of Appeal on June 1, 2004. The Ministry advised, however, that two plaintiffs in that action filed an application for leave to appeal to the Supreme Court of Canada, which was denied on April 27, 2006.

Project Go Ahead

[209] Based on the understanding that a consensus on the historic site had been reached, the Ministry continued to proceed with plans for the site. For example, on July 13, 2004, Mr. Lees wrote Ms. Neville to advise that he had spoken with the Mayor of New Denver, who was delighted that the historic site was going ahead.

[210] As well, Mr. Lees spoke with Ms. Stoochnoff, who agreed to complete two sculptures for the site by the end of August. Ms. Neville testified that Ms. Stoochnoff had unrestricted artistic freedom to create the sculptures, and had envisioned depicting the relationship between mother and child. She testified that the Ministry did not “approve” the sculpture design, but left it to the sculptor’s discretion. The Ministry did, however, provide funding for the sculptures.

[211] The Ministry also collected various stories from survivors for inclusion on storyboards to be placed on the site. The stories are compelling and poignant and serve as a reminder of the ongoing hurt and trauma experienced by the survivors.

Survivor Opposition to the Historic Site

[212] While the Ministry was proceeding with site plans on the basis that a consensus had been reached with survivors, the Survivors did not share this view.

[213] On August 6, 2004, Ms. Ericksen, Mr. Swetlishoff and others wrote to survivors requesting their support to speak out against the Ministry’s decision to proceed with the historic site.

[214] Also on August 6, 2004, a petition was circulated amongst survivors requesting that the AG, amongst other things, implement the Report's recommendations, starting with an unconditional, clear and public apology in the Legislature and noting that they had not agreed to the historic site.

[215] On August 23, 2004, several of these same persons also wrote to the Mayor of New Denver advising that they did not support the historic site. As well, on August 29, they wrote to Attorney General Plant requesting that the project be stopped.

[216] Ms. Neville testified that the Ministry believed that it had achieved a consensus regarding the historic site or it would not have proceeded with plans to build it. She noted that they had been trying to be responsive to all the needs that had been expressed to it by survivors, including an apology in the Legislature and the historic site. She reiterated that many survivors had expressed the view that a historic site was desired as a legacy, and to remind the public about what had happened in New Denver and to prevent it from ever happening again.

Work on the Sculptures and Site

[217] By the end of August, Ms. Stoochnoff had completed one sculpture and was working on the other. Work had also commenced on the historic site.

Letter to AG that Survivors Opposed to Site on Religious Grounds

[218] On September 13, 2004, Mr. Swetlishoff and others, on behalf of the NDSVC, wrote to the AG, expressing opposition to the historic site and enclosing some signed petitions.

[219] In this letter, there was reference to opposing the historic site because their faith opposes representative icons of any kind, and they considered the historic site to constitute a violation of s. 7 of the *Human Rights Code*. Ms. Neville testified that it was not her understanding that there was general opposition to the historic site on this basis. She noted that there is an elaborate tomb erected for Peter the Lordly Verigin that is maintained by the Doukhobor community and which has site interpreters to describe to the public what the site commemorates. She also testified that several of the persons who

had signed the letter had been present at the meeting at which consensus had been reached.

[220] I do not consider the fact that there is a historic site maintained for Peter the Lordly Verigin which is open to public view to diminish in any way the religious opposition expressed by the Survivors in their letter. I accept that, if the historic site was to be a place of worship, or was to display a religious icon, that it would offend the religious tenants of the Survivors.

AG Confirmation to Survivors that Statement of Regret Forthcoming

[221] On September 14, 2004, the AG wrote to Mr. Swetlishoff and others confirming that the Ministry intended to make a statement of regret in the Legislature during the fall sitting of the House and that they would be advised of the date and details of the announcement.

[222] He further indicated his understanding that the historic site was initially proposed by some survivors and that the statement of regret should precede the dedication of the site.

[223] Work continued on the site.

[224] On September 21, 2004, the NDSVC wrote to the AG advising that they required an apology and were not in support of the historic site. In addition to this letter, a protest sign went up at the historic site which stated:

The Attorney-General is violating the B.C. Human Rights Code.
Discriminatory Publication insults our ancestry. NDS Collective.

[225] While the sign referenced the “NDS Collective”, there was no evidence as to who made or put the sign up near the site.

AG Advice to Survivors that an Apology would be Forthcoming

[226] On September 30, 2004, the AG wrote to the NDSVC, c/o Mr. Swetlishoff, in reply to the September 21, 2004 letter. He advised that the Ministry’s efforts and decisions have been guided by the Report, and that he was looking forward to making a statement in the Legislature as part of the reconciliation and education process.

[227] Also on that date, the AG wrote to Mr. and Mrs. Swetlishoff updating them with respect to the Ministry's response to the Report and specifically stating that "We will be proceeding with an apology in the Legislature as discussed, on October 4, 2004."

[228] He further advised that this would be followed by the completion and dedication of the historic site, as well as a review of the counselling program and referencing the possibility of other programs.

[229] Mr. Plant acknowledged in his evidence that he had specifically advised Mr. Swetlishoff and others that he would be proceeding with an apology in the Legislature on October 4. He explained that he erred when he used the word apology in the letter, and regretted doing so. He believes that he was "quite sure" by this point in time that it would only be a statement of regret, but could not provide a definitive explanation as to why he stated it would be an apology, except for what may be characterized as administrative error.

[230] Mr. Plant also explained the significance of making a statement in the Legislature. He stated that the Legislative Assembly is the centrepiece of public life and business in British Columbia and, by making the statement in the Legislature, it becomes part of permanent Hansard record. He also explained that while he understood that a statement made in the Legislature would be privileged, this was not a factor in the decision to make the statement at that location.

The Statement

[231] In preparation for the statement in the Legislature, the Ministry attempted to contact survivors and invite them to attend. Several survivors indicated that they intended to travel to Victoria to be present for the statement. Ms. Neville forwarded the names of the survivors to the AG to enable their introduction prior to the statement.

[232] On October 4, 2004, the AG rose in the House and paid tribute to the eleven survivors in attendance. He then went on to say the following:

The provincial ombudsman brought this chapter to the attention of government and the public in her 1999 report entitled *Righting the Wrong: the Confinement of the Sons of Freedom Doukhobor Children*. This report details the events that occurred some 50 years ago, when 104 Sons of

Freedom Doukhobor children were removed from their parents, who were arrested during a protest in the West Kootenays.

In 1953 some 104 children were taken by bus to New Denver, where those of school age were kept in a residential care facility and those who were not of school age were returned to their families. Over the next six years, from 1953 to 1959, the government enforced a policy of mandatory school attendance. Approximately 200 children were placed in the New Denver institution during this period. Many Sons of Freedom parents, determined not to surrender their children, hid them from the police. Initially, the children went to school in the institution, but eventually they were integrated into the local public school in New Denver.

No doubt the New Denver experience affected these children and their families in profound ways. In many cases, these children were kept from their parents for extraordinary periods of time. Some children were not allowed to return home during the summer or at Christmas because of uncertainty that their parents would return them to New Denver.

This was not an easy story to hear, nor is it an easy story to tell. I commend all those who came forward after all these years to talk about what must be extremely personal and painful memories. Many of these people, we have since come to learn, have buried their past, and they even felt it necessary to hide their Sons of Freedom background and their association with New Denver from their friends, their neighbours and their employers.

The challenge that we as government today face in understanding what happened half a century ago is not as simple as one might expect. What we do know is that these were frightening times for the residents of the Kootenay and Boundary regions of British Columbia. Bombings and burnings had been occurring throughout this part of the province for over three decades. Fear and anger had escalated among both the Doukhobor and the non-Doukhobor communities. To this end, the government of the day was under tremendous pressure to do something to end the violence.

We can't fully understand or explain the motives of a government of 50 years ago. We can, though, recognize the circumstances under which these events occurred and acknowledge how things might be done differently if we were to do them today.

I would like to thank those who had the courage to come forward to remind British Columbians about this history. Many of us were unaware or had forgotten about the conflicting values and political turmoil that involved the government and these communities over half a century ago. In particular, too many of us were unaware that you, as innocent children, were taken from your homes, your families and your communities.

We recognize that as children, you were caught in this conflict through no fault of your own. On behalf of the government of British Columbia, I

extend my sincere, complete and deep regret for the pain and suffering you experienced during the prolonged separation from your families. We recognize and regret that you were deprived of the day-to-day contact with your parents and the love and support of your families. We recognize and we regret the anguish that this must have caused. We will continue to offer counselling to former residents and to your relatives – including your siblings, your offspring and your spouses – who wish to access this service.

We hope that this acknowledgement will enable you to work with us toward continued reconciliation and healing.

[233] The statement did not include an apology, but only referred to regret. Dr. Cran testified that he was involved in the preparation of the statement of regret, and that the reason the Ministry did not apologize at the time was because there was no *Apology Act* in place, and there was outstanding litigation against the Ministry in which certain survivors were seeking individual compensation. He stated that, based on legal advice, it was premature to apologize until the “file” had been concluded. He also testified that this impediment is not present today, since there is an *Apology Act* in force.

[234] Mr. Plant testified that there were two reasons why he made only a statement of regret and not an apology. The first was that it was clear to him as a lawyer, and based on legal advice he had received, that an apology carried with it the risk of an admission of legal liability and that was not a policy position that he or the Ministry was prepared or willing to take. He did not want the statement to become an admission of wrongdoing in the civil proceedings. He explained that even though he understood that the statement would be privileged since it was made in the Legislature, he was prepared to walk outside this zone of privilege and repeat the words outside the Legislature.

[235] Mr. Plant also testified that, at the time, he was discussing an *Apology Act* as a potential area of law reform with his Deputy AG. He could not recall if an *Apology Act* had actually been drafted at the time, but was certain that it had reached the point where he had received the agreement of Cabinet to move forward. Regardless, he stated that it was his “firm view” that the idea of an *Apology Act* should not “get in the way” of issuing the statement of regret. He felt that tabling an *Apology Act* just prior to making the statement of regret would have been disrespectful. He also did not want the idea that the legal system worked better with legislation that encouraged people to admit wrongdoing

without risk of legal liability to get “caught up” in “this exercise” and that it might have if the two events occurred in proximate time to each other. He emphasized, however, that the risk of legal liability attendant upon an apology was only one of the factors in the decision to issue a statement of regret.

[236] The second reason was that he had formed the view, which he believed was shared by his Cabinet colleagues, that in “all the complex circumstances of this case”, while what had happened to the survivors as children was utterly regrettable, it was not appropriate for the Ministry to apologize for something another government did 50 years earlier.

[237] Mr. Plant explained that the statement of regret was made in response to the Report’s recommendation for an apology. In his view, an Ombudsman’s recommendation does not compel the Ministry to act upon the recommendation, but it must seriously consider the recommendation. He further explained that in some situations, such as the Woodlands situation, the Ministry might issue an apology. He testified that each case had to be dealt with on its own facts, and he considered it better to examine individual circumstances and look for the best solution in each case. He did not think it was practical to establish a blanket, inflexible policy and run the risk of being insensitive to unique, individual circumstances and, perhaps, the unique harm caused in particular cases.

[238] He also noted that if legal compensation was being pursued, that had an impact since government had to consider how it could best defend its position in response to that legal action. He described the situation as “complex”.

[239] I accept that the Ministry was concerned about the potential impact of an apology as an admission of liability. Despite the fact that the Court of Appeal had already dismissed the civil claim, there remained the potential at that time for the Supreme Court of Canada to allow an appeal of that decision. However, the very clear representation had been made to the Survivors that an apology would be forthcoming, and it is not surprising that they reacted with disappointment, hurt and anger when they heard only a statement of regret.

[240] I also note that while Mr. Plant expressed the view that it was not appropriate for the Ministry to apologize for the actions of a prior government, the fact is that

governments have apologized for past acts. As noted in the Woodlands apology, “the past lessons of history must not be forgotten”. A public and formal apology is one way of ensuring remembrance. It is also a necessary and essential element of the healing process for the Survivors as evidenced during the hearing.

Aftermath of the Statement and Stop Work Order

[241] After the statement, the AG met with the survivors who had personally attended in the Legislature. It is fair to say that a majority of survivors were greatly disappointed that there had not been an apology. Mr. Sherstobitoff testified that he asked the AG why there was no apology, and that the AG replied that he could not apologize because it would cost the government too much money.

[242] Ms. Neville, who also attended the meeting, testified that because many of the survivors did not consider the statement of regret to constitute an apology, they spoke “quite forcefully” against continuation of the historic site.

[243] It is clear that despite the opposition to the site expressed by the NDSVC in its September correspondence, the Ministry remained of the view that if it made a statement in the Legislature, then the historic site would proceed with survivor support. However, given the opposition expressed to him immediately after the statement of regret, Mr. Plant testified that he decided to immediately halt work on the historic site. He also instructed his Deputy AG, Mr. Seckel, to canvas survivors about whether or not they wanted the site completed.

CBC Radio Show

[244] The day after making the statement of regret in the Legislature, the AG went on a CBC radio show to speak about it. During that radio interview, he provided the following explanation for why the Ministry issued a statement of regret rather than an apology:

Well, the statement yesterday was intended to be as complete a statement of sympathy and regret for the harm done that it would be possible to make. The children who were taken from their parents 30 years ago as a result of a decision by the government of the day to try to do something to bring an end to 30 years of bombings and burnings in the Kootenays, were innocent of anything. You know, this was a fight between adults, I suppose. A dispute, a long-standing dispute among a whole bunch of

different adults, it sure wasn't anything to do with anything the children had done. The children became victims and many of them were traumatized by the enforced separation from their parents. Who wouldn't be? Now, what's the difference between a Statement of Regret and an apology? Usually an apology involves an admission on the part of the person making the apology that they did something wrong. It goes beyond the acknowledgement that there was hurt and harm and pain and anguish and it becomes an admission of wrongdoing. There's a couple of reasons why that's problematic here. One is that we are still having to face litigation as a government and I think that there are good reasons for government to be in court that there was no legal wrongdoing committed fifty years ago, and secondly, and this is the harder part, I think the verdict of history is mixed on whether or not the government did the right thing here. Clearly these children were caught in something that was not of their making but at the same time what we do know is that when government began to change its policies, about half a century ago, the long wave of terrorism finally and gradually came to an end.

[245] When the interviewer put to the AG that the Ombudsman had asked the government to apologize, and that it hadn't, he replied:

Well, I mean we are sorry for the harm done to the children but we did not accept, and I don't accept the Ombudsman's recommendation that government acknowledge that it did something wrong. And I say that knowing that first of all, first and foremost, that's not an easy thing for these people who, have lived their lives with this trauma to bear, but I think I also have to make a...government has to act on what it believes is right for these people and what is right for the public interest of the Province of British Columbia, and as I say when you look at the historic record, I mean in the early 1950s, before this took place, one third of the policing budget for the Province of British Columbia was spent trying to maintain some kind of civil order in the Kootenays. It was a very, very trying time for the people living there and government felt enormous pressure to do something. Historians are going to argue about whether what government did was the right thing but what we do know, and I do, and I'll say it again, we know that kids were caught in the middle of this, I can only begin to imagine how traumatic it was to be removed from your family and kept isolated for months and months. But we have acknowledged that anguish and I also acknowledge that we have more work to do as we try to build some sense of reconciliation for this sad chapter in our history.

[246] Mr. Plant testified that he did not intend to offend anyone by his comments.

[247] It was clear from Mr. Plant's evidence and his comments during the CBC Radio show, that an apology was not forthcoming not only because of the outstanding litigation

and the potential impact on legal liability, but also because the Ministry was not persuaded that the apprehension and confinement of the survivors in the 1950s was unjustified in the circumstances of the time.

Other Reactions to the Statements

[248] Mr. Plant recalled receiving a variety of reactions from the public to the statement of regret. He remembered hearing from people who were disappointed or angry that an apology had not been forthcoming, and also hearing from people who thought that the right thing had been done. He also recalled hearing from people who felt he had gone too far. He characterized the overall public reaction as “mixed” and described that as not unusual when dealing with difficult public policy issues.

[249] There was also mixed reaction to the statement of regret amongst the survivors, one of which will be reviewed in detail.

Ms. Elkin’s Response to the Statement of Regret

[250] After hearing the statement of regret, Ms. Elkins wrote a letter to Mr. Plant. While it is long, it bears including in most of its entirety since it captures the essence of what was expressed by the Survivors during this hearing.

Dear Mr. Plant,

I heard you say you “regret” the incident in 1953 where “doukhobor” children were removed from their homes for their parents civil disobedience.

I was seven years old at the time of that incident “half a century ago”.

I have not only regretted the incident but have lived inside it, agonized about it, and kept it a secret.

My horrible secret was that I was born into the doukhobor culture and I was one of “those” doukhobor children. You see, at seven years of age, I believed it was all about me, rather than about the adults who governed and upheld the laws of the land, Canada, supposedly, a democratic society.

I have not experienced democracy and equality. Since that incident of fifty years ago I have lived inside the closet believing I needed to be confined for my own good and for the betterment of the society I lived in! I believed the laws of the land applied only to good Canadian people, definitely not to the people of doukhobor descent. I believed society needed to be protected from me and my kind, and if anyone in society found out where I came from, I would once again be arrested.

Now fifty years later as I listened to your speech, I did not hear that a harm was done to me under Canadian law. I did not hear any words in your speech that touched the heart of a terrified seven year old child. I had truly hoped to hear that a terrible injustice was committed by the Canadian government of the day towards a group of innocent Canadian children.

You see, at age seven, I did not need to be apprehended, labeled, numbered, and isolated from the rest of society. I was not a danger or a threat to anyone. I was seven! I did not need to be institutionalized and forced to live my life within a group of other children who were just as innocent as I was.

Contrary to what people of that day thought, and perhaps even to this day still think, I was not sequestered at home and taught how to create bombs in order to blow up bridges and buildings!

My life as a child, although far from perfect, revolved around my older sister, my middle sister, my baby brother, my mom, and around the creek we used to swim in. My world at seven was still pretty small.

When the policemen came to get me it changed my life forever. In one short day, my familiar world was taken from me and replaced with policemen, matrons, a large cold sterile building, and of course, the school.

After I was apprehended and dumped into the institution, I was left to fend for myself at seven. There were no adults there to turn to. And even though my middle sister came with me, we were no longer friends who played together, we were enemies towards each other.

The essence of New Denver was one of helpless terror. The fact that I was confined with other doukhor children was not a comfort to me. For the most part we were strangers to each other who were forced to live together and survive the new life forced upon us. The survival did not feel good.

As children we needed kindness, love, understanding, and some recognition other than being dubbed “those doukhor children”. Besides the education, we needed some dignity, respect, and supportive adults who loved and understood terrified children. New Denver did not instill in me feelings of well-being towards myself or towards others. Instead New Denver taught me I was “just another one of those doukhor children”, somehow responsible for the violence in the culture I came from.

As I listened to your speech of regret, I did not think that you, as a representative of the Canadian government, understood what pain and terror the prejudicial practices of that day created in the lives of innocent children who are now adults. What discouraged and surprised me was your reference to “the cultural violence” and to “the tremendous pressure” the government of the day was under. I would like to believe that in a democratic society the adults who govern, or have governed Canada would have other means at their disposal for resolving disputes, besides apprehending and confining innocent children into institutions.

You see, as a child I was innocent.

I was not responsible for the cultures violence, or for the feelings of tremendous pressure the government of the day was under. I would like to believe that in a democratic society Canadian children could not be arrested and confined into institutions to relieve the tremendous pressure the provincial government in power was feeling. And in a democratic society I would like to believe that when a wrong is committed, a representative of the democratic country would take ownership of the wrong, take steps to correct it, and take measures to ensure it does not happen again to other children, regardless of the culture they come from. Righting the Wrong, is the correct title used in the ombudsmans report.

I hoped as I listened to your speech of regret that you would have understood that a wrong was committed by the government in power towards a group of innocent children. I believe that even fifty years ago we knew better. As a matter of fact, the Rights of the Child date back to well beyond 1953. My statement of regret is that fifty years later, you still do not understand or see that my rights as a child were violated by the institution of New Denver.

I am puzzled how the confinement of myself as a child into a heartless cruel institution was not a violation of my rights as a human being. I am puzzled that the terror I experienced in New Denver did not warrant an apology!

...

Violence and terrorism have been with us for many years and we know they are found in all cultures. I am disappointed that Canada, a democratic country, allowed such use of force and terror to round up innocent children, and confine them into institutions for acts of cultural violence the children, themselves, did not commit.

Yes, I do believe children need an education. However, terrorizing children into the educational system by force would not have been my first choice. I know for sure, my first day of school and all the events leading up to it, were unlike yours, or any other Canadian child, except for the First Nations children. It's interesting that even though it is half a century ago, the terror and the shame I felt as a child never left me.

Thank you, Mr. Plant for taking the time to read my letter. I needed to let you know the disappointment I felt when I heard in your speech that the life of terror imposed on myself and the other children was not worthy of an apology from the government, and yet it was the government itself that violated and took away my rights as a human being.

As a Canadian citizen I believe I deserve an apology. I have wasted too many years living in the regret of being born a doukhorbor and whatever else the word itself meant to society at large or to the government in power. I also believe that as a Canadian citizen I and the other children

who were apprehended and confined to an institution by the government deserve some closure to the terror and the emotional pain and suffering we experienced in New Denver. In my books it was not right, humane, or democratic. And I cannot understand how from your position of power, you do not see it as an injustice towards Canadian children. We were terrorized by the process of getting educated!

...

New Denver greatly impacted my life. It took away my home, my culture, my country, and my freedom to live my life without fear and terror of being born into the doukhobor culture.

I had hoped as I listened to your speech that I would finally be able to live my life without hearing the chorus of, “dirty duke, dirty duke” resounding inside my head. It would have been nice to have had the tape erased.

Restorative Justice is a new program being implemented and it’s a concept based on accountability and apologies. I hear it is an effective method in healing past traumas. I understand it allows people and the communities they live in to heal and leave the terror and the shame, and the ugly memories behind them.

It would definitely be helpful to me because I, simply, do not understand how an incident that violated my rights as a human being is only regrettable to the people who hold positions of power in the government now.

[251] Ms. Elkins felt deeply offended by the statement of regret, and considers an apology to be important for healing. She testified that she is offended that she continues to be known by a religion and ethnicity she no longer upholds, and that she remains branded as a “Sons of Freedom Doukhobor”. She said that one of the effects of her experience in New Denver was that she would not identify herself as of Russian heritage or as a Doukhobor. Rather, she would say she was Ukrainian or Scandinavian. She felt that she had lost her culture and did not fit into a society that had branded her as a “Sons of Freedom Doukhobor”. She was offended by the AG’s use of that term because she believes that in Canada, people should not be labelled, numbered or known by their ethnicity or religion. She acknowledged that the term was used in the Report’s title, but noted that in the body of the Report, the children were referred to as the “children of New Denver.” She also considered the use of the term in the Report’s title to be inappropriate.

[252] The AG responded to her letter, however, she did not consider that it explained or answered her concerns. She reiterated how disappointed she was that, as AG, Mr. Plant

did not take responsibility or acknowledge how children's rights were violated by their apprehension and confinement in the 1950s.

[253] Ms. Elkins acknowledged in cross-examination that the AG had not referred to "cultural violence" in his remarks. She explained that her use of that phrase in her letter was in reference to the bombings and burnings that had been referred to in the statement of regret. She considered it to be a discriminatory generalization that all Doukhobors were involved in bombings and burnings, and stated that her parents had not been involved in such activity.

Other Responses to the Statement of Regret

[254] In contrast, Ms. Freeman testified that she accepted the statement of regret and was not offended by it or the AG's subsequent remarks. She wrote a letter to the AG expressing her appreciation for the statement. Ms. Makortoff also wrote a letter to the AG expressing appreciation for the statement, and support for the historic site.

Continuing Consultation and Work on the Sculptures

[255] After the direction to stop work on the historic site, the Ministry proceeded with an attempt to determine if there was any possibility of obtaining consensus to complete it. In particular, the AG directed Mr. Seckel to meet with survivors in Agassiz and Surrey, B.C. to obtain their perspective.

[256] Ms. Stoochnoff also continued to work on the sculptures and they were ready for delivery to the site by the end of October 2004.

[257] On October 21, 2004, Mr. Lees emailed Ms. Neville and Ms. McDougall advising that he had advised Ms. Stoochnoff that he did not anticipate installing the sculptures until late November. He stated that he was "suitably vague about why, just saying that after the statement of regret the Ministry was considering when and what would be occurring at the site".

Agassiz Meeting

[258] On November 10, 2004, a meeting was held at Ms. Freeman's home in Agassiz, B.C. Mr. Seckel attended on behalf of the Ministry. Ms. Hamoline recalled that she advised Mr. Seckel at that meeting of her disappointment that the Ministry only made a

statement of regret. In her view, she did not want to hear the Ministry blame her parents, but wanted it to take responsibility, as her guardian, for the abuse and hurt she experienced as a child being taken from her home and confined in New Denver. She simply wanted the Ministry to say it was sorry for what happened to her in New Denver.

[259] Ms. Freeman recalled that diverse views were expressed at the meeting about the historic site, but that only one person remained opposed to the site and that the opposition was based on the lack of an apology.

[260] Ms. Hamoline also attended a meeting in Surrey with Mr. Seckel and recalled advising him at that time that she and other survivors in attendance at that meeting expressed their opposition to the historic site on religious and cultural grounds. They continued to request an unconditional apology.

Closure of the Historic Site

[261] On January 26, 2005, the AG wrote to Mr. Swetlishoff summarizing the Ministry's response to the Report and the steps it had taken since making the statement of regret. In particular, he stated:

As I indicated to you in a previous letter, I met with a small group of former residents of New Denver immediately following the statement I made in the Legislature on October 4, 2004, a copy of which was sent to you. They advised me that a majority of the former residents do not want the historical site. However, this was a small group in the context of all those who were in New Denver. For this reason, I asked the Deputy Attorney General, Allan Seckel, to canvas the views of a larger number of former residents to determine if there was a broader interest in having the historical site completed.

Mr. Seckel commenced his consultation by meeting with two groups of former residents where he had an opportunity to hear the differing views. You had advised that you had authority to speak for a majority of former residents, and told Mr. Seckel at the meeting in Surrey that the people you represent did not want the historical site completed. You expressed this point quite forcefully and others in the room supported this view with considerable emotion. As a result, Mr. Seckel concluded that further consultation was unnecessary.

On the basis of Mr. Seckel's meetings, it is now clear that government will not be able to satisfy the expectations of all of the former residents. Given there is no general support for the completion of the historical site, Mr.

Seckel has advised me that there is insufficient support for the completion or dedication of a historical site in New Denver.

In closing, government will continue to offer the counselling program, which I understand is benefiting a number of those who were affected. However, in consideration of opposition to the historic site, no further action will be taken by government.

[262] After this letter, the only further steps taken in respect of the historic site were to ensure that it was left in a safe condition. The sculptures were never erected at the site, the storyboards were not created and placed at the site. The concrete tables and chairs remain at the site.

Differing Views of the Historic Site and Sculptures

[263] Ms. Ericksen recalled that the first time she heard of the historic site, the land had been allocated, blueprints drawn up and those blueprints were then shown to survivors. Ms. Ericksen had been apprehended and confined in New Denver when she was seven years old. She spent five years there. She testified that, to her, the historic site “really did something to my inner self”. It was visibly apparent during the hearing that the site and the sculptures affected her deeply.

[264] While Ms. Ericksen had seen the plans for the site, she had not personally viewed the sculptures. Regardless, she testified that she considered both the historic site and the sculptures to go against her faith, and that she felt “badly discriminated against” as a result. She explained that Doukhobors had renounced the Orthodox church due to idolatry or monuments of any kind. She stated that, in her religion, living things are respected and they are not to worship idols or things made of stone. Rather, they seek the spiritual in each being and living thing.

[265] However, she also agreed in cross-examination that the historic site was not of a religious nature, and stated that it spoke of something that was a “large hurt and hardship of small children” and that it profoundly hurt her. She stated she did not want it built because of the deep hurt it caused her, and that she did not need a monument to remind her of the trauma of her confinement as a child in New Denver.

[266] Ms. Ericksen also testified that she was not offended by certain symbols, such as the dove of peace, or the symbols of bread, salt and water which represent the body of

Christ, the people that follow Christ and Christ's teachings. She stated, however, that these are not monuments and are not worshipped.

[267] Ms. Hamoline recalled seeing the sculptures and described them as "beautiful", but wrong for the historic site. In particular, she noted that they were adorned with the traditional head covering for prayer. She felt these head coverings were sacred and that it was "a violation, wrong and heartbreaking" to display these images for tourists.

[268] Ms. Hamoline also testified that she was not opposed to a historic site at some point in the future, provided it was appropriate to their culture and was built after an apology. She felt that the Ministry was not listening to the survivors, and their need for an apology before anything else. She stated that after an apology, then perhaps work could be commenced on a historic site that was appropriate and sensitive to their cultural and religious values, and to their experience as children. She felt that the Ministry had wasted taxpayer money by refusing to apologize and instead imposing its agenda on the survivors. She acknowledged that there was a feeling amongst survivors that if the historic site went forward, the Ministry would then not apologize.

[269] An example of a differing view was the sentiment expressed by Mrs. Freeman, a survivor, in a November 1, 2004 letter she wrote to the AG regarding the historic site. She wrote, in part, that:

I am definitely in favor of the Historic Site under construction in New Denver. The single, very important issue (in my humble opinion) about this site is AWARENESS. The statues of Mother and Child are an incredible work of Art, that capture the essence of what was, sculpted by Nadia, herself a fellow survivor. There is an energy emanating from this work, and it certainly is not romanticizing anything, let alone the plight of the children who resided at the Dorm. The viewer will sense a loss of childhood, and a great deal of hurt, pain, sorrow and yearning. The emptiness surrounds the Mother and Child, yet the viewer will also see a faint glimmer of hope for the future.

[270] Mrs. Freeman testified that it was her understanding that the purpose of the historic site was to remind people of the wrongs that were done to children, that the children suffered greatly, and to avoid it happening again. She testified that she does not understand why the site would be considered contrary to the Doukhobor faith. She does not view anything at the site as an icon or idol, but as a reminder that wrongs like what

occurred in New Denver should never happen again. She also testified that while she heard some opposition expressed toward the site by certain persons in attendance at meetings in her home, it was not on the basis of religious or cultural grounds, but because the Ministry had not yet apologized.

[271] Mrs. Freeman had also viewed the sculptures prepared by Ms. Stoochnoff. She considered them to be “real” and was deeply moved by them. She did not consider the depiction of headscarves on the sculptures to be offensive on religious grounds, but felt it represented traditional dress.

[272] Ms. Makortoff also wrote to the AG in support of the historic site, sculptures and statement of regret. She testified that, as a Doukhobor, she did not consider the historical site to be offensive on religious or cultural grounds. She had visited the site and seen the concrete tables and preliminary work on the site. She understood that the two concrete tables symbolized the separation of children and parents and was not offended in any way by this. Rather, she considered the tables represented what actually happened in New Denver, and served as a reminder.

[273] Ms. Makortoff had also seen the sculptures made by Ms. Stoochnoff for the site. She did not consider that the sculptures conflicted with her religious beliefs or cultural values. Rather, she considered the sculptures to be visually powerful, and to reflect the dress of mother and child at the time.

[274] Mr. Lees attended several meetings with survivors to present the concept drawings for the site. He recalled the meetings being emotional at times, and that there was both opposition and support expressed for the site. He did not recall any objection being voiced to the site on the basis of religious or cultural grounds. He noted that the appropriation of cultural objects and symbols is a very sensitive issue in his work, and that he was careful not to include anything in the concept drawings that would cause offense to the Doukhobor community.

[275] Mr. Lees recalled that many survivors made suggestions on how to make the site more meaningful. For example, he recalled that one woman suggested that there be small stones, each with a name and number, placed around the site. She explained that every child confined in New Denver had been given a number that had to be recorded on their

clothing, other belongings, and report cards, and which followed them throughout their time in New Denver. Mr. Lees concluded, based on his experience at these meetings, that there was strong support for the historic site and concept drawings, but not unanimous support.

[276] Dr. Cran testified that he spoke to Mr. Swetlishoff on numerous occasions between 2000-2004 and did not recall Mr. Swetlishoff expressing opposition to the historic site on religious or cultural grounds. He did recall, however, that Mr. Swetlishoff was opposed to the historic site in general. Dr. Cran also did not recall hearing opposition expressed by any other survivor to either the historic site or the sculptures on religious or cultural grounds.

[277] Ms. Neville testified that the first time she heard of any religious opposition to the sculptures and the use of head coverings was at the hearing. In her view, the dress of the woman and child that Ms. Stoochnoff had sculpted was representative of traditional dress that she had seen on other Doukhobor women and children at various community events. This was consistent with the evidence of Mrs. Freeman and Ms. Makortoff that the scarves represented traditional dress worn by women and children at that time, and I accept that this was the case.

Other Ministry Statements

[278] On May 20, 2003, the Minister of Children and Family Development, on behalf of the Government, in an Open Cabinet Meeting, made the following statement, in part, to former residents of Woodlands, Glendale, Tranquille and Endicotte Centre (“Woodlands”) and their families:

It is also important and proper to acknowledge the harm suffered by some former residents of Woodlands and other institutions as a result of past policies and priorities. On behalf of the people of British Columbia, I offer this government’s sincere apology to each former resident and their families who suffered harm as a result of time spent in institutional care in our province. The lessons of history must not be forgotten. This government is committed to ensuring that those with developmental disabilities who require assistance in their daily living are accorded the dignity and respect they did not always receive in the past.

[279] The Government also established a \$2 million trust fund to provide access to counselling services for former residents and their family members.

[280] On June 28, 1995, the following Ministerial Statement, in part, was made in the Legislature regarding Mr. Tom Berger's Report on Abuse of Students at Jericho Hill School:

The events described in Mr. Berger's report and elsewhere should never have occurred. There is no excuse or justification for what happened. The victims bear no responsibility for events over which they had no control. We regret that they were exposed to these terrible experiences, we regret this especially because they were young and vulnerable children. It took great courage on their part to come forward and disclose the abuse they endured.

Government acknowledges its responsibility to ensure the care and well-being of children in its care. Government also has a responsibility to provide the appropriate means for early detection of the circumstances of abuse, effective intervention should it occur, and support to facilitate the healing process for survivors of sexual and institutionalized abuse. Accepting this responsibility also means that we will help victims and their families heal the wounds of the past and prevail over the pain that was inflicted upon them.

[281] The evidence was clear that the Ministry apologized to the children at Woodlands, but only made a statement of regret to the students at Jericho Hill School.

Comparison of Peter the Lordly Verigin's Tomb, the Doukhobor Village and Historic Site

[282] The Ministry entered photographs of the site of Peter the Lordly Verigin's tomb which is maintained by the Doukhobor community outside Castlegar, B.C. The photographs depict a large tomb, and manicured grounds. There is also a carved stone with an inscription in both Russian and English.

[283] The Ministry also entered photographs of a Doukhobor Village which is located across from the Castlegar airport. At that site, there is a statue of Tolstoy and a sign with a peace dove on it.

[284] The photographs of the historic site in New Denver, as it exists today, depict two concrete tables set at different levels with a gap between them. The two levels and gap were meant to represent the separation of parents and children and the gap that was

created by the removal of the children from their homes. In the absence of some knowledge about the purpose of the site and the confinement of the survivors, or written information at the site, the symbolic meaning of the tables would not be readily apparent to a casual observer.

LEGAL FRAMEWORK AND ANALYSIS

[285] The complaint was filed under ss. 7 and 8 of the *Code*, which provide:

Discriminatory Publication – Section 7

(1) A person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that

- (a) indicates discrimination or an intention to discriminate against a person or a group or class of persons, or
- (b) is likely to expose a person or a group or class of persons to hatred or contempt

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or that group or class of persons.

(2) Subsection (1) does not apply to a private communication, a communication intended to be private or a communication related to an activity otherwise permitted by this Code.

Discrimination in Accommodation, Service and Facility – Section 8

(1) A person must not, without a bona fide and reasonable justification,

- (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
- (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.

(2) A person does not contravene this section by discriminating

- (a) on the basis of sex, if the discrimination relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of life or health insurance, or

- (b) on the basis of physical or mental disability or age, if the discrimination relates to the determination of premiums or benefits under contracts of life or health insurance.

[286] I have analysed the legal issues within the context of the Tribunal's tests for each of these sections. In doing so, I have considered both the Survivors' and Ministry's arguments presented on the preliminary application, as well as the argument presented at the conclusion of the hearing.

[287] Despite being provided an opportunity to present additional legal argument at the hearing, the Survivors relied solely on the argument submitted on the preliminary application. This argument was restricted to the preliminary questions at issue in that application and did not fully address the legal issues required to be answered in this decision. The Ministry provided fuller legal argument that specifically addressed the ss. 7 and 8 issues.

Section 7

[288] In order to establish discrimination under s. 7(1)(a), the Survivors must prove, on a balance of probabilities, that the Ministry published, issued or displayed, or caused to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation (the "Publication") that indicates discrimination or an intention to discriminate against the Survivors on the basis of race, ancestry or religion. The Tribunal makes this determination in light of the purposes of the *Code* as set out in s. 3: *Koehler v. Carson and others (No. 2)*, 2006 BCHRT 178, upheld on judicial review, 2006 BCSC 1779; *Palmer v. Palmer v. BCTF and others*, 2008 BCHRT 322, paras. 50-58.

[289] In order to establish discrimination under s. 7(1)(b), the Survivors must prove, on a balance of probabilities, that they were likely to be exposed to hatred or contempt, as those terms are interpreted and applied in the context of the *Code*, as a result of the impugned Publication: *Elmasry and Habib v. Roger's Publishing and MacQueen*, 2008 BCHRT 378; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11. That is, when objectively considered by a reasonable person aware of the relevant circumstances, would or did the impugned Publication expose the Survivors to feelings of

an ardent nature and unusually strong and deeply felt emotions of detestation and vilification (see: *Elmasry*, para. 30).

[290] Context is important in determining whether there is a breach of s. 7 of the *Code*. As noted by the Tribunal in *Abrams v. North Shore Free Press Ltd. (c.o.b. North Shore News)*, [1999] B.C.H.R.T.D. No. 5:

In my view, context is critical in understanding the meaning of a message. The meaning conveyed by an expression may vary depending on its context. An expression that feels neutral or innocuous out of context may take on a very different meaning when put in its proper context. Context for this purpose includes not only the publication context but also the social and historical contexts. (para. 59)

[291] In *Elmasry*, the following contextual factors were considered:

We conclude that assessing the publication's meaning in its context includes consideration of:

- The vulnerability of the target group;
- The degree to which the publication on its face contains hateful words or reinforces existing stereotypes;
- The content and tone of the message;
- The social and historical background for the publication;
- The credibility likely to be accorded the publication; and
- How the publication is presented.

In any given case, one or more of the considerations might predominate the assessment, and other considerations might be appropriate (paras. 82 and 83)

[292] I also note that recently the Supreme Court of Canada in *Whatcott* commented on the interpretation of hatred and contempt, and the importance of context, as follows:

First, courts are directed to apply the hate speech prohibitions *objectively*. In my view, the reference in *Taylor* to “unusually strong and deep-felt emotions” (at. p. 928) should not be interpreted as imposing a subjective test or limiting the analysis to the intensity with which the author of the expression feels the emotion. The question courts must ask is whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred.

Second, the legislative term “hatred” or “hatred and contempt” is to be interpreted as being restricted to those extreme manifestations of the

emotion described by the words “detestation” and “vilification”. This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects.

Third, tribunals must focus their analysis on the effect of the expression at issue. Is the expression likely to expose the targeted person or group to hatred by others? The repugnancy of the ideas being expressed is not, in itself, sufficient to justify restricting the expression. The prohibition of hate speech is not designed to censor ideas or to compel anyone to think “correctly”. Similarly, it is irrelevant whether the author of the expression intended to incite hatred or discriminatory treatment or other harmful conduct towards the protected group. The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination.

In light of these three principles, where the term “hatred” is used in the context of a prohibition of expression in human rights legislation, it should be applied objectively to determine whether a reasonable person, aware of the context and circumstances, would view the expression as likely to expose a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination. (paras. 56-59)

[293] I will first address the complaint filed pursuant to s. 7 of the *Code* in regard to the historic site.

(a) Historic Site

[294] I accept that erecting a monument or creating a historic site could constitute activity proscribed under s. 7 of the *Code*. The language of s. 7 specifically refers to the “display” of a “notice”, “sign”, “symbol” or “other representation”. The historic site, including the storyboards and sculptures, as well as other elements contemplated for the site, could reasonably be captured by these terms. Indeed, in its submissions on the preliminary application filed in this complaint, the Ministry acknowledged that erecting a monument or constructing a historic site could be captured under s. 7.

[295] However, for the following reasons, I have concluded that there is insufficient evidence to support a conclusion that the other elements of s. 7(1)(a) have been satisfied.

[296] First, I am unable to conclude that the evidence establishes that there was any discrimination or an intention to discriminate on the grounds of race, ancestry or religion, either during the planning or implementation stage, regarding the historic site. Ideas were

generated and shared amongst survivor groups and the Ministry. Survivors were provided an opportunity to express their support or objection to the concept and plans, and the Ministry responded to those concerns by suspending and then ceasing construction of the site.

[297] In my view, the evidence supports a conclusion that there was a sincere desire on the part of the Ministry to construct a historic site that was respectful and premised on a consultative process with survivors, however limited or proscribed that process might have been from the Survivors' perspective.

[298] Second, the historic site was not completed, and the Ministry ceased work on the site when apprised of significant opposition to it amongst the survivor community. The elements of the site that were constructed and remain, such as the concrete tables, were not specifically identified by any Survivor witness as a place of worship, or iconic representation, that would be contrary to their religious beliefs.

[299] Third, I am unable to conclude that the historic site was intended, or perceived to be, a place of worship. One Survivor witness testified that the site was not religious in nature, but rather was emotionally hurtful. Another Survivor witness testified that she was not opposed to the historic site in the future if it was "culturally appropriate" and after an apology. The majority of respondents to the last survivor survey were also supportive of a historic site at the appropriate time.

[300] As well, while there was an identified objection to the scarves depicted on the sculptures, I accept that the sculptures were not designed or approved by the Ministry, but were the creative choice of Ms. Stoochnoff. As well, the sculptures were never publically displayed and remain at Ms. Stoochnoff's personal residence.

[301] In regard to s. 7(1)(b), the evidence does not support a conclusion that the historic site would likely expose the Survivors to hatred or contempt, including amongst the Survivors' religious community, and I am unable to infer from the concept plans and other evidence about the proposed site that it would be likely to do so. In this regard, I note that in their original complaint, the Survivors indicated that the site would cause them to be shunned by the Unity Committee of Canada and the United States. However, there was no evidence of this presented during the hearing.

[302] There was also no evidence of any other likely exposure to hatred or contempt. In short, the evidence does not support a conclusion that, when objectively considered by a reasonable person aware of the relevant circumstances, the historic site would have or did expose the Survivors to feelings of an ardent nature and unusually strong and deeply felt emotions of detestation and vilification (see: *Elmasry*, para. 30).

[303] As a result of these conclusions, I dismiss the s. 7 complaint based on the historic site.

(b) AG's Comments in the Legislature and CBC Radio

[304] The Survivors also alleged that the AG's comments in the Legislature and on CBC Radio breached s. 7 of the *Code*.

[305] In regard to the AG's comments in the Legislature and on the radio, the Survivors presented no substantive argument as to how these comments breached s. 7 of the *Code*. No particular passages were identified, though the complaint does reference that the Survivors consider the manner in which the Ministry acknowledged their confinement to have minimized and diminished any wrongdoing, to have justified their confinement based on the alleged conduct of their parents or other adult members of the Doukhobor community at that time, and to be hurtful and insulting.

[306] The Ministry took the position that the comments in the Legislature were privileged: *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667. It also acknowledged, however, that the AG was prepared to restate the comments outside any zone of privilege, and to some extent did so during the radio show.

[307] The Ministry further says that the statements in the Legislature and on the radio were not discriminatory or intended to discriminate, and did not expose the Survivors to hatred or contempt. Rather, it says that the statements, when considered in context, reflected a genuine expression of empathy for all the survivors. It says there is nothing in the statements that would contravene s. 7 of the *Code*.

[308] In reaching my decision on this part of the complaint, I have considered, amongst other things, the content and tone of the statements, the background leading up to the

statements, the vulnerability of the Survivors, and how the statements were presented: *Elmasry*, paras. 82-83.

[309] Regardless of whether or not the statement in the Legislature was privileged, I have concluded that the s. 7 complaint premised on both the Ministry's statements in the Legislature and over the radio has not been proven, and I dismiss that part of the complaint for the following reasons.

[310] First, in regard to s. 7(1)(a), I am unable to conclude that the comments discriminate or indicate an intention to discriminate against the Survivors on any of the alleged grounds of discrimination. To the contrary, the comments express sympathy and regret for the trauma suffered by the Survivors when, through no fault of their own, they were apprehended, confined and isolated from their family and community.

[311] Second, I cannot reasonably infer from either of the statements that any comment in those statements was likely to expose the Survivors to hatred or contempt as those terms are interpreted and applied under s. 7(1)(b), and there was no evidence of any such likely exposure.

[312] I understand that some Survivors felt they or their parents were being blamed, and that the reference to bombings and burnings was inappropriate. However, their offence and disappointment in reaction to the statements is not a sufficient basis upon which to establish a breach of s. 7 of the *Code* on any of the prohibited grounds of discrimination. I find that the statements were an expression of sincere regret that do not contravene either s. 7(1)(a) or (b) of the *Code*: *Elmasry*, paras. 82-83.

[313] This part of the complaint is dismissed.

Section 8

[314] I will now turn to a consideration of the s. 8 complaint.

[315] The Survivors bear the onus of proving, on a balance of probabilities, that the Ministry discriminated against them, based on race, ancestry or religion, in the provision of a service customarily available to the public. In order to do so, the Survivors must prove their race, ancestry and religious beliefs, that they experienced an adverse impact with respect to the provision of a service customarily available to the public and that it is

reasonable to infer from the evidence that the prohibited grounds of discrimination were a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61, para. 33.

[316] I note that it is not necessary that a prohibited ground of discrimination be the sole factor in the adverse impact, provided it is at least a factor: *O'Connor v. Town Taxi*, 2000 BCHRT 9, para. 55.

[317] Further, the *Code* does not require that there be any intention to discriminate in order for there to be a breach of s. 8 of the *Code* (s. 2).

[318] If the Survivors prove a *prima facie* case of discrimination, then the burden shifts to the Ministry to establish a *bona fide* reasonable justification for its conduct. If it does so, then there is no breach of the *Code*.

[319] At the outset, I note that I accept that the Survivors are Doukhobors of Russian or Russian-Canadian ancestry. I also note that the Survivors presented no substantive argument on this aspect of the complaint, except to the extent that there was reference to the scope of “service” in the submissions made on the preliminary application.

a) Historic Site

[320] The Survivors say that the Ministry constructs historical monuments and historic sites throughout the Province, and that the manner in which it proceeded with the construction of the historic site in this case was discriminatory.

[321] The Ministry says that the construction of a historic site is a discretionary decision and not a service customarily available to the public. It further says that s. 8 does not contemplate mere intention or planning to take action. It says that the evidence establishes that the Ministry was only prepared to fund and facilitate the construction of the historic site if the survivors supported it. It says that it engaged in a broad consultative process and, when it was advised of opposition to the site, it suspended and then ceased the construction of the site. It says the fact is that the historic site was never built, and the Survivors suffered no adverse impact.

[322] There was little, if any, evidence about other historic sites that the Ministry had constructed throughout the Province. The evidence focussed on the Ministry’s decision to

fund and facilitate the construction of a historic site in New Denver, and its consultation process with survivors. Based on this evidence, it is my view that the Ministry's decision to fund and construct a historic site was a discretionary, non-discriminatory decision in response to the Report's recommendations. Once the Ministry made this decision, it was then required to provide that particular "service" in a non-discriminatory manner to the survivors: *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.

[323] For the following reasons, I am not persuaded that the Survivors have proven that the manner in which the Ministry proceeded with plans for the historic site, and commenced preliminary construction, breached s. 8 of the *Code*.

[324] First, the historic site was not built, and what remains is not readily identifiable as a historical marker for the Survivors' experience. The site does not visibly reference any aspect of the Survivors' religion, ancestry or race.

[325] Second, the site is not a place of worship and there is no monument or sculpture erected at the site.

[326] Third, the Ministry was engaged in a consultative process which included discussion of a historic site and consideration of concept plans for the site. An opportunity was provided for the Survivors to comment on the site plans, and when opposition was expressed on religious and cultural grounds, the work was suspended and ultimately stopped. The Ministry was responsive to the expressed religious and cultural concerns regarding the historic site and acted in a timely manner.

[327] The evidence does not support a conclusion that the Survivors were adversely impacted because of their race, ancestry or religion in regard to the manner in which the Ministry proceeded with plans for the site, or any other aspect of the consultative process and/or limited construction at the site.

(b) Historical Wrongs

[328] The Survivors further say that the Ministry investigates and addresses historical wrongs committed by the Ministry against children and various ethnic groups, and that the manner in which it chose to address the historical wrong against the Survivors was discriminatory. In particular, it says that the Ministry treated the Survivors less favorably

than it did other children subjected to institutional abuse. For example, it says that the Ministry provided apologies and compensation to children maltreated at Jericho Hill School and Woodlands. In contrast, it says the Ministry has only issued a statement of regret to them, and that it has suggested that their confinement was justified or excusable because of their parents' or other Sons of Freedom Doukhobors' actions at the time. They say that the distinguishing feature between them and other institutionalized children is their race, ancestry and religion, because they were children of Sons of Freedom Doukhobors.

[329] The Ministry says that a discretionary decision to enter into voluntary discussions with a group of persons claiming a historical wrong is not a "service". It says it had no legal obligation to engage in discussions with the Survivors, or to provide redress for what the Survivors describe as a historical wrong. It notes that its decision to consult with survivors was not made under any statute, regulation or judicial order, and says that an exercise of governmental discretion, based on policy considerations of the day, is not a "service" captured by s. 8 of the *Code*.

[330] The Ministry also says that in the absence of a factual finding that there was, in fact, a historical wrong, there is no factual underpinning for the alleged discrimination.

[331] I note that the *Ombudsmans Act* did not compel the Ministry to implement the Report's recommendations or to engage in discussions with the survivors to address historical wrongs. However, the *Ombudsmans Act* did provide the authority for the Ombudsman to request the Ministry to advise it of the steps taken to address a Report's recommendations and, if no steps were taken, the reason for not taking steps to implement a recommendation. In this case, the Ombudsman did continue to monitor and report publically on the Ministry's implementation of the Report's recommendations.

[332] I accept that the Ministry's decision to enter into discussions with the survivors with a view to reaching a mutually-satisfactory resolution to the Report's recommendations was a discretionary decision. The discretionary nature of the decision does not remove it from the purview of the *Code* since the Ministry was required to reach that decision in a non-discriminatory manner. For example, if it had refused to respond to the Report's recommendations or enter into such discussions based, in whole or part, on

the fact that the Survivors were Doukhobors, then the Ministry may well have breached the *Code*.

[333] I find that the Ministry's response to the Report's recommendations constitutes a "service" within the meaning of the *Code*. The fact that this service may be provided to a limited group of persons (those who are the subject of an Ombudsman's Report) does not change its characterization for the purposes of the *Code: Berg*.

[334] I am unable to conclude, however, that any adverse impact experienced by the Survivors as a result of the Ministry's response to the Report's recommendations was because of their race, ancestry or religion. In particular, I note the following:

- a) The evidence established that the former Woodlands residents received an apology while the Jericho Hill students received a statement of regret. The Survivors were mistaken in their view that the Jericho Hill students had received an apology.
- b) The evidence established that a trust fund was set up for the former Woodlands residents to receive counselling services for themselves and their families. The Survivors also received access to counselling services.
- c) There was no reliable evidence tendered during the hearing of individual compensation or amounts paid directly to either former Woodlands residents or Jericho Hill students, absent a court order. In particular, there was no evidence that the Ministry provided personal compensation to individuals for historical wrongs that arose prior to August 1, 1974, such as it refused to pay to the Survivors further to the decision in *Arishenkoff v. British Columbia*, 2005 BCCA 481.
- d) There was no reliable evidence tendered during the hearing that the Ministry, as a matter of common practice, regularly implements Ombudsman's recommendations.

[335] The sparse evidence before me about the Ministry's response to what the Survivors' characterized as other historical wrongs demonstrated an individualized response to each situation, which in some cases included similar features (such as counselling and a statement of regret). The evidence was insufficient to support a conclusion that any difference in the responses was based, in whole or part, on any of the alleged grounds of discrimination.

[336] The Survivors' were understandably disappointed with the Ministry's refusal to implement the entirety of the Report's recommendations. While I may sympathize with

their personal feelings about this issue, I cannot conclude, based on the limited evidence before me, that the Survivors' race, ancestry or religion was a factor in the Ministry's refusal to implement any of the Report's recommendations. The complaint under s. 8 of the *Code* is dismissed.

[337] I acknowledge that the Survivors sincerely believe that their human rights as children were violated in the 1950s. However, the jurisdiction of this Tribunal is limited to the events of 2000-2004.

[338] I also appreciate that the Survivors felt deeply hurt and offended by the Ministry's refusal to formally apologize to them, despite their consistent expression of need for a real and sincere apology in order to truly heal. The value of a sincere apology cannot be underestimated. The Legislature, in fact, has now recognized the inherent and remedial power of an apology by protecting those willing to make one from legal liability: *Apology Act*, R.S.B.C. 2006, c.19.

[339] There is no further need to shield the Ministry from potential legal liability based on the issuance of an apology. In addition to the *Apology Act*, there is the decision in *Arishenkoff*.

[340] I acknowledge the positive steps taken by the Ministry to facilitate healing and resolution. Whether the Ministry takes any further steps, including issuing an apology is, however, not within the jurisdiction of this Tribunal to order given the dismissal of the complaint.

Enid Marion, Tribunal Member