Institutional Abuse Analysis

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	1995/96	1996/97	1997/98	1998/99	1999/2000	2000/01	2001/02	2002/03	Totals to date
Salaries	82,503	314,050	823,783	1,047,615	726,911		5,449	14,796	3,015,107
Other	25,743	131,238	190,149	115,837	373,158	27,449	136,965	1,978	1,002,517
Administration									
Awards		11,680,751	4,428,513	4,475,934	4,541,438	3,314,197	2,058,041	228,219	30,727,093
Counselling	153,982	1,140,701	1,619,277	1,744,844	1,509,939	943,968	704,432	27,814	7,844,957
Legal Fees	11,655	989,798	1,251,712	1,112,853	952,583	250,152	39,345	46,714	4,654,812
Family Services	35,165	160,285	185,711	232,119	304,277	325,334	197,705	140,002	1,580,598
Other Prof.	259,000	698,185	177,295	454,613	179,638	36,470	14,601	8,848	1,828,650
Services									
sub-total	***568,048***	***15,115,008***	***8,676,440***	***9,183,815***	***8,587,944***	***4,897,570***	***3,156,538***	***468,371***	***50,653,734***
IIU / Files		654,233	1,645,916	2,232,867	1,526,669	995,885	672,046	1,819	7,729,435
Shelburne EAP				1,171,108	1,101,868	1,104,965	1,023,801	101,806	4,503,548
Kaufman Review					76,340	645,439	835,002		1,556,781
TOTAL	**568,048**	**15,769,241**	**10,322,356**	**12,587,790**	**11,292,821**	**7,643,859**	**5,687,387**	**571,996**	**64,443,498**

Compensation Program Comparative Analysis

Province	Total filed	Total Cases Awarded	Total Awarded (including counselling)	Average Award (including counselling)	Average Award (excluding counselling)	Total Interim Counselling Provided	Highest Award	Lowest Award
NS 1956 - mid 70's	1457 (as of Dec 19/96 - Audit report)	1216 (83%) 1 pending (1246 went through entire process)	$37,839,001 (does not include interim counselling)	first phase: June - Nov 1, 1996: appx. $47,000[1] second phase: Dec 1996 - Oct 1997: appx. $36,000 third phase: Nov 1997 - to date: $20,993 total average (based on actuals) $31,118 (average counselling award - $6,038)	$25,079 (total average)	$1,817,568.35 (Plus Expenses $549,465.82) *as at March 13/02*	$130,000 ($120,000 + $10,000 for counselling)	$5300 ($300 + $5000 for counselling)
Ontario (Grandview - mid 60's - early 70's)	329	"most were validated"	$16,400,000 (total expended in awards/benefits)	n/a	"just under $40,000" (financial award only)	n/a	n/a	n/a

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View Chapter 11 of the Kaufman Report
View Chapter 12 of the Kaufman Report

[1]Approximate figures are taken from the Report of the Auditor General, 1998

Province	Total filed	Total Cases Awarded	Total Awarded (including counselling)	Average Award (including counselling)	Average Award (excluding counselling)	Total Interim Counselling Provided	Highest Award	Lowest Award
Ontario (St. John's/St. Joseph's - 1930-1974)	1025 (Group1 & 2 = 595[2])	Group 1 & 2 = 580; (97.5%)	$16,070,561 (total expended in awards/counselling)	$33,700 (paid out)	n/a	n/a	$107,944 (cash benefits only)	$2500 (cash benefits only)
Ontario (George Epoch 1969 - 1986)	97	83 (86%)	total cost of Agreement $2,500,000	n/a	$25,000	total $500,000 provided for counselling	$25,000 (cash benefits only)	$25,000 (cash benefits only)
New Brunswick	413	284 (69%)[3]	$10,159,744.66 (total payout)	n/a	n/a	$5000/claimant; could apply for addit. $5000	$120,000 (excluding counselling)	n/a
Newfoundland 1966 - 1982	n/a	43 settlements	n/a	n/a	n/a	n/a	$250,000	$50,000
British Columbia 1978 - 1987	405 (40 withdrew)	359/365 (98%)	$12,665,000 (financial compensation only; separate program for counselling)	-	$35,500	separate program	n/a	$3000

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[2]Group 1 and 2 represent claimants who filed within the specified time period. Remaining claimants were dealt with separately and did not receive similar benefits (reduced substantially)

[3]Only victims of the 5 employees who were charged criminally were compensated.

XI

Resumption of the Program

1. INTRODUCTION

When the Government agreed to a Compensation Program in May 1996, it presumed that there would be approximately 500 claims of abuse. Although it was recognized that there may be those who would exaggerate the abuse or even seek compensation to which they were not truly entitled, it was also presumed that the allegations would be, for the most part, true. Clearly, the first presumption was incorrect and doubts were raised about the second. The combined impact of these two factors on the resources of the Province contributed to the suspension of the Program on November 1, 1996. Furthermore, the number of Demands and notices by claimants that they intended to make Demands made it impossible to effectively administer the Program with the resources that had been allocated to it.

On December 6, 1996, the Minister of Justice announced a number of changes to the Compensation Program. These were summarized in the previous chapter. In this chapter, I address the impact of those changes, and the later development of further changes, contained in the November 6, 1997 Guidelines.

2. DEVELOPMENTS AFTER RESUMPTION

The Internal Investigations Unit ("IIU") grew. When the Government announced the resumption of the Program, it indicated that the IIU would now be involved in claims investigation. Its staff was subsequently increased to 15 investigators and nine secretarial and data research support personnel. In an e-mail to the Deputy Minister of Justice dated December 11, 1996, the head of the IIU, Robert Barss, detailed why this increase was necessary:

> Because of the case management complexity and volume associated with the claim validation process, it will require a complete focus of investigative resources not distracted by other investigative activities. I propose assigning 10 investigators plus the case manager (Frank Chambers) to work with the ADR program manager in achieving the claim validation objectives established between all the concerned parties on a day to day basis. The reporting responsibilities will be between the claim validation case manager and the ADR program manager. My office will provide the strategic overview and investigation continuity between the claim validation, internal investigation, criminal

> investigations, civil litigation investigations and all other assignments as determined by the Deputies of Justice and Community Services.
>
> Four investigators will be assigned to my office to continue with the internal investigations presently in progress. This group of investigators will also maintain the ongoing liaison with Operation HOPE staff regarding the perpetrators. This group will also be responsible for information disclosure as well as evidence continuity gathered by all staff of the IIU (CLEIMS). This group will also maintain the ongoing activity of information retrieval within Government as well as respond to investigation follow-ups from the civil litigators and employee lawyers.

The file assessors, Sarah Bradfield, Averie McNary, Amy Parker and Barbara Patton, raised a number of administrative and policy issues in a memorandum to the Deputy Minister, dated December 13, 1996. They recommended the immediate appointment of a Program director and a Program administrator. The administrator would be responsible for handling the large volume of day-to-day tasks, and the director would be responsible for:

> both the assessment and investigation aspect of compensation claims. The PD [Program Director] will determine investigative priorities, coordinate the IIU and the ADR assessment team, liaise with the RCMP, ensure automated systems are in place, evaluate the program, analyze the flow of anticipated claims and recommend staffing and management needs.

The assessors also urged that four additional full-time assessors be hired as soon as possible. File reviews were to resume on February 1, 1997, and the four current assessors anticipated that their commitments to those reviews would render them unavailable to respond to new claims. They also recommended:

- That all new interviews (including the Murphy intake interviews) be videotaped, thereby allowing for better assessment of the statements, based on full knowledge of the questions asked and the demeanour of the claimants;

- That all new statements be sworn;

- That the IIU be given 60 days to provide the Program office with its completed investigation of a claim, allowing the assessors 60 days to evaluate the information, determine whether they need more information and draft a Response to the claim;

- If the assessors decide they need further information, that the IIU conduct further interviews, with the assessors providing direction as to the areas of questioning required;

- That the IIU give investigative priority to claims that had been scheduled for file review. All other claims should be prioritized chronologically by intake date.

In a meeting on December 12, 1996, the Murphys advised the Deputy Minister that, in light of all of the circumstances, they would not continue to be involved in taking statements from claimants. The withdrawal of the Murphys was communicated by the Minister of Justice to all counsel and unrepresented claimants in a letter dated January 10, 1997. He advised that Facts-Probe Inc. had decided not to participate in implementing the new statement-taking protocol, but that statements already taken by the Murphys would be accepted for the purpose of compensation claims. The Minister added:

> In future, all statements will be taken by either the Department of Justice Internal Investigation Unit or the RCMP, or a combined team. The decision as to who will take the statement will be made in consultation with the RCMP, and there will be instances where separate statements will have to be taken to satisfy the needs of the respective agencies. Statements will be videotaped and a copy of the tape will be given to counsel or unrepresented claimants, except where the statement is given to the RCMP alone. In that case, a copy of the tape will be available from the RCMP upon request.

The Deputy Minister advised the assessors that, as of January 7, 1997, the name of the Program was changed from "Compensation for Survivors of Institutional Abuse" to simply "Compensation for Institutional Abuse." All references to "survivors" were to be changed to "claimants." Further, given the uncertain legal status of the Memorandum of Understanding ("MOU"), the assessors were not to refer to it. One of the assessors, Barbara Patton, had prepared a draft of new Guidelines for the Program by January 6, 1997.

An IIU investigator, Frank Chambers, became the Case Manager for the IIU Claims Validation Investigations. He contacted the Compensation Program office and advised that his team had taken a 'quick look' at the 86 files which had outstanding offers.[1] He suggested that eight be placed on hold so that the IIU could investigate them. For the other 78, he suggested that the Program office proceed with the limited information already available, commenting that although the IIU would like to do more, it did not have the time and resources to do so. As it turned out, some of the eight files singled out by Chambers had already been settled, and others were almost at the point of settlement. The Program office concluded that it needed more information before reversing the positions it had taken.[2]

A letter was sent by Amy Parker on January 10, 1997 to all claimants' counsel regarding the form of the release to be signed by a claimant as a precondition to receiving any compensation

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[1]Although Chambers referred to 86 files, other reports and documents put the number of files for which there were outstanding offers at about 150: letter dated December 2, 1996 from the Deputy Minister of Justice to the Deputy Minister of Finance; memorandum dated December 13, 1996 from the file assessors to the Deputy Minister of Justice.

[2]There had already been at least one previous case where the Province had reversed its position. An offer to settle for $80,000 had been made to one claimant, who appeared to have accepted. However, the Province declined to pay due to information uncovered after the offer had been made. An application was brought by the claimant for an order in the nature of *mandamus*, but it was later abandoned. The claimant elected to proceed to file review. At file review, the Government's position to offer no compensation was upheld

or proceeding to file review. The new releases removed all references to "survivor" and the MOU. The new terms of payment were set out.[3] Claimants were required to acknowledge their understanding that their statements may be used without notice in civil actions, discipline proceedings, police investigations, or in reports of child abuse to the Department of Community Services. Claimants were also to acknowledge that the consequences for knowingly providing false statements could include legal action for the return of monies and criminal proceedings; the Province could also withhold payments which might be due "unless the proceedings were fully resolved" in the claimant's favour.

Sgt. Jim Brown, Case Manager for Operation HOPE, forwarded a letter to all lawyers representing claimants advising them of the status of the RCMP investigation and of some of the changes in protocol. He noted the previous practice of having an alleged victim sign a waiver if he or she did not wish a criminal investigation, to give a statement to the RCMP, or, ultimately, to testify in court. Now, alleged victims indicating that they did not wish a criminal investigation would have their request taken into consideration, but the ultimate decision on the laying of charges and the prosecution of alleged abusers would rest with the police and the Public Prosecution Service. The RCMP would not agree to take a statement only for purposes of compensation.

Brown further advised that the RCMP was now prepared to take statements from individuals who had not yet been interviewed or wished to be re-interviewed to provide more detailed disclosure or to add information to their previous statements. However, he stressed that the RCMP was only conducting a criminal investigation and, as such, were interested only in the more serious allegations of sexual and aggravated assaults and assaults causing bodily harm. He assured the lawyers that the RCMP investigators would conduct a professional, non-accusatory interview, take a 'pure version' statement, and ask clarifying questions where required. It was possible that investigators would have to recontact or revisit an individual to clarify certain allegations or to address evidence suggesting that the alleged victim had been deceitful.

On January 22, 1997, the Deputy Minister announced the appointment of Michael Dempster as the Program Director for the Compensation Program. Dempster was an experienced administrator who had reached senior executive rank in the Federal Civil Service before taking early retirement.

In a memorandum dated January 23, 1997, one of the assessors, Averie McNary, requested clarification from Dempster as to how the changes to the Program had altered the fundamental principles and purpose of the Compensation Program embodied in the MOU. She noted that at the assessment stage, where there was ambiguity about the credibility of a claim, the assessors applied the principles of the MOU and gave the benefit of the doubt to the claimant. An alternative approach might entail that assessors require claimants to submit to further questioning, take stances which discouraged pursuit of certain claims, or rigorously cross-examine at file

[3]As indicated in the previous chapter, awards over $10,000 would now be paid over a four-year period. The greater of $10,000 or 20% of the award would be paid in one lump sum payment, and the remainder would be paid over time with interest.

reviews. McNary indicated that the assessors assumed that the original MOU principles remained their 'default' position.

My staff could find no document that directly responded to this memorandum. However, when Mr. Dempster spoke with my staff, he advised that the philosophy during his tenure was to tighten up the Program, but to pay legitimate claims. If what the claimants said could be true, and there was no evidence to refute it, his instructions from the Deputy were to err on the side of the claimant. Dempster was careful to point out that he did not instruct assessors on any individual decisions – they were made by the assessors, usually after conferring with their peers. He believed that the assessors critically analyzed the claims, and made balanced decisions on the basis that there were true abuse victims in the Program, while remaining cognizant of the existence of fraudulent claims.

3. MEETING THE DEADLINE OF APRIL 18, 1997

The most pressing problem for the Compensation Program was trying to meet the announced deadline of April 18, 1997 to respond to the Demands that had been submitted as of December 18, 1996, while also investigating the 21 claims that were slated for file review beginning in February 1997.

On January 16, 1997 Frank Chambers told Amy Parker that contact had been made by telephone with a number of current and former employees respecting pending file reviews. Parker advised Chambers that only written statements could be used in the file reviews. It was concluded that, as there were a large number of witnesses, there was insufficient time to interview them and take written statements for use in the file reviews. The assessors believed that consent to adjourn the scheduled reviews was unlikely to be given. In the result, it was decided that notes of telephone interviews would be provided to the Program office since they might corroborate claims that assessors might otherwise dispute in a file review It was recognized that if the IIU found information to refute a claim, but could not obtain a written statement, the Program office would be unable to rely on the notes of telephone interviews in the file reviews.

Joint meetings were held between the assessors and the IIU investigators. The assessors wanted more details from current and former employees about the institutions where they worked. The assessors also wanted to fully explain to the investigators the difficulties that they faced in the claim process.

Assessors became concerned that they would be unable to meet the April 18th deadline. In an e-mail to Dempster, dated February 21, 1997, Amy Parker noted that there were 181 files to be responded to by April 18th.[4] Parker pointed out that, to date, the assessors had not received any information from IIU on any of them. Further, none of the assessors had started working on the files as they were too busy with file reviews.

In an e-mail to the Compensation Program office, dated February 25, 1997, Chambers noted they all shared concerns about workloads and due dates. He wrote that the 181 files due by April 18th had been assigned to investigators. Former employees were being interviewed by ADR investigators and the results of these interviews would be forwarded with the investigators' final reports. Complaints against current employees were being handled by IIU investigators under Barss. The employees would be asked to respond to those allegations. Once the statements were transcribed (they were generally audiotaped) they would be provided to the Compensation Program office. Chambers further advised that Barss had reviewed some of the complaints against current staff and deemed them "to be of a frivolous nature." As such, the IIU would not be seeking responses from employees on them.

In an e-mail dated March 13, 1997, Dempster informed the assessors that Chambers had indicated it would be nearly impossible for the IIU to complete its investigations on all of the 192

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[4]In other documents, the number of cases to be responded to by April 18, 1997 is given as 192. It is unnecessary for me to resolve which is the correct number.

cases in time for the 120-day deadline. Furthermore, the IIU had worked to a 120-day deadline, rather than an earlier timetable that would leave time for assessors to use the IIU's work. It was clear to Dempster that the "IIU did not have the resources to do the investigations on the volume of cases." The IIU members offered to express their opinion on whether certain low level cases were worth the investigative time and resources it would take to complete them.[5] They contemplated that the Compensation Program office could take unilateral action on those cases, based on existing information. Dempster wrote to the assessors:

> I was convinced by this conversation that he and his group were up to their necks in work and despite promises that have may have been made on their behalf, they cannot deliver. If I receive that in writing, I will inform the Deputy, and have a discussion with Bob on alternative measures.
>
> As for our efforts, I think we can continue to action the cases we can, based on the data we have and if we feel the data is insufficient, we will have to advise counsel that we cannot meet the deadline. Before we do that, we have to advise the Deputy ... Everyone is feeling the strain of the deadlines and we need to be helpful among the units because we all need each other. Remembering that we are going to be successful to the extent we try our best and operate as a unit, we give ourselves the best chance for that success. IIU is probably just as busy as we are, and if we consider the overall program demand we can keep things in perspective.

The Program office provided a Response to 74 Demands on or before April 18, 1997. On all other Demands, the deadline could not be met. The Minister of Justice, the Honourable Alan E. Mitchell,[6] was advised by the Program office of the reasons why:

> The principal reasons for failing to meet this deadline are (1) there has been insufficient time for the IIU to complete investigations on these persons; (2) that compensation for institutional abuse solicitors and IIU investigators have had to spend significant time preparing and gathering information for file reviews; and (3) the sheer volume of claims. The need for additional staff was identified some time ago and as April 1, 1997, the number of compensation for institutional abuse solicitors was increased to 7; an eighth person to handle the assessment of claims is due to start within 2 weeks.

Letters were sent to counsel for claimants in the applicable cases, advising that the deadline could not be met and of the reason why. (The Deputy Minister had instructed that such a letter be sent.) A form letter had been drafted and circulated following a meeting between the IIU and Program staff. It set out four basic explanations which might be provided for the delay in

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[5]There were files where the investigation was stopped by the IIU, sometimes on the basis that the claim value was too low to justify their further involvement. (E-mail from Michael Dempster to Averie McNary, March 24, 1997.) There is no record of the number of claims that fell into this category.

[6]Jay Abbass resigned as Minister of Justice on April 1,1997 and Mr. Mitchell was sworn in as the new Minister on April 2nd.

individual cases. Each file was reviewed to determine which explanation applied. The four reasons for delay which were outlined in the form letter were:

- The claim involves allegations which relate to other matters which are being investigated by the Department, and coordination of investigations is necessary before the completion of the ADR investigation;

- The claim is of a particular severity and there are avenues of investigation open which must be pursued;

- Records requested from external sources have not yet been received or were only recently received and must be reviewed and analyzed;

- The investigation requires contact with the claimant, either by an in-person interview or other means, and that contact has not occurred or has occurred too close to the response date to allow for completion of assessment.

The Government's inability to meet the 120-day deadline met with prompt objection from claimants. Anne Derrick advised Dempster on April 18, 1997 that it was unacceptable that claimants were being required to endure further delays, in some cases seven months after their Demands had been filed, and that the stress and anxiety levels amongst claimants was palpable. She expressed her concern that the delays would be lengthy. She objected, in particular, to delays for further interviews of past employees or for interviews of claimants who had already been interviewed by the IIU. She wrote:

> In the main, my impression of the changed compensation process which was touted by Mr. Abbass as having been improved (a claim rejected, when it was made, by counsel and Survivors) has lost any sensitivity towards Survivors that may have existed at its inception. The relentless re-interviewing, reliance on the absence of corroborative records, disregard for the Guidelines of the Memorandum of Understanding and its provisions, spurious bases for reducing or rejecting claims are all operating to discredit this process and further injure and demoralize the very people it was originally designed to help and heal.

In a meeting on July 21, 1997, Barss, Chambers and Dempster revisited the continuing difficulty for the Program in attempting to meet a 120-day deadline. Among the reasons identified were: 1. the view that statements taken by the RCMP statements often were 'pure version' and the IIU believed that almost all of them would have to be redone (in order to ask necessary follow-up questions), 2. release forms had not been obtained in a timely fashion, 3. considerable time was being devoted by the assessors to issues concerning file reviews, the use of polygraphs, etc., and 4. the IIU had begun to take initial statements from claimants. About 287 interviews were scheduled for August 1997, and each required preparation time for IIU investigators and Program staff. This would force existing file investigations to be held in abeyance. Dempster concluded that there were too many factors which were outside the ADR unit's control to be able to comply with the 120-day requirement. The hope was expressed that a simple statement could be formulated in the proposed Guidelines that "file processing is to be completed in a timely

manner, once all the required documentation is received in the ADR unit."

4. THE COURT CHALLENGE

In the meantime, work had continued on proposed new Guidelines for the Program. As early as February 11, 1997, Dempster reported to the Deputy Minister of Justice that the Guidelines would soon be ready. On April 3, 1997, Dempster noted in an e-mail to Averie McNary that the Government would not be releasing the Guidelines until the week of April 21, 1997, but that this date could be affected by a pending court challenge.

The challenge referred to was an application for an order compelling the Minister to comply with the terms of the MOU and declaring invalid the new release which claimants were required to sign. The application was filed on April 1, 1997, on behalf of 211 claimants. It was scheduled to be heard on May 14, 1997. The applicants contended that the Minister had a legally enforceable duty, either by custom or by contract, to comply with the terms of the MOU. The Province took the position that the MOU was a compensation framework that set out an *ex gratia* compensation process, and there was therefore nothing to prevent the Province from changing its terms as the need arose.

The Province also took the position that there were many factual matters in dispute. Accordingly, the matter should be dealt with as a conventional lawsuit, rather than as a more simplified application. This position ultimately prevailed. On May 9, 1997, McAdam J. ordered that the application be converted into a conventional action upon the filing of a Statement of Claim. Although the Statement of Claim was filed and the Province filed a Defence, the plaintiffs discontinued the proceeding in June 1997, citing their lack of resources and the time and expense involved in pursuing the litigation.

5. POLYGRAPHS

Despite the end of the court proceeding, there was no immediate move to announce the new Guidelines for the Compensation Program. The reason for the delay was the advent of polygraph testing of employees.

It appears that statements were taken on audiotape from approximately 18 current and 35 former employees between January and April 1997, sometimes more than once. In discussions with my staff, Frank Chambers explained that the employees were frustrated. They had no opportunity to refute allegations and began offering to take polygraph tests. According to Chambers, Barss could see no harm in allowing it: if employees were guilty, they would either not attend for the tests or fail them.

The early polygraph tests were confined to sexual allegations.[7] Chambers indicated that the first group that was tested passed, that is to say, the polygraph operator concluded that they were not deceitful in denying the commission of sexual abuse.

The issues for the Compensation Program office raised by the polygraph tests were identified in a memorandum from Dempster to the Deputy Minister and Barss dated June 9, 1997:

- Are the results of the tests determinative?
- Must we inform legal counsel that future and past claimant statements will be reassessed based on this newly obtained evidence?
- Will the Government cease further payments or take action to recover what has been paid?
- Will IIU investigators stop an interview with a claimant if an allegation is made against a former or current employee who has already passed the polygraph?
- Will the IIU provide a complete list to the Program office of all named claimants who were mentioned by the polygraphist when he tested each employee?
- Will the Program office inform file reviewers that they have determinative findings in the form of polygraph results?
- Does the IIU have further polygraph testing plans?

Extensive consideration of the use of the polygraph was undertaken by the IIU and the file assessors, and a detailed memorandum was prepared by Barbara Patton, dated June 27, 1997. By that time, 12 employees had been given polygraph tests by Sgt. Mark Hartlan of the Halifax Regional Police Service with respect to allegations of oral sex and intercourse. Sergeant Hartlan concluded that 11 of the 12 employees tested as truthful in their denial of the allegations. The test results had been sent to John Castor at the Canadian Police College in Ottawa for confirmation.

Patton canvassed the admissibility of polygraph results in criminal, civil, family, and administrative proceedings in Canada and in the United States. She stated that in criminal cases polygraph results are inadmissible, not due to fears of inaccuracy, but rather because their admission would be contrary to well-established rules of evidence, disrupt or delay proceedings, and result in a greater degree of uncertainty in the process. However, offers or refusals to submit to a polygraph examination may, in some circumstances, be considered by a trier of fact.

Patton concluded that the Province was not limited in the evidence that could be considered in validating a claim. She felt that the real issue was the weight to be placed on the

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[7]The Province had received opinions from polygraphists that only very few types of allegations of physical abuse could be effectively tested by polygraph examination.

results. She wrote:

> It is my opinion that there is no reason in law to reject polygraph test results from the ADR process. The ADR process is unique: it is "*sui generis*", governed by neither the evidentiary rules of a civil trial, a criminal trial, nor an administrative hearing."
>
> The case law is only of limited usefulness on the issue of weight. I am of the view that within the context of the ADR program the issue of the weight to be given to the polygraph test conducted by Sgt. Mark Hartlan is not a matter of law but rather of policy. Policy considerations affecting weight could include: (a) the validity of the polygraph as determined by an expert; (b) the disciplinary status of employees who have been polygraphed; (c) the absence of the employees' voice within the MOU; (d) a fiduciary duty to expend monies for a purpose for which they were intended.

The Program office retained a well known expert in the field, Dr. David Raskin, to provide his opinion. In a letter dated July 28, 1997, Patton informed Raskin that, to date, 20 employees had been polygraphed with respect to sexual assault allegations. Nineteen had tested no deceit indicated. One had failed. She noted that Sergeant Hartlan had done the tests and that the results had been confirmed by three other polygraphists, including John Castor of the Canadian Police College. She requested an opinion on the following:

1. the standards we should be looking for in a polygrapher;

2. whether the methodology used by persons certified as polygraphers by the Canadian Police College can be relied upon to yield a valid polygraph test result;

3. how difficult it is for a truthful person to test "no deceit indicated" to questions relating to allegations of sexual assault on a properly conducted polygraph;[8]

4. whether a question about the commission of an offence in general (e.g. Did you ever sexually assault any person at the School?) is as valid a testing tool as a question about the commission of a particular offence against a specific person (e.g. Did you ever sexually assault Joe Smith?), or a very specific question such as "Did you ever place your penis in the anus of Joe Smith?"; and

5. the conclusion to be drawn where a person against whom an allegation is made, and the person making the allegation, both test "no deceit indicated."

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[8]Ms. Patton asked how difficult it would be for a *truthful* person to test no deceit indicated, but she may have meant an *un*truthful, or *guilty*, person. Dr. Raskin responded as if she had asked about an untruthful person.

Dr. Raskin responded on August 28, 1997. He wrote that the training offered by the Canadian Police College was the best available, and that the method and techniques practiced by polygraph examiners certified by the College could be relied upon to produce valid polygraph test results. However, he recommended that the examiner should have at least two years field experience. He also suggested that in very important cases, independent review by another qualified examiner would be highly desirable. With respect to the risk of an untruthful person producing a non-deceptive polygraph result, he stated that the scientific evidence indicated such false negative errors would occur in approximately 5% of examinations. It was his opinion that sexual abusers are no different from other offenders with regard to the effectiveness of polygraph techniques. According to him, the only published scientific study to investigate this proposition directly ultimately demonstrated that 100% of the actual perpetrators accused of sexual abuse in the study were correctly detected as deceptive. As for the phrasing of questions, he said:

> In general, it is preferable to phrase relevant questions about the alleged offences in terms of specific acts. However, this is not always possible when the allegations are vague, or involve numerous alleged acts or numerous alleged victims. Under such circumstances, it may be necessary to phrase the questions in terms of inclusive categories, such as "sexually assault", "touching for sexual purposes", or "sexual touching" as was done in the examinations conducted in the present investigation. If the latter approach is utilized, it is necessary to discuss the types of acts and the possible victims that would be included under these terms and instruct the suspect that the questions include any and all of the described specific sexual acts. Therefore, it would be important to know the ways in which the categories were discussed and defined with the suspect during the polygraph pretest interview. Review of the tape recordings of the examinations would be helpful in this regard.

Dr. Raskin offered the following further opinion:

> The fact that 19 of 20 accused have passed their polygraph examinations by producing non-deceptive results raises a very strong suspicion that many of the cases involve false allegations. If as many as 10% of non-deceptive results are false negative errors, the probability that 19 of 20 such results are erroneous is vanishingly small. It is essentially zero. I suggest as a procedural requirement that in cases where the accused has obtained a non-deceptive result on a properly administrated and interpreted polygraph examination, the accuser should be expected to undergo a similar examination by a qualified examiner. If the accused has passed and the accuser fails, this should be strong enough evidence to close the matter. Also, knowing that they might be requested to undergo a polygraph examination to substantiate their claims would be expected to serve the strong deterrent to false claims. This would benefit not only the Compensation Program, but would increase the likelihood that bona fide claims would receive the type of attention they deserve.

On July 29, 1997, Anne Derrick wrote to Michael Dempster, advising that she had learned that the Program office was in the process of developing a polygraph policy. She raised detailed concerns about the utility of polygraph testing and the controversy over its validity, and urged the Government to resist any temptation to utilize it in the compensation process.

On behalf of herself and John McKiggan, Derrick later wrote another letter, dated

September 10, 1997, requesting input before there was a final formulation of a polygraph policy by the Department of Justice. She understood that the direction likely to be taken would include a requirement that some claimants be polygraphed. She wrote that this would fly in the face of the founding principles of the process and would produce unreliable and, therefore, unfair outcomes.

The Minister of Justice responded on September 23rd, stating that it was not the Department's intention to include a requirement that some claimants be polygraphed, and that he could not envision a process which would force people into taking polygraph tests. He added:

> We must also be mindful of those who feel they have been wrongly accused, many of whom have voluntarily taken a polygraph test in an effort to clear their names. Obviously, we must take every allegation of abuse seriously, and must use every investigative tool at our disposal in this very complex investigation.

6. CLAIMANT INTERVIEWS, DISCLOSURE ISSUES AND MEDICAL RELEASES

In the meantime, the IIU, the Compensation Program and claimants' counsel grappled with issues surrounding interviews and re-interviews of claimants, disclosure of institutional records to claimants, and privacy issues in relation to medical records.

In January 1997, the IIU started videotaping all statements from claimants. This placed a considerable logistical burden on the Compensation Program office, both to produce transcripts and to find the time to view the tapes themselves.[9]

Concerns were raised by Derrick and others about the manner in which the IIU was conducting claimant interviews. In particular, complaints were raised that support persons were not being permitted to attend and that, during the interviews, claimants were being interrogated about the contents of institutional records and asked to explain the denials of abuse by the alleged abusers. In interviews with my staff, IIU investigators denied that they treated claimants unfairly, but acknowledged that they put records, prior statements and other material to claimants, and required explanations for purported discrepancies.

In a letter dated May 5, 1997, Dempster wrote to Derrick addressing some of her

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[9]It was well arguable, however, that videotaped interviews could resolve issues otherwise in dispute. For example, one claim proceeded to file review because the Province maintained that the named employee was not at the institution when the abuse allegedly occurred. At the file review, the claimant denied that he had identified that particular employee; rather, he had been given the employee's name by the Murphys. This explanation was accepted by the file reviewer and compensation was awarded. Apart from some leading questions early in the Stratton investigation, the Murphys denied making any such suggestions to witnesses. Others felt that the Murphys had been suggestive in their questioning of witnesses. This debate could more easily have been resolved, had the Murphy interviews been videotaped.

concerns. He advised her that it was not his office's intention to restrict a claimant's access to an appropriate support person during the interview process. Further, he indicated that the function of the interview was to obtain the most accurate data possible to assist in making a compensation-related decision and that, therefore, the claimant must be given an opportunity to address any statements by the alleged abusers.

Chambers wrote to Derrick on August 20,1997:

> IIU investigators are trained professionals. They design and ask questions in a respectful manner which are, in their view, relevant to the claim being investigated. Though it is regrettable that some questions can be uncomfortable to claimants, this is a necessary part of a program requiring the assessment of claims to large sums of money. As you will agree, investigators are attempting to get to the truth of the matter, in as much as this is possible in the parameters of the compensation program. We cannot assume that a claimant is telling the truth. The compensation process provides few mechanisms to allow the Province to challenge claimant's allegations. Where we suspect that an allegation is false or fabricated, it is necessary to probe the alleged events in the interview with relevant questions. The type of questions that you may object to may indeed go to the thing or things alleged to have occurred, and as such are relevant.

The Compensation Program took the position that institutional or other records would not be released prior to IIU interviews, or indeed until a Response was made by the file assessor to a Demand for compensation. The Program's position was reflected in a letter, dated June 17, 1997, from an assessor, Leanne Hayes, to counsel for a claimant. She pointed out that the purpose of the investigation was to acquire information untainted by outside influences, including institutional records:

> Some counsel have expressed concerns regarding cross-examination by IIU investigators of the claimants based upon the institutional records, and that this is inherently unfair. I note that during the RCMP interview, the RCMP investigator clearly had access to records or information upon which he based certain lines of questioning ... It seems to me that if the RCMP are entitled to conduct their investigation without prior release of documents or sources of information to the claimant (or in that case, the complainant/victim), that the Province should be offered the same opportunity to complete investigation without prior release of "evidence."

On July 13, 1997, the IIU imposed a requirement that claimants sign blanket authorizations for the release of medical records, so they could be obtained before a claimant was interviewed. The IIU did not consult with the Program office about the need for medical records on a case-by-case basis. Indeed, IIU investigators might not even be aware of the substance of a claim before they had taken a statement from the claimant. Claimants' counsel objected to this procedure, which did not limit the requests for medical information to situations where the information might be relevant to the claim.

As I noted earlier in this Report, the Murphys had been retained to take statements from claimants both before and during the operation of the Compensation Program. Many claimants gave more than one statement to the Murphys. It was common in re-interviews for new

allegations of abuse to be made.[10] This was not unique to re-interviews done by the Murphys. New or different allegations also surfaced in subsequent interviews conducted by the IIU and the RCMP.[11]

In discussions with my staff, the Murphys expressed some discomfort with new statements from claimants which revealed more serious or different allegations where the new statements were taken after the compensation grid was published. They also expressed discomfort over such statements taken following therapy sessions. However, their instructions were not to question or challenge claimants, but to record accurately the claimants' experiences. In the files reviewed by my staff, where the IIU or RCMP investigators re-interviewed claimants, and differences surfaced from previous accounts, the claimants were asked to explain the differences.

In a letter to Dempster of July 29, 1997, Ms. Derrick pointed out that the IIU were requesting re-interviews of her clients in cases where they had not even looked at the videos of statements taken by the RCMP. She reflected that this seemed contrary to the announced intention by the Government to avoid a multiplicity of interviews.

In a letter dated September 23, 1997, the Compensation Program office announced that, effective October 1, 1997, "all Statements will be taken only by the Internal Investigation Unit." The RCMP would continue to conduct interviews, but solely for the purpose of their criminal investigation. RCMP statements taken prior to October 1st could still be used for compensation purposes, but an IIU statement might be required to complete the investigation.

7. CALLS FOR A PUBLIC INQUIRY

The various complaints emanating from both claimants and employees generated calls for a public inquiry the reports of institutional abuse. Some employees, some claimants, the NSGEU and the media all promoted, to varying degrees, the need for such an inquiry. On July 20, 1997, the Minister of Justice requested that a briefing note be prepared for the Premier addressing what such an inquiry's mandate might be, whether it would get meaningful answers that could not be obtained from the current process, and how it would affect the ADR process and Operation HOPE.

Barss, who was then Acting Deputy Minister of Justice, forwarded a briefing note to the Premier's office on July 21, 1997. The note raised concerns over the impact a public inquiry would have on the RCMP investigation and the considerable stress it would place on current

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[10]I understand that, in some instances, there is a dispute as to whether the allegations were truly new or simply more detailed.

[11]Indeed, new allegations arose even at the file review stage, which sometimes led to an adjournment of the review for further investigation.

employees. It was pointed out that the Stratton investigation had found that abuse occurred in three institutions, and that nothing was done although the abuse was known. It was believed that a public inquiry would probably come to the same conclusions, and would likely recommend that compensation and an apology be provided to the victims, that the perpetrators be investigated and brought to justice, and that steps be taken to ensure that this could not occur again. These steps had already been taken by the Government. The note concluded:

> Though an inquiry would provide a reprieve for government, the questions of compensation, the RCMP investigation and the internal investigation would still be left at the end of the day. In our view, we may accomplish the same objective by having the IIU complete a comprehensive report on the three institutions. Upon completion of their investigation, the IIU can provide a report that outlines the extent of abuse, knowledge of abuse, analysis of the process which allowed the abuse to occur, accountability mechanisms, and recommendations to prevent any recurrence. The report would be for public consumption. We would announce our intentions to do so shortly, which would quell the calls for a public inquiry, and allow the process of compensation as well as the investigations to continue.

Another briefing note on the issue, dated August 20, 1997, was prepared for the Premier by Michael Dempster. Dempster recommended that there not be a public inquiry. Instead, he suggested that the Compensation Program continue, but with significant changes to give the Province greater protection from fraudulent claims, in the context of a process that respected the privacy of claimants and employees and allowed for further improvements. The Premier endorsed the idea that proposals be put to the Priorities & Planning Secretariat ("P&P") for an improved compensation process.

On September 10, 1997, the Minister of Justice submitted a memorandum to P&P recommending that calls for a public inquiry continue to be rejected, and that the Compensation Program continue, but with significant changes to give the Province greater protection against fraudulent claims. On September 12th, Dempster advised the assessors and other officials to defer further file reviews pending direction from P&P.

On September 23rd, P&P approved the Minister's recommendation. He was directed to return to P&P with the specifics of new Compensation Program Guidelines. The decision by the Government was announced by the Premier.

8. CONCERNS OVER FRAUD

The July 21st briefing note from Barss also stated that intelligence coming from correctional services in federal and provincial institutions indicated that inmates were sharing information on which employees to name as perpetrators. The concern was raised within the Department of Justice that a significant number of claims could be fraudulent. Changes to the Program were being examined to ensure that the Program was compensating only legitimate victims of abuse.

The note also cited a recent example where the Program had denied a claim because the institutional records showed that the alleged abuser was not employed at Shelburne when the alleged abuse occurred. However, the file reviewer concluded that it was not proven that the employee was not there and made a substantial award in favour of the claimant. The note stated:

> No one disputes the fact there was widespread abuse at these institutions, but we must be diligent in our efforts to ensure only those who were truly abused receive compensation, and those who are wrongly accused are cleared as quickly as possible.

By this time, the IIU had put together a list of 173 persons who, in their view, had made fraudulent claims for compensation. There was a variety of reasons why a file was placed on this list, including:

- The claimant made an allegation of sexual abuse against an employee who took and passed a polygraph test;
- The claimant refused to cooperate with the RCMP;
- Information was obtained from informants or through other intelligence showing that the claimant had lied about the allegation;
- The claimant demanded a large amount of money, was offered less and accepted;
- The IIU investigation revealed a lack of truthfulness. For example, the claimant alleged abuse by a counsellor who was not there at the time indicated, or named others as witnesses who were either not present or disputed having seen the abuse.

I later comment on the inclusion of some of these items on this list.

9. FILE REVIEWS BEFORE THE GUIDELINES

The changes announced on December 6, 1996, did not purport to change either the basic principles set out in the MOU or the provisions that governed file assessment and file review. It was clear that there was a wide discrepancy in the information available to file assessors, and

hence, for any subsequent file review process. This was due, in large measure, to the logistical impossibility of the IIU investigating all the claims.

Approximately 100 file review decisions were rendered between May and November 1997. Given the number of file reviewers and decisions, one must be careful not to over-generalize about the approaches taken by reviewers. However, I describe several decisions below in order to highlight some of the variations in approach taken by reviewers.

Some file reviewers considered their role to be fairly limited. One wrote, in a June 1997 decision:

> I have come to the conclusion that my role is fairly limited. The MOU provides little suggestion that a file reviewer was to delve into questions of credibility. I take from the MOU that the drift of my role is to hear the allegations and to fit them into the category set forth and affix the appropriate compensation based on that.
>
> Obviously if some allegations could be clearly demonstrated to be untrue, impossible, or strain the bounds of credibility, they would have to be discounted in my decision. Short of that, however, there is little room to test the allegations and the MOU did not apparently contemplate me doing so.

A file review was held on July 10, 1997, with the claimant, his counsel, and an assessor present. The claimant made three allegations of physical abuse and a single allegation of sexual abuse. The physical abuse allegations were directed against three employees. The allegation of sexual abuse was of fondling by an unidentified individual. The file reviewer had before her the claimant's Murphy statement, his videotaped interview with the IIU, and a review of the philosophy and policies on the use of force applicable in Shelburne from 1970 to 1995. The only available documents were employee shift logs for the 45-day period that the claimant was at Shelburne.

In relation to the sexual abuse allegation, the file reviewer stated:

> I take the position that since the allegation was made and the Province is unable to provide any countering evidence that the incident did not occur and has not otherwise impeached [claimant's] credibility that I am compelled to accept the truth of his allegation.

As for the allegations of physical abuse, the file reviewer noted that the Province accepted as credible the claimant's account respecting one allegation and had made no specific comment respecting the second. The reviewer accepted that both of these incidents occurred as alleged by the claimant. With respect to the third allegation, the Province accepted that the claimant was involved in an altercation with the named employee, but disputed its extent and the resulting injury. The file reviewer accepted that the altercation did result in physical injury, albeit not a long-term one. She concluded that the claimant suffered minor sexual and minor physical abuse and awarded $30,000, plus a counselling allowance of $5,000. It appears that the Province's positions were taken without any information as to what the employees had to say.

The same file reviewer conducted a review on September 19, 1997, where a claimant made numerous allegations of physical and sexual abuse. In her decision, she reflected that she had asked questions of the claimant to clarify issues and evidence, and that the lawyer representing the Province had been given the opportunity to cross-examine the claimant. She wrote:

> I have an obligation under this alternate dispute process to make a determination of [claimant's] credibility and to ascertain, within the parameters of the guidelines set out under Schedule "C" of the MOU, the classifications of sexual and/or physical abuse suffered by [claimant]. I concur with Mr. McKiggan's submission that my determination is to be made out on a balance of probabilities, more particular, is it more likely than not that claimant] was abused in the manner and by the persons as stated in his allegations.

The file reviewer concluded that she did not necessarily accept each allegation of physical abuse, nor that it was chronic or that it resulted in serious physical trauma. She nonetheless found that the claimant did suffer a degree of physical abuse within the minor physical category, and awarded $5,000. With respect to alleged sexual abuse, she found the allegations disturbing, but the very general terms in which the claimant described the abuse and the inconsistencies between his various statements led her to conclude that, on the balance of probabilities, the claimant did not suffer the sexual abuse alleged.

In another decision, dated August 26, 1997, a file reviewer wrestled with the approach to be taken under the MOU where the Province disputed the alleged abuse. This was the first time that the issue had arisen for this reviewer. After noting that the MOU was silent on the issue, he stated:

> Nowhere, however, in any of these Articles [the MOU], is the standard of proof or the location of the burden of proof mentioned. The matter is therefore at large. On this basis, I know of only one way in which the resolution of a dispute about the existence or non-existence of any past event can occur. At the end of the day, there must be a decision, one way or the other, as to whether its occurrence is more probable than not. That is all the balance of probabilities test requires, but it cannot require anything less. This is so because the only other possible conclusion is that it is more likely than *not* that the event did not occur. No series of statements believed to be false, more likely than not, could ever be the basis for compensation under the MOU.
>
> (Emphasis in the original.)

The file reviewer also concluded that although the burden was on the claimant, the MOU intended that the claimant's statement should be the foundation document for the claim, and thus provide a *prima facie* basis for compensation. In other words, if nothing else was presented and the allegations went uncontradicted by other evidence, compensable abuse was proven and the matter became one of categorization and compensation.

The file reviewer accepted as fact the 'findings' set out in the Stratton Report and the

allegations set out in the Survivors' Volume of Statements. In relation to the claimant's allegations of physical abuse, he commented:

> There is first of all nothing inherently improbable about what was related. The *Stratton Report* and the *Survivors' Volume of Statements* are distressingly replete with the violent responses by staff to trivial departures from routine, and with the use of force as a controlling and intimidating behaviour.

With respect to the claimant's allegations of sexual abuse, the file assessor submitted that the allegations were improbable. The reviewer again relied on the Stratton Report and the Survivors' Volume of Statements:

> Counsel for the Province also took the position that because there were numerous other boys in the cottage, the assaults are unlikely to have occurred, because the staff member alleged to have been involved would have been risking discovery. Frankly, having read the *Stratton Report* and the *Survivors' Volume of Statements*, I give this argument very little weight. It is clear from the written material that there was a culture of abuse and concealment existing in this school. Abuse was carried out with impunity and usually covered up if observed. Fear of discovery would certainly exist, but we now know from the *Stratton Report* that the likelihood of anything untoward happening as a result of any such discovery was vanishingly small.
>
> We also know from the many survivors' statements that the resident boys were conditioned to obedience and silence in the face of abuse by intimidation and physical punishment by staff members. Attacks on residents were almost always accompanied by an admonition to remain silent or face retaliation and punishment. In the result, I believe staff inclined this way pretty much did what they wanted, when they wanted, with little fear of either discovery, particularly by the residents, or of punishment.
>
> .....
>
> We have to look at the type of proof of which the events are capable, and at the informing context conveyed by the *Stratton Report* and the *Survivors' Volume of Statements*.

10. NOVEMBER 6, 1997, GUIDELINES

A detailed memorandum containing the proposed new Guidelines for the Compensation Program was approved by P&P on October 21, 1997, and by Cabinet on October 24, 1997. On November 6th, the Government released them to the public, as the "Compensation for Institutional Abuse Program Guidelines." They were to provide the framework for the continuing Program and appeared to replace the MOU. They were made without the prior consent or approval of claimants' counsel.

When the Government announced its further "adjustments" to the Program, they were said to "help ensure that only legitimate victims receive compensation for abuse." The Minister of Justice, the Honourable Alan Mitchell, stated:

> We cannot forget for a moment that there are real victims of abuse. However, we cannot allow anyone to defraud this program. It simply isn't fair to the true victims of abuse, and to the taxpayers of this province. These changes allow us to move forward, and to protect the interests of those who truly deserve to be compensated.

The Guidelines have many features that distinguish them from the original MOU. Some of these features were already reflected in the earlier changes made to the Program when it was reinstated. Here are the key components:

- The lengthy preamble to the MOU is absent. As noted before, the preamble contained the principles and fundamental purposes associated with the Compensation Program, including the acknowledgement of moral responsibility for the abuse perpetrated, condoned or directed by employees, the assistance of survivors with the healing process, and the affirmation to the survivors that they were not responsible for their own abuse.

- The Guidelines may be revised by the Province of Nova Scotia as the need arises. They are, by their terms, subject to unilateral change.

- The term "claimant" is substituted in the Guidelines for "survivor," which was used in the MOU to describe an individual who alleges that he or she was a victim of physical and/or sexual abuse.

- The definition of "physical abuse" is similar to that given in the MOU, except that the Guidelines specifically provide that physical abuse does not include an act that would be included under section 43 (or its predecessor sections) of the *Criminal Code* (which justifies the use of reasonable force by certain persons for purposes of correction), or the reasonable use of the strap by way of correction where its use was a common disciplinary practice in the Nova Scotia public schools at the time the incident described took place.

- "Sexual interference," which under the MOU could include "inappropriate watching or staring, comments and sexual intimidation," is now defined to mean "touching, watching, comments or intimidation, where such acts are for a sexual purpose."

- A specific provision that the Program does not provide compensation for 1. abuse perpetrated by residents upon residents, 2. abuse perpetrated by individuals who were not employees, 3. negligence, or 4. as earlier reflected in the MOU, the psychological consequences of physical or sexual abuse.

- As of the effective date of the Guidelines, to be eligible for the Program, a claimant must have submitted a Demand by December 18, 1996, or notice of an intention to file a Demand by that date and a Demand by July 31, 1998, and executed medical

releases by April 1, 1998. In addition, where a claimant had not yet given a statement (defined as an account detailing physical and/or sexual abuse alleged as having occurred at one or more of the subject institutions taken by Facts Probe Inc., the police or the IIU), the claimant had to at least contact the IIU by February 27, 1998, to schedule an interview.

- At any stage in the Program, the claimant may be requested to give a further statement to the IIU. Refusal to do so would result in the temporary suspension of the investigation.

- A claimant will be considered to have withdrawn from the Program and become ineligible for compensation where he or she has not provided a Demand, an executed medical release and contacted the IIU by the required dates, or has not provided a further statement within 60 days of a request for one.

- The Province shall only access a claimant's medical and MSI or other provincial health program records where they are needed to evaluate the Demand made.

- As of October 1, 1997, all statements will be taken by the IIU only. Prior statements given to Facts Probe Inc. or the RCMP will continue to be accepted for the purposes of filing a Demand.

- Procedures respecting the statement taking process are set out in Schedule D to the Guidelines. All statements are to be videotaped and to be taken in "pure version format" (i.e., through an open-ended process that encourages the fullest account in the witness's own words without pointed questioning), although a question and answer session may follow. The claimant shall be sworn or affirmed, cautioned that false allegations constitute offences and asked if the statement is being voluntarily given. The claimant's counsel may be present, as well as one additional invitee, such as a therapist, counsellor, spiritual advisor or family member, but the invitee cannot comment, offer opinions, counsel or lead the claimant. An investigator may terminate or suspend an interview where of the opinion that the claimant is being coached or led or where the interview is otherwise interrupted. Copies of "photo-ID's" or "yearbooks," sometimes shown to a claimant during statement taking, will not be provided to the claimant or his or her counsel.

- Where the claimant makes a new allegation subsequent to filing a Demand (meaning an allegation different from one already contained in a statement, such as the naming of an employee not previously identified as an abuser, a change in the circumstances or time associated with an assault, or an increase in the frequency or severity of a particular assault), it shall be investigated and only responded to after the IIU has completed the investigation.

- Other claimants' statements may not be incorporated within a claimant's Demand

or submitted separately for use in assessing or reviewing claims unless the IIU has had an opportunity to investigate the allegations in those statements.

! Any statement provided by a claimant may be used by the Province, without notice to the claimant, for such purposes as discipline proceedings, the investigation or prosecution of an offence, a report of child abuse to the Department of Community Services and any investigation undertaken by that Department or a child protection agency, civil litigation by or against the Province or a child protection agency, and the identification of potential witnesses for the investigation and validation of claims.

! In determining the validity of the Demand, the Province is to consider the claimant's statement(s), institutional records, the employee's employment records and, where available, polygraph test results, the claimant's medical records and other relevant information. The opinion of a polygrapher, certified by the Canadian Police College, is admissible in assessing credibility. Where such evidence exists, the Province shall notify the claimant of this evidence prior to providing its Response, include the opinion with its Response, and, at the claimant's option, arrange for a polygraph test to be administered to the claimant within 30 days of notification. Any results so obtained shall be made known to both the claimant and the Province and become part of the evidence on which the Response is based. The claimant's institutional documents shall also be provided with the Response.

! As a condition for making an offer of compensation, the Province must be satisfied on a balance of probabilities that the abuse described by the claimant occurred. Where one groundless, implausible or deceitful allegation is made, the Province will draw an adverse inference in considering other allegations.

! The claimant may expect a Response within seven months of submitting a Demand. However, complex cases or delays in obtaining a claimant's statement, medical releases or records may result in a longer response time.

! Claimants have up to 12 months to accept the Province's offer of compensation unless it is earlier revoked. A release must be provided when the offer is accepted in accordance with Schedule E to the Guidelines before payment may be made. Schedule E, the release, reflects the claimant's understanding of a number of the Guidelines' provisions, as well as containing the terms of release. Unlike the release contained in the original MOU, the release under the Guidelines does not specifically provide that the releaser remains entitled to sue any employee who committed abuse against the releaser. It does specifically reflect the claimant's understanding that his or her statement and other submitted materials may be investigated for accuracy in the future and, if civil or criminal action is commenced

respecting suspected false statements or evidence, payments will stop until proceedings are fully resolved in the claimant's favour. The claimant also promises not to disclose the amount of compensation received except to professional advisors and therapists and family. (The original MOU permitted disclosure to care givers and other survivors).

- A notice of file review must be filed within six months of receiving a Response. All file reviews will now proceed by way of written submissions only. The claimant's submissions are to be provided within 30 days of the notice. The Province's submissions are to follow within 30 days, providing reasons for its position along with any new evidence. The claimant may reply in writing within 15 days. Where a new allegation is made in the claimant's submissions, the file review process will end and a new Demand and statement must be provided and followed up in similar fashion to an original Demand.

- The claimant and Province are to provide the file reviewer with their submissions, the Demand and Response, and related documents. The parties shall provide each other with a list of documents so provided and exchange any documents not already exchanged. File reviewers shall not refuse a reasonable request to extend the submission deadline.

- File reviewers are to be lawyers with administrative law, ADR or other relevant experience. They are to be assigned by rota. The list of file reviewers remains the same.

- As a condition for making an award, the claimant must satisfy the reviewer on a balance of probabilities that the alleged abuse occurred. The reviewer may consider the same categories of materials/evidence which can be considered by the Province in assessing the Demand, including polygraph evidence.

- File reviewers are to provide written reasons within 45 days (rather than the 30 days contained in the MOU). There is no longer any provision reducing the file reviewer's fees for every day the decision is late. The award given by a reviewer is to be paid within 30 days (rather than the 20 days contained in the MOU).

- Awards over $10,000 are to be paid over a four-year period, with the greater of $10,000 or 20% of the award in one lump sum payment, and the remainder paid over time with interest. (There are detailed payment provisions.) Where the Province commences civil or criminal proceedings against a claimant respecting this Program, the claimant's payments must be stopped. A "catch up" payment is to be made, with interest, where the outcome of those proceedings is in the claimant's favour.

- The interim and long-term counselling provisions are similar to those contained in the original MOU. In the Guidelines, the Family Services Association is

specifically designated as service arranger in connection with interim psychological counselling. Further, the $5,000 for interim psychological counselling may be exceeded and later deducted from a long-term counselling award. A long-term counselling allotment may now be applied to employment upgrading, educational programs, tattoo removal, dental work, or any combination of these. Long-term counselling allotments are only available for five years from the award date.

- Where an award is made after the effective date of the Guidelines, the maximum hours billable to the Government for legal services respecting a compensation claim are increased from 10 to 15 hours.

The complete Guidelines are reproduced as Appendix "G".

11. AUDIT OF RANDOMLY SELECTED CLAIM FILES

Of the 90 randomly selected files reviewed, 18 were processed in the period from December 1996 to November 6, 1997. In these 18 files, allegations were made against 36 former and current employees, and nine unnamed or unknown employees. Our review showed that there was some employee input in nine files. As was the norm, in these files the claimants made allegations against a number of different employees; however, in none were *all* of the alleged abusers interviewed. Those employees who were interviewed denied the allegations. In the remaining nine files there was no employee input at all.[12] Four of the named employees were unavailable to be interviewed.[13]

All of the 18 files that we reviewed contained at least one Murphy statement. In 11, either the IIU or the RCMP had also taken a statement from the claimant. Fifteen of the files were governed by the requirement to respond within 120 days. Eleven were not responded to within that time period.

The IIU provided a report in 15 of the 18 files. In the sixteenth, it supplied the institutional records only. In the remaining two, a memorandum was sent stating that (as discussed between Dempster and Barss) they were files in which the investigation was "suspended in the interest of: low level of abuse; death of employees; cost effectiveness, time efficiency and specific inaccuracies."

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[12]In one of these files, the claimant only referred to unnamed or unknown alleged abusers. In another, the claimant named Patrick MacDougall. In the remaining seven, multiple former or current employees were named. These employees were available to be interviewed, but there is no record that they were ever asked to provide a statement.

[13]From the records available to my staff, three of the named former employees were deceased and one was incapacitated by Alzheimer's Disease

In the reports, the IIU would refer to their findings using the following language:

- The investigator notes that there is no corroborative evidence or witness statements in relation to this matter ...;
- [The employee] has been interviewed, he denied this allegation ...; or
- [The employee] will not be interviewed due to minor nature of this allegation.

In the IIU Investigator Conclusion column, the investigators would use this language:

- The investigator cannot confirm or dispute this allegation;
- The allegations are vague, unsubstantiated by physical evidence and have been denied by the employees contacted;
- The claimant does not know the identity of the abuser and there are no specific details ... There is little credibility to the allegations; or
- There is insufficient evidence regarding this allegation for a conclusion to be drawn based on the balance of probabilities.

Of the Demands made in the 18 files that we reviewed, 12 requested compensation of $50,000 to $100,000, four were in the range of $40,000 to $45,000, and the other two were for $20,000 and $5,000, respectively. None of the Demands were accepted as presented. In two, the assessor offered no compensation. In one, the assessor did not respond within the 120-day time period for a Response and the claimant was allowed to go to file review without a Response from the Government. In all others, offers of compensation were made.

In four files, the amount demanded was $100,000. All four cases went to file review. The outcomes of these cases can be summarized as follows:

- In the first case, the assessor offered no compensation. The file reviewer awarded $55,000;

- In the second case, the assessor also offered no compensation. The file reviewer awarded $17,000 for physical abuse, but upheld the denial of compensation for the alleged sexual abuse;

- In the third case, the assessor offered $5,000 compensation. The file reviewer awarded $50,000;

- In the last case, the assessor offered $52,000. The matter was scheduled to proceed to file review, but was settled in advance for $85,000.

Overall, nine of the 18 files we reviewed from this phase of the Program went to file review. Three were settled prior to being heard. The other six were completed by the decision of a file reviewer. In five of those six cases, the claimants exercised their option to appear personally

to tell their stories.[14] In only two of the six cases, was the alleged abuser interviewed, and both denied the allegations. However, in another, there was some input from witnesses (five former and current employees) respecting the procedure in the Special Attention Unit (the segregation unit).

The following claim files are illustrative of the assessment and file review process during this phase of the Compensation Program.

C.G., a former resident of the Nova Scotia Youth Training Centre, made a Demand for $70,000 compensation under category 3 (severe sexual and minor physical abuse). She alleged that she was sexually abused by two male staff members, identifying one by name, and the other by a description. She said that both worked with the boys' group. She also alleged that she was physically abused by female staff, but could only recall the name of one staff member.

In this case, the IIU contacted the named male alleged abuser, who gave a written statement in which he advised that he did not supervise any of the girls and denied ever touching the claimant in any way. The IIU investigator concluded that he could not "confirm or dispute" the allegation.

The Province's Response was not provided by the due date of April 18, 1997. Claimant's counsel sent a letter to the assessor, saying that because the Province missed the deadline, he wished to proceed to file review. The assessor responded on May 28, 1997 as follows:

> In this matter, assessment of the situation is especially difficult and delicate, because [C.G.], like many former residents of the Nova Scotia Youth Training Centre, faces multiple difficulties in both her history and current functioning. She has had a very troubled past, there is no doubt. I have carefully reviewed the institutional records, the Murphy Statement, the video, and medical records. I have considered the comments of Justice Stratton in relation to this facility, in particular the conclusions at page 85 to 87 of his report.
>
> This Program sets out a low proof process for establishing that abuse has occurred. After careful consideration, it is the Province's position that there is insufficient material, (or sufficient uncertainty, to put it another way) to meet the standards of the process. The factors which contribute to this conclusion are the lack of detail and specificity in the statement and the reinterview (especially as regards sexual abuse); the content of the institutional records and that [C.G.] appears to have little actual recall of the events alleged.

The file review hearing was held on June 17, 1997. C.G. was present, along with her counsel and the file assessor. The file reviewer released his one-page decision on June 30,1997.

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[14]In the sixth case, the claimant requested that the file review be conducted as a 'paper review' of the materials submitted to the file reviewer.

He concluded as follows:

> [Claimant's counsel] presented this as a category 3 claim – "severe sexual and minor physical" – and sought compensation of $70,000. [The assessor] was of the opinion that the factual allegations contained in the statement were too vague and uncertain to justify an offer by the Province.
>
> After concluding the review hearing, [assessor] appeared to accept the contention that [C.G.] had been raped on one occasion. I believe that this incident did occur. This would justify a finding of "medium sexual" abuse. I find the allegations of slapping are too vague to accept and on the totality of the evidence I am not prepared to make a finding of any type of physical abuse.
>
> I find that [C.G.] should be compensated under category 8 in the amount of $30,000.00, plus a counselling allotment of $7,500.00.

There is no indication in the file material that the statement from the former employee was submitted to the file reviewer.

J.H., a former resident of the Nova Scotia Youth Training Centre, submitted a Demand on May 28, 1996, for $100,000 compensation under category 2 (severe sexual and medium physical abuse). The allegations were against a named employee, X, and two unnamed kitchen staff. The file assessor gave her Response on August 8, 1996, denying the claim, at least in part because the named employee was not at the Centre when the claimant was there.

The claimant opted to go to file review. It was held on February 6, 1997. Present were J.H., her counsel, the file assessor, and Michael Dempster. Prior to the review, the assessor obtained some new information which suggested that there was an employee who may or may not have gone by the name X at the Centre at the relevant time.

The file reviewer released his decision on March 4, 1997. He noted that during the hearing the claimant testified and related incidents as best as she could, and that she was examined by her own lawyer and "cross-examined" by the file assessor. He also remarked that the parties were satisfied that they had full disclosure, there was a full cross-examination of the claimant, and "there were no other witnesses to testify." He commented that prior to the hearing "the Crown" conceded that there was a Miss or Mrs. X who worked at the school at the relevant times, and consequently this issue was removed from consideration at the hearing. Nevertheless, he noted that the assessor continued to question the allegations on the basis that the claimant's story was disjointed, convoluted and simply too difficult to understand and believe.

The file reviewer expressed his findings as follows:

> I have had the opportunity of listening to [J.H.] and listening to what both [her counsel] and the Crown have had to say. The Crown suggested that this is a difficult case for them and I certainly agree that it is a difficult case all around. I have no question that the [J.H.] has suffered a very troubled life, some of which can be traced to her stay at the school, but

> a lot of which can be traced to her circumstances in life.
>
> I agree with [claimant's counsel] suggestion that it would be wrong to simply discount her story because it is disjointed and somewhat difficult to follow. I agree with the Crown's suggestion that there are many discrepancies and inconsistencies in her story and some of it is difficult to believe. I also believe that some of what she feels happened can be attributed to a difficult upbringing and the School's attempts to handle her behaviour. I read her statements and find that there are indications of someone who has significant psychological problems and indeed it is extremely difficult to ascertain what is fact and what is fiction and furthermore, if we accept what she says, it is difficult to itemize what her allegations are, particularly as to time, place and frequency.
>
> That being said, I don't believe that [J.H.] should be penalized simply because she is of low intelligence or because she cannot put together her story as well as other people of greater intelligence.
>
> It is my finding that in the absence of any evidence to the contrary, [J.H.] was abused at the school. I find that she was abused by [employee X] and others and this consisted of some physical abuse and that it also consisted of sexual abuse in the form of oral sex, fondling, and on certain occasions, the insertion of certain articles in her vagina. I say this because [J.H.] says it happened and I have no evidence to contradict what she says. She strikes me as an individual who was preyed upon by workers in this school and others that are presently part of this compensation program.

The file reviewer put the claim in the mid-range of category 6 (medium physical and medium sexual) and awarded $55,000 in compensation.

D.M., a former resident of Shelburne, submitted a Demand on June 17, 1996, for compensation under category 7 (medium sexual and minor physical abuse) in the amount of $40,000. He gave a statement to the Murphys in September 1995, in which he alleged that employee A sexually abused him on three separate occasions. He also claimed that two other counsellors punched and kicked him. His claim in relation to sexual abuse indicated:

> [Employee A] caught my client stealing cigarettes several times. The counsellor brought him to the office, and made him remove all of his clothes, including his underwear. [Employee A] would fondle my client's genital area. [D.M.] describes these incidents as follows: "It was only for a minute or so but as I look back at it now, this man violated me."

The file assessor accepted that a strip search occurred on one occasion, but asserted that such searches were necessary. She did not accept that the strip search was a sexual assault. She assessed the claim at $1,000 for minor physical abuse, plus the counselling allotment of $5,000 available for educational, psychological or financial purposes.

D.M. elected to go to file review. He provided another statement to the Murphys in

November 1996, this time alleging that the sexual abuse by employee A consisted of masturbation and anal intercourse. A new Demand was made for compensation under category 3 (severe sexual and minor physical abuse) in the amount of $70,000.

The IIU submitted reports to the assessor in advance of the scheduled file review date. Although no written statements appear to have been taken, the IIU investigator reported that employee A was contacted in relation to the allegation, denied any improper actions, and offered to undergo a polygraph examination. In relation to one allegation of physical abuse, D.M. named employee B. The investigator reported that there was no record of anyone by that name working at Shelburne at the time D.M. was a resident, and that other counsellors who were present in Shelburne at the relevant time could not recall an employee by that name. D.M. advised the IIU that he was positive about the name. The investigator contemplated that D.M. might be confused, and looked at the records of another employee with a similar name who was there at the same time as D.M. The investigator reported that that employee was not a counsellor for D.M.

The case was heard on March 17, 1997, with D.M., his counsel and the file assessor in attendance. The file reviewer released his decision on March 19,1997. He commented that the Government's position had changed: "Ms. [assessor] is now prepared to accept on behalf of the Crown that [D.M.] had anal intercourse performed on him by [employee A]."[15] However, the assessor maintained that the claimant had considerably changed his story and exaggerated it. The reviewer said he had considerable difficulty with D.M.'s recollection. He concluded that even if he accepted everything D.M. said, he was unable to find with any degree of certainty that D.M. was sexually abused more than three or four times. The reviewer found that the physical abuse claimed was minor, placed the total claim in category 7 (medium sexual and minor physical abuse) and awarded $47,500.[16] There is no reference in the decision to the fact that there was no employee by the name of B at Shelburne at the relevant time.[17]

J.O. was a former resident of Shelburne and the Nova Scotia Residential Centre ("NSRC"). He submitted a Demand on November 20, 1996, requesting compensation under category 2 (severe sexual and medium physical abuse) in the amount of $100,000. The Demand was based on a statement given by J.O. to the Murphys on April 11, 1996. He alleged that he had been severely sexually abused by employee A, and that it had occurred in the "hole." He claimed that he had spent a month or month-and-a-half in the "hole" and that employee A had forced him to perform oral and anal sex at least 25 times. J.O. also alleged that he had been physically abused at both institutions by six different employees.

According to the reports provided by the IIU to the file assessor, the alleged sexual abuser was deceased. However, none of the alleged physical abusers were interviewed. The reason

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[15]There is no explanation in the file materials for this change of position.

[16]The reviewer noted that the assessor suggested the claim fall somewhere in the $40,000 to $50,000 range.

[17]In fairness, it would appear that the file assessor placed no significance on the fact that D.M. named B as his abuser, believing that D.M. may have got the name wrong.

given was that, for the most part, the allegations were "low level in nature."

There were numerous reports from NSRC that J.O. had to be restrained by staff due to what was referred to as unacceptable behaviour, and that he was considered to be dangerous to himself and to others. The IIU investigator considered J.O.'s allegations to be unfounded. He noted that while J.O. alleged he spent up to one-and-a-half months in the "hole" (the Special Attention Unit, or "SAU"), institutional records showed that he spent only two nights there for two separate incidents, and that on both occasions employee A did not work in the unit.

The file assessor provided her Response on May 2, 1997, providing detailed reasons why she was unable to offer compensation for the alleged sexual or physical abuse.

J.O. elected to proceed to file review. The review commenced on September 25, 1997, with J.O. present, along with his counsel and the file assessor. It did not conclude that day and was to continue on October 15, 1997. However, the file assessor took the position that J.O. made further allegations during the file review and requested that he be interviewed by the IIU concerning them. The file review was ultimately concluded on January 21, 1998. In the meantime, the IIU not only re-interviewed J.O., but also took statements from a number of employees who worked the shifts when J.O. was placed in the SAU.

The file reviewer released his decision on February 19, 1998. In his decision, the reviewer noted the file assessor's position that J.O.'s allegations lacked credibility. He also noted that at the hearing of January 21, 1998, J.O. amended his demand from category 2 to that of category 6 (medium physical and medium sexual abuse). The file reviewer concluded:

> After carefully reviewing the Survivors' Volume of Statements, the MOU, two videotaped interviews of [J.O.] by the IIU, transcripts of the IIU interviews, transcripts of IIU interviews of five present and former employees at the Shelburne Youth Centre, written representations from [J.O.'s counsel] and [the file assessor], voluminous material received from the Department of Justice and finally, evidence obtained at the hearings of 24 September, 1997, and 21 January, 1998, I conclude the Claimant's Demand for compensation falls under category 10 (Medium Physical Abuse) and accordingly, I award the sum of $17,000.00. On a balance of probabilities, I dismiss the claimant's Demand for medium sexual abuse under category 6.

The file reviewer wrote that the degree of inconsistencies in J.O.'s statements and evidence at the first hearing was so severe as to place his veracity in question. In addition, the file reviewer referred to the interviews of former and current employees of Shelburne about the SAU, which caused him to conclude that employee A did not have an opportunity to commit the acts alleged. There was no discussion in the file review decision about the evidence with respect to the allegations of physical abuse.

A claim by B.D., a former resident of Shelburne, is illustrative of the files where the claimant did not name his or her alleged abusers. B.D. gave a statement to the Murphys on

October 22, 1996, alleging that he was sexually abused over 40 years ago by three male employees and by other residents. He could not provide complete names of the employees, only descriptions. He claimed that the abuse consisted of oral sex, masturbation and anal sex, and that it occurred at least 100 times during his stay at Shelburne, which he said was approximately one-and-a-half years. He also claimed to have been "whacked on the head" by employees, as well as punched, kicked and shoved.

A Demand was filed on February 7, 1997. While acknowledging that sexual abuse by other residents was not compensable under the MOU, the Demand requested compensation of $85,000 under category 2 (severe sexual and medium physical).

On March 2, 1997, B.D. was interviewed by the IIU. He reiterated what he had said in the Murphy statement. In the Response of June 11, 1997, the file assessor wrote:

> In considering [B.D.'s] claim I have reviewed the information received from the IIU, the MOU, the Demand, the Survivors' Volume of Statements and institutional employee information available to me.
>
> In addition to the context provided by the Stratton Report and our experience with events at the relevant institutions, there are a number of general points which are taken into account in our assessment of Demands. These include the duration of the Claimant's stay at a particular institution, the actual time period of the stay, and the fact that all statements are necessarily subjective and therefore susceptible to the effects of time and subsequent experience on memory.
>
> According to the records, [B.D.] was at the Nova Scotia School for Boys in Shelburne between October 30, 1953 and June 28, 1954, a period of 7 months. You have submitted that [B.D.] should be placed in Category 2 under the MOU (severe sexual, medium physical) and awarded $85,000.
>
> From the description of the sexual abuse alleged, I agree with your categorization of severe sexual abuse.

The assessor, however, did not agree with the categorization of the physical abuse. An offer of $70,000, plus a counselling allotment of $10,000, was made, based on severe sexual and minor physical abuse. The offer was accepted. Since B.D. could not remember any of the names of his alleged abusers, there was no employee input in the case.

12. ANALYSIS

In Chapter X, I described the Government's announced changes in December 1996 to the Compensation Program. In this chapter, I described the impact of those changes on the Program, culminating in the development of yet more changes, contained in the November 6, 1997 Guidelines.

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

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

The RCMP and IIU computer systems had not been integrated. No statement taking protocols for the RCMP and IIU had yet been created – this would not take place until April 1997. As I reflected in the previous chapter, the resumption of the Program did not await completion of either the RCMP or an IIU criminal investigation. As a result, the validation of claims could generally not rely on the products of those investigations. Further, because the Program's resumption did not await receipt by the Government of the particulars of all the claims being advanced, there was a limited ability to compare claims and the evidence bearing upon them. This could work for or against individual claimants, depending on the situation. Finally, the assessment and file review processes remained fundamentally the same. To the extent to which the Program now contemplated greater investigation of claims, and resort to written, recorded or documentary proof from all relevant sources, no effort had been made to clarify how that affected the way in which assessors and file reviewers were now to approach the validation process. All of this meant that the validation process remained seriously flawed.

As outlined below, all of these problems plagued the investigation, assessment and review of claims from the Program's reinstatement to November 1997, when the new Guidelines were released.

When the Program was reinstated, the IIU gave some consideration to files which had outstanding offers. Chambers quickly acknowledged that the IIU had neither the time nor the resources to investigate the vast majority of these files. He identified eight that should be held up, pending further investigation. However, some of these had already been settled or were close to settlement.

There were 181 to 192 additional files that had to be investigated and responded to by April 18, 1997 (the exact number could not be ascertained). By mid-March, it became clear that it would be nearly impossible for the IIU to complete its investigation in those files on time. The IIU simply did not have the requisite resources. The IIU proposed that certain 'low level cases' be responded to based only on existing information. It stopped its investigation of some of these

files. The Province was only able to provide its Responses to 74 of the Demands by April 18th. The balance could not be responded to in time.

A random examination of the files processed by the Program from its reinstatement until November 1997 demonstrates that there was a wide disparity in information available to file assessors. For example, in a number of files examined, there was no employee input at all. In none were all of the named alleged abusers interviewed. In several, there was little or no IIU input. Even where the IIU had conducted an investigation, the information provided was not necessarily helpful in permitting assessors to evaluate the merits of the claims. As well, inconsistent reporting language was used to describe the IIU's findings or conclusions.

When the Program was reinstated, there were also 21 claims that were slated for file review beginning in February 1997. No interviews of past employees were commenced until January 1997. Even then, they were initially only telephone contacts that could not be used in file reviews. It was recognized that if the IIU found information to refute a claim, but could not obtain a written statement, the Program office would be unable to rely on the notes of telephone interviews in the file reviews. In my view, a validation process that is unable to present countervailing evidence to a claim merely because of investigative time constraints has little credibility.

In summary, time constraints and limited resources meant that, right from the outset, assessors and investigators struggled to meet the 120-day deadline and had to determine which investigations should be abandoned in the interests of time and resources. The Program was inundated with files that had to be responded to by mid-April 1997. Claim files already the subject of offers before the suspension were settled without further consideration or investigation. Some files continued to be assessed and sometimes reviewed without any interviews of available employees having been conducted. In other cases, telephone interviews only had been obtained, preventing their use during file reviews.

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

The random examination of some of the file reviews conducted during this period demonstrates the existence of these problems. The disparity in information available to assessors was manifested by a similar disparity in the kinds of information available during the file review process. As more investigative work was done on files, some file reviewers wrestled with the interplay between the MOU, the burden of proof and the assessment of credibility. Some were of the view that they had little scope to assess the claimants' credibility within the existing Program, absent patent or demonstrable fraud. Put another way, claims were to be accepted absent countervailing evidence that demonstrated that they were untrue.

This approach, which was understandable given the philosophy underlying the original MOU, was deeply flawed for a number of reasons. First, the countervailing evidence – namely

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

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

The debate over the reliability of polygraph testing has raged for some time. It is not unique to Nova Scotia. The Government consulted Dr. Raskin, a well known proponent of polygraph testing, as an expert to assist it in evaluating what use should be made of such testing. There are others who take diametrically opposed positions as to the reliability of such testing. The Supreme Court of Canada has ruled such evidence to be inadmissible in criminal proceedings.

In the Report of the Commission on Proceedings Involving Guy Paul Morin, *I examined the use of the polygraph in the investigation that led to the wrongful conviction of Guy Paul Morin. Polygraph tests were administered to two jailhouse informants who claimed that Morin confessed to the crime which he ultimately was shown not to have committed. The polygraph was also used by investigators as a "quick and ready means of clearing suspects." I found that the investigators there placed undue reliance, at times, upon the polygraph. I said:*

> *Undue reliance on polygraph results can misdirect an investigation. The polygraph is merely another investigative tool. Accordingly, it is no substitute for a full and complete investigation. Officers should be cautious about making decisions about the direction of a case exclusively based upon polygraph results.*

In my view, investigators were entitled to weigh the fact that a number of employees

voluntarily took and passed a polygraph test in determining whether allegations against those employees were true. However, as I said before, polygraph results cannot substitute for a full and complete investigation. The IIU was not provided the time or the resources to conduct a full and complete investigation of the claims made to the Compensation Program, even assuming that it was appropriate to allow the IIU, rather than the police, to conduct the investigation in the first place. It appears to me that the IIU came to regard the polygraph as virtually determinative for several reasons:

- ! *First, the results tended to confirm the IIU investigators' own views as to the veracity of many of the sexual abuse claims;*

- ! *Second, the investigators were sometimes unable to conduct full investigations. As a result, polygraph testing acted, to some extent, as a substitute;*

- ! *Third, the IIU recognized that employees could not be heard from directly during the file review process. The testing provided an opportunity for their voices to gain greater prominence in the validation process;*

- ! *Fourth, with respect, the IIU regarded the polygraph as more infallible than its history might warrant.*

In Chapter XII, the use of polygraphs (as later countenanced by the Guidelines) is more fully described. Here, I simply note the difficulty, if not the impossibility, of asking file reviewers to weigh polygraph results obtained from individuals who were not entitled to be heard in person at the file review itself.

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

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

The concerns raised by claimants included the following:

- ! *The IIU investigators were not respectful of the claimants. They would sometimes arrive unannounced at the claimants' homes to conduct interviews;*

- ! *The IIU did not always permit support persons to attend interviews;*

- ! *Claimants were being interrogated, particularly about the contents of records, and called upon to explain the denial of abuse by the alleged abusers;*

- ! *Institutional records were not released to claimants before they were questioned by the IIU about the records' contents;*

- ! *In July 1997, the IIU imposed a requirement that claimants sign blanket authorizations to permit the IIU to obtain their medical records before they were interviewed. This procedure did not limit the requests for medical information to situations where the information might be relevant to a claim. Further, the IIU did not consult with the Program office about the need for medical records on a case-by-case basis before demanding them. Indeed, IIU investigators were often unaware of the substance of the claim before the demand for an authorization was made;*

- ! *The IIU did, at times, request re-interviews of claimants where they had not even looked at the RCMP video statements.*

The IIU, on the other hand, felt that they were respectful of and fair to the claimants. They regarded it as their role to test the veracity of the claimant's account. This meant that pure version statements could properly be followed by somewhat direct or pointed questions. Mr. Chambers noted in his correspondence with Ms. Derrick that the compensation process provided few mechanisms to allow the Province to challenge claimants' allegations. Accordingly, where it was suspected that an allegation was fabricated, it was necessary to probe the alleged events in the interview with relevant questions. As for the suggestion that records were withheld from claimants, the IIU felt that disclosure would undermine their ability to obtain information, untainted by outside influences.

In my staff's interviews with the IIU, the RCMP and the Murphys, it became clear that the various parties had different views not only on how statements should be taken, but often on how well other parties were taking statements. These differences in perception – honestly held – reflect the difficulties inherent in conducting, sometimes concurrently, more than one investigation into the same allegations. They also reinforce the importance of established protocols, at the outset of any investigation, that promote cooperation, and avoid duplication of efforts and wasting of resources. My recommendations later address these issues.

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

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

Claimants were entitled, subject to limited exceptions, to have support persons present for interviews. At the investigative stage, they were also entitled not to be cross-examined. There are investigative techniques that permit investigators to explore perceived problems without resorting to cross-examination.

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

As is obvious from my comments throughout this Report, I am of the view that the Compensation Program was unfair to employees by failing to provide for a credible validation process that appropriately recognized the importance of hearing from them. But having said that, I also recognize that this process might have become unfair to true victims of abuse as well. As the IIU became increasingly sceptical about the majority of abuse claims, and recognized that there was not a forum for the employees' accounts to be fully considered within the Program, their interplay with claimants became more accusatorial, until the process became quite unfriendly not only for those whose claims were false, but also for true victims of abuse.

The effect on true victims was, no doubt, compounded by the fact that the Program was originally designed very differently. As I have said elsewhere, claimants could justifiably regard the changes in the Program as a betrayal of the spirit and express terms of the original MOU, negotiated in good faith with the Government.

I also note in this regard that the IIU began to assemble a list of persons who they felt had made fraudulent claims. Whether or not their assessment was correct, the reasons why a file would be placed on the list do not always instill confidence. Inclusion on the list based on the fact that the employee had passed a polygraph test may again show undue reliance on the polygraph results. Inclusion on the list based on the fact that the claimant made a high Demand, was offered less, and then settled, may show a fundamental misunderstanding of the motivation to settle, and the high emotional costs of revisiting abuse, for true victims.

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

The Guidelines were introduced in November 1997. A number of its provisions did represent an improvement over what previously existed. It was fitting to articulate the burden of proof both for the Province and for file reviewers, and to make it the balance of probabilities. It was appropriate to reflect that where one groundless, implausible or deceitful allegation was made, the Province would draw an adverse inference in considering other allegations. Without purporting to speak to the precise amount of time that the Province should have been given to respond to claims, it was reasonable to further extend the time within which to respond and to reflect that complex cases or delays in obtaining material might justify even a longer response time. It was also entirely appropriate to amend the confidentiality provisions of the MOU so as not to permit disclosure to other survivors. Finally, the substitution of the term"claimant" for "survivor" was understandable, although, like many other issues, it should have been foreseen at the outset.

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

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

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

I comment further on the Guidelines once I have described, in Chapter XII, how the Program operated after they came into effect.

XII

Completion of the Program

1. INTRODUCTION

The changes brought about by the Guidelines were described in the previous chapter. Perhaps the most important dealt with the validation process. First, the Guidelines required that both the Province and the file reviewer, as a condition for making an offer or award, be satisfied on a balance of probabilities that the claimant experienced the sexual and/or physical abuse described in his or her statement. Second, in deciding the validity of the allegations, the Guidelines stipulate that both the Province and the file reviewer shall consider in evidence:

- The claimant's statement or statements;
- The claimant's institutional records;
- Employment records of employees or former employees against whom the claimant has made an allegation or allegations;
- Polygraph test results (where available);
- The claimant's medical records;
- Any other relevant information.

The Guidelines tried to fix the problems that, in the Government's view, had beleaguered the Compensation Program. This chapter will focus on the operation of the Program after the promulgation of the Guidelines.

2. STATUS OF THE PROGRAM AFTER THE GUIDELINES

As of November 6, 1997 (the date on which the Guidelines came into force), the Compensation Program office had eight full-time file assessors, one part-time file assessor, 11 support staff and the Program Director. The IIU Claims Validation Unit had 10 investigators and seven support staff. In addition, the IIU had five investigators whose task it was to examine

allegations against current employees and to review completed claim files to determine if there were sufficient indications of fraud to justify referral to the RCMP or to the civil litigation section of the Department of Justice.

No statistical report prepared by the Program office is available regarding the status of the Program as of November 6, 1997. However, a report dated December 5, 1997, indicates that at that point there were 1,451 notices of claim. Nine hundred and fifty-seven claimants had actually submitted a Demand, leaving 494 that could be added to the Program office's case load (1,451 less 957). Responses had been made to 700 Demands. Assessors had accepted 26 as submitted, and outright denied 61.[1] The total number of claims completed was 613.

My staff obtained a final statistical report on the Program. The total number of Demands handled was 1,246. The Province accepted 35 Demands as presented, and totally denied 166. Eight hundred and fifty-four were settled by negotiations. Four hundred and forty-five entered into the file review process. Eighty-eight of those were settled by negotiation prior to completion of the process, and 356 were completed by decisions from file reviewers. One case is still pending.

By comparing the statistics from the end of the Program to those available at the approximate time of the introduction of the Guidelines, it can be seen that approximately one-half (613) of the total claims processed by the Program were concluded prior to the introduction of the Guidelines. However, of the 356 claims completed by a file review decision (and not negotiation), 260 were handled pursuant to the Guidelines.[2]

Of the 90 randomly selected files that were reviewed by my staff, 41 were completed in this third, or last, phase of the Program. Before discussing the results of the audit of these files, it is useful to discuss two of the major changes to the validation process, namely, the use of polygraph test results and the abolition of "in-person" file reviews, as both of these changes had a significant impact on the file review process.

3. POLYGRAPH EVIDENCE

The IIU documented that by October 31, 1997, 35 current and former employees had voluntarily submitted to polygraph tests. Thirty-three passed and two failed. Ultimately, a total of 65 current or former employees underwent polygraph testing in response to allegations of sexual abuse, two of whom also took the examination in relation to allegations of physical abuse. Of the 65, 59 were considered truthful, three were considered deceitful, and in three cases the tests were inconclusive.

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[1]Of the 61, three had been settled after the initial denial, 17 had been completed by file review decision, and 41 were still in the file review process.

[2]Thirty-three of the total file reviews were heard and concluded prior to the reinstatement of the Program on December 6, 1996 (phase one), and 63 between December 1996, and November 1997 (phase two).

Section 6.5 of the Guidelines provides that where a polygraph examination is conducted on an employee with respect to the truthfulness of some or all of the allegations made by a claimant, the claimant must be notified of the existence of the test and given an opportunity to also undergo a polygraph examination. Sixteen complainants expressed an interest in doing so, but in the end only two did. Both were found to be deceitful.

A Polygraph Argument and Book of Authorities was prepared by a file assessor and used as a template for assessors' submissions to file reviewers in cases where polygraph evidence was available. This document set out the leading authorities in Canada regarding the admissibility of this type of evidence and the weight that may or may not be accorded to the results of such testing.

The Polygraph Argument acknowledged that the Supreme Court of Canada had determined in *R. v. Beland and Phillips*[3] that the results of a polygraph examination are not admissible in a criminal proceeding. Nevertheless, the document referred to case law which supported the admissibility of the results of such examinations in family and civil litigation and in labour arbitrations. It argued as follows:

> The *Beland* case did not disallow the use of polygraph evidence on the issue of technical reliability, but with respect to the rules of evidence, especially the rule against oath helping and the proper use of expert evidence.
>
> That, it is submitted, is a reasonable restriction in **the setting of a full trial.** In that instance, the trier of fact has at her disposal the testimony of all relevant witnesses. Determination of credibility is one of the elements s/he must determine. It is reasonable not to substitute the expert opinion of the polygrapher for that which the trier of fact can form from the testimony before her.
>
> However, the *Beland* facts are not what is found in the file review in this process. The only witness who was available to testify is the claimant. The employee against whom the claimant alleges is not present or available for examination. There is, therefore, a place for the polygrapher's opinion in this process.
>
> (Emphasis in the original.)

Counsel for the claimants objected to the inclusion of polygraphs in the Guidelines. For example, in a letter to Michael Dempster (the Program Director) dated November 7, 1997, Anne Derrick disputed that the polygraph would be a useful tool in the process. She and John McKiggan, who represented approximately 46% of all claimants, advised me that, as a matter of policy, they counselled all their clients not to submit to a polygraph examinations. Assurances had been given by the Minister of Justice in a television interview on November 7,1997, that no

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[3][1987] 2 S.C.R. 398; 36 C.C.C. (3d) 481.

adverse inference would be drawn against an employee or a claimant should he or she decline the opportunity to undergo such an examination.[4]

In one of Ms. Derrick's submissions to a file reviewer, she expanded on the reasons underlying her standard advice to all clients:

> 1. The questionable validity of polygraph results;
>
> 2. The risk of a polygraph examination producing a "false positive" (an indication of deception in a subject who is telling the truth);
>
> 3. The fact, based on a general telephone conversation with Sgt. Mark Hartlen, that any polygraph administered to claimants will not examine the question of whether they were sexually abused but instead will deal with whether they have made a false claim;
>
> 4. My fundamental objection in principle to any of my clients being treated as suspects in a process they were originally promised would be "*principled, respectful and timely*", would "*affirm the essential worth and dignity of all the Survivors, who were residents of the Institutions*" and would "*assist the Survivors, in a tangible way, with the healing process*" etc. (Preamble to the Memorandum of Understanding).
>
> (Emphasis in the original.)

Counsel for the various claimants produced a great deal of material that attacked the reliability of polygraph examinations. Based on these materials, it was their position that a file reviewer ought not to give any weight to polygraph test results.

Our review of a number of file review decisions establishes that there was a wide range of responses by file reviewers to polygraph evidence. Some gave no weight to it at all, while others placed reliance on the test results where the allegation of the claimant had been specifically put to the alleged abuser.

One file reviewer said this about polygraph evidence:

> The foregoing now leads me to a brief discussion of polygraph evidence. As per Section 9.4(b) and 9.5 of the Guidelines, I am duty bound to admit into the evidence the opinion of the polygrapher, Sgt. Mark Hartlen of the Halifax Regional Police Service, as it relates to the evidence of [employee]. The polygrapher found no deceit indicated. It is important to

[4]This position was confirmed by Mr. Dempster and adhered to by the file assessors throughout the operation of the Program.

emphasize at the outset that I am not in favour of this method of adducing evidence. I say this mainly because of the great dangers that can arise through its use and I base my opinion on the materials the Province provided, entitled Polygraph Argument and Book of Authorities.

.....

Dr. Raskin sums up in the last paragraph of his letter by stating:

> Finally, I would like to add a comment and a procedural suggestion. The fact that nineteen of twenty accused have passed their polygraph examinations by producing non-deceptive results raises a very strong suspicion that many of the cases involve false allegations. (He no doubt is referring to the counsellors at the Shelburne Youth Centre and other youth facilities in Nova Scotia). If as many as ten percent of non-deceptive results are false negative errors, the probability that nineteen of twenty such results are erroneous is vanishingly small. It is essentially zero. I suggest as a procedural requirement that in cases where the accused has obtained a non-deceptive result on a properly administered and interpreted polygraph examination, the accuser should be expected to undergo a similar examination by a qualified examiner. If the accused has passed and the accuser fails, this should be strong enough evidence to close the matter.

I strongly disagree with the above noted quote from Dr. Raskin's letter. Firstly making such a blatant statement as he has could possibly tarnish the minds of individuals at the Department of Justice who are administering this Program in that they could prematurely form an opinion that if a counsellor tested non-deceptive, the Claimant could not be truthful in his or her allegations.

Secondly, the Claimant should be under no forced obligation to submit to a polygraph examination if he/she do not wish to submit to such an examination. Moreover, no inference on the part of assessors at the Department of Justice should be made concerning the Claimant's refusal to submit to such an examination.

.....

From a reading of the above and indeed the complete polygraph materials provided by the Province, it is abundantly clear that the use of polygraph evidence is far from an exact science and is fraught with many dangers. As a result, I treated the results of Mr. [employee's] polygraph examination as "another piece of evidence" and afforded it no more weight than it deserved.

A recent file review decision, released on October 9, 2001, reached a similar conclusion. The claimant had made allegations against six former and current employees. Two of those employees were deceased. However, the remaining four had undergone polygraph examinations, some addressing allegations in a general way, others more specifically. The file reviewer cited the opposing arguments by

the file assessors and counsel for the claimant regarding the weight to be given to polygraph results. Although the file reviewer treated the results as "another piece of evidence," he assigned no weight to any of the results of the four employees, and concluded, on a balance of probabilities, that the claim was made out under Category 2 (severe sexual and medium physical abuse). He awarded compensation of $90,000, plus a counselling allotment of $5,000.

Another file reviewer felt differently about polygraph evidence:

> Obviously, the fact that a lie detector test has shown [employee A] to be truthful in denying the sexual allegations is very important evidence in how I assess the involvement of [employee A] and this young man. I should point out that much is being made in a number of the submissions about the burdens of proof and the thresholds to be met by the adjudicator and yet, I would only repeat as I have in earlier decisions that I don't believe the process is that difficult. The Program as it now stands had been redesigned, and the threshold is on the balance of probabilities; unfortunately we do not have a chance to meet or cross-examine the complainant or alleged perpetrators, and in many cases we do not hear from the alleged perpetrators. This leaves the adjudicator in the ... position of having to draw conclusions of some significant importance without ever meeting the parties involved.
>
> Polygraph evidence is very important. In fact, I have received very extensive representations on other file reviews as to the accuracy of the polygraph evidence, and have found it to be very powerful in assessing one person's credibility against another's. Furthermore, the use of this evidence is clearly set out as an accepted part of the process. It is abundantly clear that the vast majority of the abuse related by the Claimant is alleged to have occurred at the hands of a [employee B]. Unless I am in error, or there is some further confusion, I don't believe anyone has heard from [employee B] to deny any of these allegations. The ongoing repeated assaults clearly centre on [employee B] and not on [employee A], with the allegations as to [employee A] being a few isolated physical assaults and one incident of masturbation.
>
> The Program calls for conclusions based upon the balance of probabilities and, regarding [employee B] I have the Claimant's statement and nothing to counter it from [employee B] or from any other witnesses. I refuse to conclude that because there is a discrepancy between what the Claimant is saying and what [employee A] is saying, which is supported by the lie detector results in the Crown's favour, that this must be conclusive as to all of the allegations. If in fact [employee B] has passed the lie detector test, I would expect my decision to be quite different in this matter, but apparently that evidence is not here. I haven't heard from [employee B] or in fact had an opportunity to even interview him or the Claimant.

It was not uncommon for a claimant to make claims of abuse against a number of different employees, some of whom may have been polygraphed on sexual allegations, but not on physical ones. Furthermore, not all of the employees were available to be polygraphed or even interviewed.

In one claim that went to file review, the claimant, P.F., alleged minor sexual abuse against an

unnamed carpenter. He also claimed to have been subject to chronic beatings causing serious personal trauma at the hands of a particular employee. That employee underwent and passed a polygraph examination in relation to allegations by other claimants alleging sexual abuse. However, because of the opinion as to the inadequacies of polygraph examination for allegations of physical abuse, the employee was not given a polygraph examination on P.F.'s allegation. Further, it does not appear that the employee was interviewed in relation to the allegation. The file reviewer commented:

> [P.F.] claims that he was subjected to chronic beatings and suffered serious personal trauma. He describes one particularly serious beating at the hands of Mr. [employee], an individual who by now was well-known to file reviewers as being notorious for inflicting beatings, particularly on smaller boys at this institution.
>
> The Department of Justice, in its Response, does not take issue with the facts as alleged by [P.F.]. I shall take a moment to review the Department of Justice's position. The Department of Justice basically states that the issue here is characterization of the offence complained of and the determination and the severity of those events, and with that, I do agree.
>
> .....
>
> The Department of Justice agrees with the suggestion that the assaults were medium physical abuse. Mr. Ford suggests the fact that [P.F.] received no hospital treatment makes it unrealistic to conclude that he broke his nose and his ribs. He also suggests that it is inconceivable that [P.F.] would have continued in his day-to-day activities at the school with broken ribs. I disagree with both of these comments because of what we now know about this institution and what we now know about the abuse children did suffer there. I am certain that many people attended classes and went about their day-to-day activities with broken bones and broken ribs and to complain in most cases was futile in any event.

The file reviewer awarded $20,000 compensation.

4. IN-PERSON FILE REVIEWS

The second major change to the file review process brought about by the Guidelines was the abolition of the right of the claimant to appear personally. Counsel for the claimants strongly objected to this change. For example, in a letter to Michael Dempster dated November 7, 1997, Anne Derrick said the following:

> I am compelled to say that I am at a loss to understand the policy rationale for removing the entitlement of survivors to participate directly in File Reviews. This was an aspect of the process that not only enabled survivors to have an actual hearing if they wanted it, with

> counsel, it also provided File Reviewers with a direct opportunity to assess credibility. I regard the disentitlement of survivors to an oral hearing as a cynical departure from the original principles along which the compensation process was established.

My staff could not find policy documents that set out the factors considered by the Government in abolishing in-person file reviews.[5] However, comments on the abolition were made by file assessors in the course of making submissions to file reviewers. In one such submission, dated April 19, 1999, the file assessor explained as follows:

> In light of the fact that the accused counsellors were not able to attend these hearings while the accusers were able to attend, this revision is seen as ensuring that a greater degree of due process is being exercised within the Compensation Program.

Furthermore, a file assessor wrote to Dempster on October 14, 1998, remarking on the criticisms that file reviewers were offering on the changes made by the Government to the Program:

> The criticism I find particularly offensive relates to the elimination of the claimant's personal appearance before the file reviewers. The reasoning behind this particular change was logical, financially responsive, and from my understanding, based to some extent on a sense of fair play. One factor was that the financial and practical logistics in arranging file reviews was prohibitive, the money could be better spent on counselling and compensating victims. What I consider to be a stronger and more appropriate consideration is the unfairness and ethical considerations in allowing the claimants to appear before file reviewers without giving the same opportunity to the accused employees, which would be possible in a criminal or civil action. The only reason that the claimant lawyers have put forward to support the personal appearances of their clients is the file reviewer's right to judge the claimant's credibility on their own. This is not really correct. Credibility of a claimant from a personal appearance can be made from a viewing of the video taped interviews. What is really missing is the opportunity for the claimant to make a personal **emotional** appeal to the file reviewer. The courts have consistently stated that emotions

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[5]The assessors discussed the option of adopting an adjudicative model for file reviews. This option would have the hearing conducted before a panel of three persons (presumably with witnesses). The assessors identified a number of issues that would need to be addressed if employees were to be permitted to have a role in the file review process. These issues were articulated as follows:

- Where there is an offer and appeal can the employee be heard and deny the allegation?
- If so, where does that put the offer?
- Would the lawyer/assessor have the opportunity of interviewing the employee in advance of the appeal?
- Who represents the employee, the Province or his or her own counsel?
- If employee participation is allowed, it will be necessary to ensure that no adverse inference will be drawn against those who choose not to participate.

> are not be considered in decision making! There is no reason why a file reviewer should be any different![6]
>
> (Emphasis in the original.)

A number of file reviewers reflected on the difficulty created by requiring them to make assessments of credibility without hearing in person from the claimant or from the alleged abusers. One file reviewer stated:

> I am at a very substantial disadvantage in coming to conclusions in such matters because I have only the opportunity to read the transcripts and not to see these witnesses in person. In such circumstances, the substantial risk that comes with not being able to observe demeanour is always present, a lack of which can feed into a conclusion that may be inappropriate, but I can only work with the materials I have been given.

A questionnaire was circulated to all file reviewers by my staff. Twelve of the 19 active file reviewers responded. Only one felt that the changes instituted by the Guidelines did not materially affect the file review process. The remaining 11 all thought the changes made the evaluation of credibility more difficult and detracted from the process. As one commented:

> [r]emoval of the interview was a retrograde step. It was helpful when credibility was an issue, as it frequently was. I have endured the tedium of watching 3-4 hours of videotaped interviews in which the only relevant parts might last 5 or 10 minutes and the right questions may never have been asked.

5. AUDIT OF RANDOMLY SELECTED CLAIM FILES

As noted earlier, of the 90 files reviewed by my staff, 41 were completed in this third and last phase of the Compensation Program. The purpose of our review was to determine the way in which claims were processed, some of the difficulties which were encountered, the reasons for those difficulties and, in general, to achieve a better understanding of how the Program actually operated.

As provided by the Guidelines, claimants were required to submit a Demand – a two-part document comprised of a letter setting out the amount requested and the category under which the claim should be considered, with reasons therefor, as well as a statement taken by Facts-Probe Inc. (the Murphys), a police agency, or the IIU.

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[6]Mr. Dempster responded by e-mail that they had done an in-depth review prior to changing the process that included these issues.

In the first two phases, most statements were taken by the Murphys. In this phase of the Program, however, most statements were taken by the IIU or the RCMP.

The majority of the 41 files examined contained multiple statements (sometimes taken by the same agency). The total number of statements contained in these files was 82. Only 13 of the files relied on a single statement from the claimant. In10of these, it was a statement given to the IIU, two had statements made to the RCMP, and only one claim was based on a Murphy statement.

In the 41 files, allegations were made against 73 former and current employees, as well as seven unnamed or unknown employees. In only 15 files were the alleged abusers either interviewed or polygraphed. In six of the 41 files, other witnesses – former residents or former or current employees – were interviewed (sometimes by phone). In 26 files there was no employee input. Eight of the named employees were deceased at the time that the claims were processed.[7]

Polygraph results were used in eight of the 41 files. All employees passed the test. In one file the claimant had also been polygraphed, but failed the test.

Five of the 41 claimants asked for compensation in the range of $5,000 or less, 11 sought from $15,000 to $30,000, 17 asked for $40,000 up to $70,000, and eight demanded $90,000 to $120,000. The Responses made by the Compensation Program office were as follows: four claims were denied, in 27 cases an offer was made of $5,000 or less, in two cases the offer was between $6,000 and $15,000, in six it was from $16,000 to $25,000, and in two the offers were for $45,000.

Thirty-seven of the 41 files contained reports prepared by the IIU. In the remaining four files, the assessors were provided with institutional records only. In offering their conclusions to the assessors, the IIU used the following language:

- Alleged incident cannot be substantiated, due to the fact that the complainant is unable to provide names of witnesses or times to corroborate his story;
- It cannot be determined if the version of events given in the complainant's allegations are [sic] truthful;
- There is no evidence to support or refute the victim's statements;
- There are no records to support or deny the broken wrists;
- Because of the contradictory information plus [an employee's] polygraph results, the allegations should be considered suspect;

[7]In two out of the 26 files where there was no employee input, allegations were made against three named employees. In both files, two out of the three named employees were known to be deceased.

- The injury was not a result of intentional physical abuse by [a counsellor];
- In the opinion of this writer the allegation lacks credibility in both substance and presentation;
- If the allegations are to be believed, the use of force and punishment exerted by [a counsellor] was excessive and not supported by institutional policy;
- We must give some weight to what would have been considered reasonable punishment in 1962. The type and style of discipline has changed over a thirty-six year period. There is no documentation to support or deny this allegation;
- When the balance of probabilities are [sic] weighed it can be concluded that the incident with [a counsellor] may have occurred and probably was discipline. There are no witnesses to this allegation.

Of the 41 files, 14 were completed by file review. The awards given ranged from $3,000 to $41,000. In two cases, the file assessor's complete denial was upheld at file review. The following samples of file review decisions show some of the problems that remained in the compensation process. As it turns out, a number of them dealt with polygraph evidence.

E.B. submitted a Demand alleging sexual and physical abuse by one employee and physical abuse by three others. It was a Category 6 claim (medium physical and medium sexual abuse), and the amount sought was $55,000. The claimant had undergone a polygraph examination, and failed. The employee against whom sexual abuse was alleged had also taken a polygraph test, and passed. The employee was supposed to have been working nights at the time of the alleged abuse, yet the file assessor pointed out that the employee did not work nights. The assessor also argued that there were significant inconsistencies in the multiple statements made by the claimant, making it difficult to determine which, if any, of the allegations might be true.

The file assessor questioned the claimant's credibility, but nonetheless found a "thin line of consistency" with respect to two of the allegations and made an offer of $2,000. The file reviewer concluded that the claimant's description of the incident of sexual abuse did not have the ring of truth to it. He stated:

> I am prepared to give some weight to the results of the polygraph examination which determined that there was no deceit indicated by [employee], but that there was deceit indicated by [E.B.]. I have taken great care not to place undue weight on those polygraph examination results, but rather to treat them as one of the several elements to examine in assessing whether [E.B.] has persuaded me on the balance of probabilities that the sexual abuse which he describes did take place. Having taken all of those factors into account, I have concluded that [E.B.] has not met that standard. I am not persuaded that it is more likely than not that the sexual abuse described by [E.B.] did indeed take place.

The reviewer accepted the Province's position that, at a minimum, some incidents of physical abuse did take place, and concluded that the claimant should be compensated in the amount of $2,500, plus the applicable counselling allotment.

J.G. claimed he was physically abused by a number of counsellors when he was a resident at the Nova Scotia Youth Training Centre. He also claimed that he was the victim of sexual abuse, including rape. A Demand was made for compensation in Category 6 (medium sexual and medium physical abuse) in the amount of $60,000. The accused employee had been given a polygraph examination with respect to the allegations of sexual abuse and had passed. J.G. declined the offer to undergo a polygraph examination.

The assessor, in his Response, pointed out the inconsistencies in J.G.'s statements and relied on the employee's polygraph test that dealt directly with the claimant's allegations of sexual abuse. However, he accepted that J.G. suffered medium physical abuse and offered a settlement of $10,000 plus a counselling allotment. There is no indication in the file as to why this concession was made.

The file reviewer noted that the Province had acknowledged that medium physical abuse had occurred, so the remaining issue was whether or not, on a balance of probabilities, the claimant was sexually abused as described in his statement. She concluded:

> I find that on a balance of probabilities [J.G.] was sexually abused by an employee of the institution while he was a resident of the institution. There were three incidents of sexual abuse:
>
> 1. anal penetration on one occasion;
>
> 2. attempt by the perpetrator to have anal sex with the claimant, which attempt was unsuccessful;
>
> 3. attempt by the perpetrator to have the Claimant perform oral sex on him, which attempt was unsuccessful. In the course of that attempt the perpetrator touched the side of the claimant's face with his erect penis.
>
> I cannot find, on a balance of probabilities, that the perpetrator was the person named by the Claimant: [employee]. It is possible that the claimant misnamed his abuser.

The reviewer concluded that an award should be made "pursuant to Category 10 [sic][8] (medium physical and medium sexual abuse) in the amount of $50,000," together with the counselling allotment.

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[8]Category 10 is medium physical or medium physical and sexual interference. It appears that the file reviewer meant Category 6, which is medium physical and medium sexual abuse.

D.M., a former resident of Shelburne, submitted a claim for $47,000 based on allegations of sexual abuse and physical abuse under Category 7 (minor sexual and medium physical abuse). The Response by the file assessor was that the physical abuse allegation should be categorized as minor and that the sexual abuse allegation was not specific enough to justify any offer. An offer for $2,500 plus a counselling allotment was made for the physical abuse. In the file review decision of March 2, 1998, the file reviewer commented as follows:

> Notwithstanding some significant changes which appear to be directed at resolving difficulties of assessing the credibility of claims (which difficulties I and others have referred to in earlier award decisions), the new Guidelines are not much better in that regard.
>
> The Province has set forth a basis for compensating people who make claims. It has done very little to address the question of assessing the credibility of those claims. One of the key factors in the old MOU was the right of the claimant to appear before the File Reviewer so there could be at least an assessment of the demeanour and way of giving evidence that might be helpful to the File Reviewer. That is now gone. We are relying entirely on written statements and records and videotape statements. There is a reference now to polygraph results but that is not a factor in this present claim.
>
> I can only come to the conclusion that, however unsatisfactory it may be for the Province, the File Reviewers are in the position where they must *prima facie* assume the allegations of the claimants to be accurate and accept them unless there is some very clear and compelling evidence or argument to the contrary.
>
> .....
>
> I point out again that the Province has, by its own formulation of the Guidelines, made it extremely difficult for it to contest the credibility or validity of the claims. I am constrained to follow the Program as set up by the Province and, based on that process, after reviewing all of the evidence that I have before me, I am satisfied on the balance of probabilities that he experienced the behaviour and abuse complained of.
>
> The objections made by the Province, in the absence of anything written or taped to challenge these allegations in a serious way, are at best speculative.

The file reviewer concluded that D.M. suffered abuse within Category 7 and awarded $41,000 in compensation plus the appropriate counselling allotment. There is no indication in the file if the alleged abuser was ever contacted. There was no IIU report, only institutional records.

H.M., a former resident of Shelburne, filed a Demand claiming physical abuse by two employees and sexual and physical abuse by a third. He provided two sworn statements, one to the RCMP, the other to IIU. He indicated that he was abused every day, that one employee had hit him 50,000 times, and that another employee had struck him on the side of the head causing loss of hearing. The alleged sexual abuse

consisted of fondling by an employee who had since died. H.M. also said he had witnessed another resident hang himself, and provided details regarding his interaction with this resident and of his personal knowledge of the suicide.

The file assessor pointed out that H.M. had been released from Shelburne almost two years before the suicide occurred.[9] The assessor also underlined a number of inconsistencies in H.M.'s statements. Nonetheless, he conceded that H.M. had suffered some physical abuse and made an offer of $5,000. There is no explanation in the file or in the file review submissions for this position.

Counsel for the claimant submitted to the file reviewer that it is not enough for the Province to merely suggest that a claim is not believable. Convincing evidence must be brought forward to contradict the claimant's sworn statement. It appears from the submissions that the employees named in the Demand were not specifically interviewed with respect to this claim. H.M.'s counsel wrote:

> Abuse of children is a secretive crime. By its very nature, there are seldom witnesses to the offence and the survivor usually has no evidence, other than their statement, to prove the allegations. It is the survivor's word against the abuser's word. However, in this case the province has not even provided statements from the alleged abusers refuting the allegations against them. Mr. Osborne has confirmed on behalf of the province that, although statements have been taken from [employee A] and [employee B] no reference was made to the allegations of [H.M.]. [Employee C] is not capable of providing the statement because he is deceased.

In response, the file assessor noted that while there had been a tacit acceptance under the MOU that a claimant's statements were presumed to be true unless shown to be otherwise, this was no longer the case: all claims must be proven by the claimant to have occurred on a balance of probabilities, and there was no onus on the Province to bring forward "convincing evidence" to contradict the claimant's sworn statement. The assessor questioned H.M.'s credibility and submitted the only reasonable conclusion which could be drawn was that he had exaggerated his claim and lied in order to dramatize his allegations. He asserted that the Province's offer was fair and reasonable.

The file reviewer rendered his decision on June 11,1999:

> After carefully reviewing the Guidelines, video of IIU interview, detailed transcript of IIU interview, summary of IIU interview, video of RCMP interview, summary of RCMP interview, institutional records from the Department of Justice and finally, written submissions form Fergus Ford and John McKiggan, I conclude on a balance of probabilities the Claimant's demand for compensation falls under Category 10 (Medium Physical Abuse) and accordingly, I award to the Claimant the sum of $25,000.00. Moreover, I find the aggravating factor of withholding treatment contributes to his claim being a $25,000.00 award which is at the upper end of Category 10.

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[9]The incident is well known as there was a Magisterial inquiry into the fatality.

> After carefully perusing all of the evidence, I found the Claimant to be most credible. Indeed, but for the embellishment of being struck 50,000 times, I found, generally, the remaining evidence to be absent of exaggeration. Moreover, the Claimant indicated [employee D (commonly known by the residents as [nickname]) was "a good fellow" and [employee E] "was an okay guy". The foregoing added to my assessment of the Claimant's credibility.
>
> (Emphasis in the original.)

R.P., a former resident of Shelburne, claimed compensation of $90,000 under Category 2 (severe sexual and medium physical abuse). He stated that he was hit on the head with knuckles by a counsellor while standing in line, grabbed by night staff in a painful manner and told not to run away, and shoved by another counsellor. The most serious allegations were of sexual abuse by an unidentified counsellor on three to five occasions, including anal intercourse. In the file review decision dated February 8, 1999, the reviewer noted:

> In the Province's Response dated September 11, 1998, it accepted [R.P.'s] allegations of physical abuse, but categorized the abuse as minor. However, it concluded that [R.P.] had failed to prove the allegations of sexual abuse on the balance of probabilities and rejected that portion of his claim. In the result, it offered [R.P.] a settlement of $3,000 for a category 12 claim of minor physical abuse.

There is no indication in the file why the file assessor accepted the allegations of physical abuse. At least two of the employees referred to by R.P. were deceased. The other was not contacted.

The assessor submitted that the claimant's apparent inability to recall any details about the sexual abuse or identify the perpetrator who sexually abused him put his credibility seriously in doubt, and that these allegations should therefore be dismissed as unproven. However, counsel for R.P. argued that since there was no opportunity for cross-examination in the file review process, the reviewers were deprived of the opportunity to make a first hand assessment of credibility. In such circumstances, counsel submitted, the onus should be placed on the Province to come forward with evidence to refute a claim. Since the file assessor had not produced any evidence to counter the claimant's allegation, then it should be taken as proven.

The file reviewer found as follows:

> The Province's reluctance to accept the allegations of sexual abuse in this case is readily understandable. [R.P.] has provided only scant details of the abuse and cannot identify the alleged perpetrator. However, on the basis of the videotapes, which I have reviewed very carefully, I am satisfied, on the balance of probabilities, that [R.P.] was sexually abused by a member of the staff at Shelburne. I do not believe anyone who watches the tapes would have any real misgivings about [R.P.'s] sincerity or the fact that he generally has

> problems attempting to recall what happened to him while he was at Shelburne. Contrary to the Province's view, I find that [R.P.'s] general recollection of his time at Shelburne was sketchy and somewhat impressionistic. This is not surprising, in my view, having regard to the passage of time. Recognizing the obvious shortcomings in [R.P.'s] statements, one is still left with the sense of conviction that [R.P.] is telling the truth, as best he can, and that he was in fact sexually abused.

The file reviewer concluded that the description of the sexual abuse was so imprecise that he had to find that it was minor, bringing the claim into a lower category. Compensation was fixed at $25,000, with a counselling allotment of $5,000.

R.T., a former resident of Shelburne, claimed $25,000 for medium physical abuse. He alleged that a bus driver, whose name he believed to be employee X, had grabbed him by the throat and thrown him down at the bus stop. Another employee, Y, hit him with the back of his hand. He also claimed other incidents of inappropriate punishment and discipline.

The Response by the file assessor was that the records did not indicate there ever was an employee named X. Our review of the file reveals that the IIU contacted Y, who, in a telephone conversation, stated that he could not remember R.T., nor any such incident, and denied ever having struck any resident in such a manner. There is no indication that a formal statement was ever taken from Y. No reference was made by the file assessor to this information in the Response or to the file reviewer. The file assessor concluded that R.T.'s claim fell within Category 12 (minor physical abuse) and made an offer of $5,000.

The claim went to file review. The reviewer noted that both counsel for R.T. and the file assessor "agreed that [R.T.] was physically abused during his stay at the Nova Scotia School for Boys in 1967 and that the physical abuse which he experienced falls within compensation Category 10 in Schedule "A" of the Guidelines, described as medium physical abuse."[10] Based on this common submission, the file reviewer was satisfied, on the balance of probabilities, that R.T. had a valid claim and that he did experience physical abuse. An award of $14,500 was granted, plus a counselling allotment of $5,000.

J.L. was a former resident of Shelburne. His Demand alleged severe sexual and physical abuse (Category 1) and asked for compensation in the amount of $120,000. The Province declined to offer any compensation for sexual abuse, but offered $5,000 as compensation for minor physical abuse. In a decision dated May 15, 1998, the file reviewer dealt, at length, with all aspects of the legal and factual issues arising from the claim. With respect to J.L.'s complaint that the process was unfair due to the lack of an in-person hearing, the reviewer noted as follows:

> I can offer sympathy for this position, but no remedy. The validity of [J.L.'s] claim is required to be measured against a test for proof – the balance of probabilities – which

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[10]The Province changed its position as to the appropriate compensation category by the time of file review. There is no indication in the file why they did so.

> arose out of the requirements and opportunities of the adversarial process in our courts. That is a very different venue and it is true that it presents opportunities for evidence validation/falsification which are denied a claimant under the Program. There is, for example, no possibility for cross-examination under these Guidelines. Cross-examination is the great engine for evidentiary assessment process in our courts. As well, unlike the Memorandum of Understanding it replaced, the Guidelines do not provide a possible venue for the file reviewer to see and hear the complainant at an in-person hearing; in fact, the Guidelines are at pains to see to it that the file reviewer is isolated from the complainant. File Reviewers sometimes get a video-taped statement to review, which can assist this difficulty, but this is happenstance and did not occur in this case.
>
> There is no question but that this creates problems in assessing credibility, but these problems are quite evident on a reading of the Guidelines, and [J.L.'s] participation in the Program process is voluntary. It is an alternative to the court model which was available if he wanted. That may not present much of a choice to him, but having elected to proceed under the Guidelines, he must be taken to have accepted their evident limitations. I am bound to, and will, apply the mandated standard as best as I can in the circumstances.

The file reviewer concluded that the allegations of severe sexual abuse were not established. The details of the allegations were contradicted by records from the institution, which were accepted by the reviewer. In addition, the failure to identify the alleged abuser by name caused the reviewer to draw a strong adverse inference against the claimant. In the result, he concluded that J.L. had failed, by a considerable margin, to discharge the burden of proof with respect to the alleged acts of sexual abuse. In addition, the file reviewer did not consider that a number of alleged acts of physical mistreatment were made out. He did, however, conclude that the claimant had established some physical abuse. Records from the institution confirmed that the claimant had received medical treatment. The reviewer also relied, in part, on the Stratton Report, concluding that "[t]his kind of activity by counsellors at the School was not at all unusual." In the result, the file reviewer held that J.L. had made out medium physical abuse. He awarded the amount at the top of that category, $20,000, and a $5,000 counselling allotment.

6. SNAPSHOT AS OF NOVEMBER 1, 2001

Before turning to an analysis of the final phase of the Program, it is appropriate to look at the status of the Government's response as of November 1, 2001.

According to the records examined by my staff, 45 court actions were brought against the Government by former residents of Provincial institutions. All were based on allegations of physical and/or sexual abuse said to have been suffered by the plaintiffs at those institutions. Seventeen cases have been completed, but only one of them went the length of the litigation process: *G.B.R. v. Hollett et al.*[11] It

[11](1996), 154 N.S.R. (2d) 161; 139 D.L.R. (4th) 260 (N.S.C.A.).

resulted in an award of $50,000 for pain and suffering and $35,000 in punitive damages. The other 16 cases were settled either through the Compensation Program or negotiations between the litigants.[12]

In Chapter II, I referred to the initial actions (and notices of action), mostly filed on behalf of former complainants from the criminal process. Apart from G.B.R., there were 12 plaintiffs who actually commenced an action.[13] Nine were settled within the Compensation Program. The remaining three were settled outside of the Program, but all within the compensation parameters and principles of the Program.

As with Demands in the Compensation Program, claims were frequently made in litigation against multiple alleged abusers. Where the alleged abuser was Patrick MacDougall, and there was no available evidence to refute the allegation, settlement was negotiated. However, the Government would not acknowledge, or pay damages for, physical or sexual abuse alleged to have been committed by former or current employees who were available to participate in the litigation process.

As of November 1, 2001, 28 cases were still outstanding. Eighteen of the 28 plaintiffs did not attempt to make a claim in the Compensation Program. In the remaining 10 cases, the claims were either denied by the Province, or the plaintiffs opted out of the Program at some stage.

From our review of the outstanding files, it does not appear that specific employee input has been sought in the conduct of the litigation. Nevertheless, defences were filed denying the allegations of abuse. Up until August 2001, none of the named former or current employees had been contacted by the litigation section concerning the pending litigation arising out of their alleged culpability.[14] Examinations for discovery of these former or current employees have not been held.[15]

The concern expressed by the IIU and Government officials about fraudulent claims has already been referred to in this Report. In a memorandum dated September 22, 1999, the IIU reported to the Minister of Justice, the Honourable Michael Baker, that, as of that date, the IIU had referred 63 suspicious files to the Commercial Crime Section of the RCMP for investigation. The memorandum also expressed the view that there are many more suspicious files that may warrant criminal investigation but that, given

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[12]One of these, *S.J. v. A.G.N.S.* was in the litigation process, but the plaintiff abandoned the action in November 2000.

[13]The initial group that commenced actions were *Peter Gormley v. A.G.N.S.*; *M.D.S. v. A.G.N.S., K.F.S. v. A.G.N.S., J.G.O. v. A.G.N.S., M.F.S. v. A.G.N.S., M.A.M, A.B., B.N., R.G., G.C., S.G. and J.F. v. A.G.N.S.*

[14]It is, of course, axiomatic that if a former or current employee was named as a defendant, then he or she would have notice of the claim and the opportunity to fully participate in the litigation process.

[15]Discoveries of provincial employees were held in *G.B.R. v. Hollett* and in *M.D.S. v. A.G.N.S.*

the available resources and time constraints, the issue has not been pursued.[16]

The RCMP indicated to my staff that, initially, it was their intention to pursue an investigation in 29 of the 63 files. In May 2001, RCMP officers met with IIU investigators in respect of a further 133 files. Fifty-seven of these were reviewed and investigations were commenced in 18. Accordingly, as of July 12, 2001, 47 cases of suspected of fraud were being investigated. By the end of October 2001, this figure was reduced to 12.

Only one charge of fraud has actually been laid, in *R. v. Burt*.[17] The case was scheduled for trial, but the Public Prosecution Service decided that the available evidence did not offer a reasonable chance of conviction. Accordingly, on April 27, 2000, the Crown offered no evidence and the charge was dismissed.[18]

There is one case where the claimant's installment payments have been suspended pursuant to the Guidelines. The claimant is said to have confessed to an IIU investigator that he had defrauded the Province by making a false claim.

It bears repeating at this point that it is beyond my mandate to make any determination as to whether or not any particular claim is or is not fraudulent, and indeed whether or not there was or was not widespread abuse at any of the various Provincial institutions.

7. SURVEY OF THE FILE REVIEWERS

In the process established by the Government to compensate claimants, the ultimate forum to determine the validity of any particular claim was file review. In the course of seeking input from the file reviewers about the Compensation Program and their role in it, we asked them the following questions:

> What assumptions did you make about the occurrence of abuse at the beginning of the process or at various times throughout? Did your views as to the prevalence of widespread abuse change from the beginning to the end?

The comments from the 12 reviewers who responded are set out below:

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[16]An IIU Report submitted to the Minister of Justice in December 1999 reported that 69 files had been forwarded to the RCMP, but the Report cautioned that this number was not at all conclusive as to the number of frauds perpetrated by claimants.

[17]This case was not referred to the RCMP by the IIU, and is not included in the 47 cases mentioned above.

[18]The Province also discontinued its civil claim against Mr. Burt for allegedly defrauding the Province.

1. I did not feel it was appropriate to make any assumptions. My view is only as good as my understanding as to the number of residents versus the number of residents who were abused. I did not look at the relevant statistics and do not have an informed view in that regard.

2. I knew nothing about it until I read the Stratton Report. As I proceeded I became convinced of terrible abuse in Shelburne, although at varying levels with both the same person or various individuals and only from certain employees. I heard only one case from Truro that was serious to the individual, but minor on the scale.

3. I assumed that both sexual and physical abuse had occurred over the years of operation. At the end of the Program after having reviewed 17 cases, I was of the view that there was frequent minor physical assaults (hitting, etc.) but that the large number of serious sexual claims were inflated.

4. I made no assumptions about the occurrence of abuse. I assumed that the Government accepted the conclusions of the Stratton Report and that they based their compensation process on that acceptance. The format of the MOU indicated that there wouldn't be much doubt about the credibility of the complaints.

5. I made no assumptions about the presence of abuse, and therefore my views would not change.

6. Because my impartiality was most important in assessing credibility and making a decision in each case, I made no assumptions at the outset of the process nor during the process. I do believe now that the process has concluded that there was widespread abuse at the various institutions.

7. I assumed that there was a level of abuse at Government institutions, just as there is a level of deviant behaviour in the population at large. I also had a sense that where opportunities for deviant behaviour could be coupled with authority, that there would be some individuals who would see working in these facilities as an opportunity for aberrant behaviour. I also assumed that there would be, to some degree, a reluctance on the part of employees to speak out against other employees. I am also old enough to know, at first hand, from experience in government, that there was a tendency to deal with unpleasant, uncomfortable and even illegal situations informally – witness – Patrick MacDougall.

8. I became more sceptical of the sexual abuse and more convinced of the minor to mid-range physical – with the confusion as to what was acceptable discipline of that day – i.e. – the boot room and the boxing matches. I wanted to talk to someone about this to get a better understanding. I also became more convinced of fraudulent claims! I think the ability of the file reviewers to talk might have been a help. It was a collective problem for all concerned yet each claimant was segregated in the approach. For example, I had 5 to 8 files of sexual abuse by MacDougall. I never knew the type of sexual predator he was or his physical size etc. It looked at times like he was a stallion. I had a vision of a giant of a man with overactive hormones. I wondered at his professed stamina. I wondered if there were other files with the same allegations. I saw the harmony of my file, but

lost it in terms of the harmony of the institution and other conditions. I may have felt different if I knew dozens claimed of sexual abuse by the same person at the same time. That is not possible, yet for one person to make a claim of that magnitude is. I lost the perspective of the total institution and kept going back to the Stratton Report for that feeling!

9. As a lawyer who has dealt with a large number of young people who have been in institutional settings I recognize there are occurrences of abuse. This assumption would have been with me at the start of my duties as a file reviewer. I was also mindful that societal values have changed over a period of twenty (20) years and what may well have been the norm in my childhood to deal with an undisciplined child, would constitute an assault in contemporary society. As my involvement in the Program continued, it was apparent that due to the sheer number of claimants alleging multiple incidents of sexual and physical abuse, there would have to be staff members at institutions who spent twenty four (24) hours a day, seven (7) days a week sexually molesting and physically abusing the young people under their care. Obviously, that type of prevalence would be impossible and clearly many of the claims were false. I would also assume, based upon my experience as a criminal lawyer, that given the opportunity of "free money" many people who were part of the criminal lifestyle would eagerly come forward to lay a false claim about their time in an institution. Clearly this would have been an experience which they probably hated, and alleging misconduct at the hands of staff, who they also probably greatly disliked or resented, would not be a difficult exercise. It would be extremely naive not to fully expect this.

10. I didn't make any general assumptions about the terms of abuse at the institutions at any time in the process. Consequently, they really didn't change. I tried to keep an open mind on this, but in retrospect, after having completed the Program, I would think the abuse could not possibly have been as widespread as all the allegations seemed to support.

11. I must say that I became rather more cynical and sceptical as the claims rolled in. Some claims, such as those made against staff who were not at the institution at the same time as the claimant, were obviously false, yet the apparent sincerity of the claimants was not different from that of other claimants.

12. I didn't make any specific assumptions about the occurrence of abuse. I had read the Stratton Report and accepted that there certainly had been instances of abuse. I had no real idea to what extent the abuse was widespread or who the alleged perpetrators were other than Patrick MacDougall.

8. STATISTICS

Databases were maintained by the IIU and the Compensation Program office. From these, my staff has compiled some statistical information about the Compensation Program. However, I note at the

start that because these databases were created for different purposes and maintained by separate offices, it is impossible to completely reconcile some of the numbers. Indeed, as previously mentioned, variations exist between different reports from the same databases which are difficult to reconcile. It is, therefore, important to bear in mind that some of the figures which are set out below are not necessarily precise.

The Fox Pro database maintained by the IIU shows that 1,487 individuals notified the Province of their intention to submit claims under the Compensation Program. Some did not proceed, others withdrew, and some were found to be ineligible. A breakdown according to residential institutions shows that 1,282 were former residents of Shelburne, 145 had resided at the Nova Scotia School for Girls and 59 were from the Nova Scotia Youth Training Centre. One was resident at an ineligible institution.

The database maintained by the Compensation Program office showed the total number of potential claimants (as of the cut-off date of December 18, 1996) to be, in various reports, 1,451, 1,454, 1,455, 1,457 and 1,459. In all, 1,246 claims were processed by the Program.[19] Due to the considerable overlap in the categories, it is impossible to discern the number of claims of sexual, as opposed to physical, abuse. Nor is it possible to reliably determine the severity of abuse claimed, other than by dividing the claims into the highest and lowest prescribed categories. Nine claimants received awards for severe sexual abuse (Categories 1 and 4) and 399 were compensated for minor physical abuse (Category 12).[20]

The IIU office closed on October 31, 2001. In total, reports were completed on 68 current employees. In 66 reports, the IIU concluded that none of the sexual or physical abuse allegations had been "substantiated." The IIU documented 17 incidents where force had been used by current employees towards residents. All of the incidents had been documented in reports and addressed at the time by management at the relevant institution. The uses of force either were deemed appropriate or resulted in cautions or verbal reprimands to staff.

There were two instances, one in 1996, the other in 1998, where the allegations were held to be valid. In both instances, the Province moved to formally impose disciplinary sanctions. One employee, who had failed a polygraph examination, was dismissed in April 1998. He grieved his dismissal, but the matter was settled prior to the arbitration hearing. The other employee was Roy Mintus, who was dismissed on December 13,1996.[21] As noted in Chapter II, Mintus filed a complaint with the Labour Standards Tribunal that his discharge was without cause. The complaint was heard over 13 days from May 1998 to March 1999, and the tribunal upheld the dismissal.

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[19]In addition, the Program turned away approximately 239 claimants on the basis that they were not eligible.

[20]Category 12 is for minor physical and/or sexual interference with a range of $0-$5,000. Without examining each file it is impossible to indicate how many of these files involved allegations of only minor physical abuse.

[21]Some of the evidence against Mr. Mintus that led to his dismissal was originally uncovered by the 1991 RCMP investigation regarding the NSSG, but was unknown to the Department of Community Services until after the Stratton Report was released.

To date, Operation HOPE has forwarded briefs with respect to sexual and physical assault allegations against 11 former or current employees to the Public Prosecution Service for possible prosecution. The Service has not yet made any decisions in that regard.

9. COSTS

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

Salaries	$2,994,862
Other administration	$954,617
Awards to claimants	$30,006,485
Counselling	$7,607,167
Legal Fees	$4,573,794
Family Services Association	$1,440,596
Other Professional Services	$1,819,802
IIU	$7,686,485
Shelburne EAP[22]	$4,002,997
Total	$61,086,805

[22]This refers to the Employee Assistance Program described in Chapter XIV.

10. ANALYSIS

This chapter describes the continuation of the Government response, most particularly the Compensation Program, up to the present. Since the flaws in the Program discussed in this chapter have largely been outlined in earlier chapters, the analysis here is brief.

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

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

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

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

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

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

The decision to abolish in-person hearings was, with respect, unwise and inappropriate. First, an ADR process that excludes claimants, including true victims of abuse, from any right (if they so choose) to meet with the fact finders is likely to fail. It is incompatible with principles of respect for true

victims, and their engagement in a process intended to provide them relief, which principles are fundamental to the success of any redress program. Indeed, an opportunity to be heard may be critical to the healing process for some abuse victims. I further address these and other such principles in Chapters XVII and XVIII of my Report.

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

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

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

I recognize, as I have earlier expressed, that undue importance should not be given to demeanour in the assessment of credibility. Indeed, one of the points which I made in the Report of the Commission on Proceedings Involving Guy Paul Morin *had to do with the dangers associated with undue reliance upon demeanour, which is too easily misinterpreted in the evaluation of truthfulness. Mindful of that cautionary note, the demeanour of a witness nonetheless has relevance to the assessment of credibility. More importantly, the ability of the fact finder in an ADR process to focus the witness on areas of concern, confusion or ambiguity, and to obtain answers that are directly relevant to the issues to be resolved, is critical to the assessment of credibility. This is especially so where there is no right of cross-examination by an adverse party. The file reviewers who responded to our questionnaires almost uniformly held the view that the abolition of in-person file reviews was a regressive change that made*

their assessments of credibility more difficult. One also commented on the difficulties in poring over hours of unfocused, often irrelevant videotaped interviews.

Apart from these concerns, my examination of the file review process during the post-Guidelines period also revealed that file reviewers were, at times, confused or took fundamentally different approaches to how claims should be assessed within the regime of an ever-changing ADR process. It is true that the burden of proof was now explicit and provided some direction. Some file reviewers regarded this as a change; others saw it as confirmatory of what was implicit in the process itself. However, file reviewers continued to struggle with how assessments of credibility should be made, not only in light of their inability to observe the interested parties first hand, but also within an ADR regime whose mandate and philosophical perspective became unclear. I found it significant that a number of file reviewers became more sceptical about the prevalence of abuse – particularly sexual abuse – as they reviewed more and more claims, which understandably caused them some difficulty in how they were to approach future claims; in how, if at all, they could draw upon what they had purportedly learned through prior file reviews; and in the extent to which they could rely upon the purported findings contained in the Stratton Report. The changes in the Program failed to provide them with adequate answers.

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

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

IX

The Early Days

1. PREPARATIONS FOR THE MOU

The Memorandum of Understanding ("MOU") took effect on June 17, 1996. This was the official start date for the processing of claims. However, before the process could begin, a number of details had to be addressed by the Government.

The Compensation Program office was set up on the first floor of 5151 Terminal Road, Halifax, in the same building that housed the head office of the Department of Justice ("Justice"). Lawyers from Justice were assigned as file assessors: Amy Parker, Sarah Bradfield and Brian Seaman.[1] Paula Simon ran the office as Program Manager and was also fully involved in file assessments. Alison Scott continued to provide legal advice to the Program and assisted in file assessment as time permitted.

In a memorandum dated May 6, 1996, the Minister of Justice told the Priorities & Planning Committee of Cabinet ("P&P"):

> The resources to validate allegations is [sic] critical in ensuring that sufficient information is available to respond to claims for compensation in a timely fashion. The ability to do so will be important to the integrity of the compensation process.
>
> It is clear that the IIU lacks the investigative resources to meet the expectations of the compensation process. It is critical that investigators be in place as quickly as possible to deal with the volume of material, and to ensure the process is not delayed.

Four additional investigators were added to the Internal Investigations Unit ("IIU") in May 1996: David Gunn, Erol Flynn, Edwin Grandy and Wallace Bonin, all retired officers from the Halifax Regional Police Service. Although attached to the IIU, it is clear that they were hired to assist in the Compensation Program.

On May 17th, two weeks after the Program was announced, Robert Barss, head of the IIU and Executive Director of Policing Services, reported to the Program office that 454 individuals

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[1]Mr. Seaman initially worked part-time.

were expected to make claims.

As noted earlier, the MOU stated that the survivors had chosen the list of file reviewers and that the Province had accepted the list.[2] In fact, it had been agreed by counsel for the claimants and the Government, that counsel for the claimants would submit a list of 20 nominees by June 17, 1996. The Province could then remove names from the list if there was a conflict of interest. However, counsel for the claimants submitted a list of 67 names. Compensation Program staff concluded that it would be a daunting task to try to deal with 67 different potential file reviewers. They therefore reviewed the list, eliminated individuals with conflicts of interest, and, keeping in mind issues of gender, race, and geographical location, reduced the list to 28 names. They anticipated that only 20 of the 28 persons would agree to undertake the task. Eventually, 22 accepted the assignment.

Some of the claimants' counsel asserted that the Province had acted unfairly in reducing the number of file reviewers. They took the position that, given the level of distrust the claimants felt towards the Government, the reduction would be seen by claimants as an attempt by the Government to control the selection process. *With respect, it is my view that the list submitted by counsel for the claimants was somewhat unmanageable, and that the Government's determination to shorten the list was eminently reasonable, particularly given the fact that all names selected had originated with claimants' counsel.*

Inquiries were made by at least two counsel for claimants about submitting statements in lieu of those taken by the Murphys. In an e-mail to Ms. Parker, Alison Scott advised as follows:

> The Mo. [MOU] accepts one form of validation. Murphy statements. The Province is not permitted to test the statement by way of cross-examination, or to lead contradictory information from other sources, i.e. the employee alleged to have committed the abuse. The only check we have in the system is the information we can glean from the Murphy statements, and any information H & D [Harry and Duane Murphy] may be able to impart to us. The statements follow a similar format and there is consistency in the interviewers. To allow other statements in the process would undermine the minimal control the Province has in evaluating truth and credibility. Neither we, the Murphys nor the file reviewer were present when the statement was given to observe demeanour. The admission [of other statements] is prejudicial to us in that we do not have the opportunity, through the Murphy's [sic] to test any of it. In addition, the admission is inconsistent with the provision in the MOU which requires new allegations to be substantiated by a second Murphy statement, or delay the hearing. If parties intended additional information to come in other than the Murphy statement, we would not have inserted this provision. Adoption of a statement presents the same problems. While the Murphys may receive a statement from someone, unless the allegations set out in the adopted statement are found in the Murphy statement, we have no opportunity to bring the Murphy's judgment to bear on the

[2]As outlined in Chapter VII, file reviewers were to preside over file reviews, which were to be proceedings held when a claimant and the Province were not able to agree upon a resolution of the claimant's Demand. The file reviewer would determine whether the Demand was valid and, if so, the amount of compensation to be awarded. The file reviewer's decision was to be final and not subject to appeal.

> issue of credibility. Invite him [claimant's counsel] to request a second Murphy statement if he feels that the present one is inadequate. Do not agree to have a preliminary determination of an issue. The Mo. makes no provision for it.

2. THE EARLY OPERATION OF THE MOU

The assessment of claims began in mid-June 1996. In keeping with the limitations on my mandate, I do not comment on any individual claim or Government Response. My focus will be on the process utilized in the Compensation Program.

Prior to the MOU coming into effect, Amy Parker requested from the IIU a list of all staff employed at the relevant Provincial institutions from the time the Province took them over to the present, along with the date each staff member began and ceased employment. This information was to allow the file assessors to establish whether an alleged abuser was working at an institution at the time the abuse was alleged to have occurred.

By June 14, 1996, the Program had received 20 claims for compensation. The Program office asked the IIU investigators for all the information they had on the claims being made, but the only information the investigators had, for the most part, was the dates of intake and release of the claimants and employee information at the various institutions.

The file assessors decided to have weekly team meetings to discuss claims. They wanted to achieve consistency in their approach to responding to Demands. It was also decided that the file assessors would meet once a week with the Murphys in order to obtain their input on the credibility of individual claimants. The first of the meetings with the Murphys was arranged for June 18th to discuss the 20 claims already received.

As noted before, the terms of the MOU required the Province to respond within 45 days after receipt of a Demand submitted by a claimant. Twenty claims had been submitted by mid-June; the first Responses were therefore due by August 1st. By June 21st, the Program had received 154 Demands. Four weeks later, the number had risen to 259. The sheer number of claims made it difficult for the Government to respond within the agreed upon period.

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

The file assessors continued to try to rely on the Murphys for assessments of credibility of the claimants. They met with them on June 28th for this purpose. A further meeting was to be

held on July 18th to discuss 45 claims, but our review of the documents indicates that this meeting did not take place. Amy Parker wrote to the Murphys on that date, attaching a list of 231 claimants (which included the 45 claimants who were to be the subject of the July 18th meeting). She said: "Please let me know, before August 1, 1996, if you feel any of the claimants are being less than candid and truthful."

When interviewed by members of my staff, the Murphys recalled that their instructions from the summer of 1995 were to take statements in the same manner as they had for Mr. Stratton. It was their recollection that they asked who was going to verify the statements. They advised my staff that they were told by Ms. Scott that verification was going to be done by a task force headed by Mr. Barss. The Murphys advised that they certainly did not anticipate that claims would be paid based on the statements they had taken for Mr. Stratton or on the statements taken subsequently from new claimants.[3] We could find no documentation that dealt specifically with these issues. However, there is an interim report dated October 26, 1995, by the Murphys to Scott. It reflects that the Murphys had informed Barss and the RCMP of their contacts with claimants before and after the Stratton investigation. The Murphys noted as follows:

> We have not gone beyond our Terms of Reference to seek out records of the Shelburne Youth Centre to confirm the dates the victims were admitted and released. Medical records at the Centre, or the Roseway Hospital in Shelburne, or elsewhere, if any exist, have not been reviewed. If such documents were available, they may corroborate some of the information supplied by the victims.

In the course of discussions with members of my staff, the Murphys recalled being asked on occasion by members of the Compensation Program office whether or not certain claimants were telling the truth. They said their response was that they were not psychologists and could not make that determination. They told the Program office that the claimants seemed convincing, but they simply did not know if the claimants were actually being truthful.

During this period, comments about the Compensation Program were made both by counsel for claimants and counsel for current employees. In a letter dated July 10, 1996, Ms. Derrick wrote to Simon, Parker and Scott, stressing the need for the Government to be mindful of the impact that the Responses by the Province would have on claimants:

> The process of advising clients and preparing Demands has been profoundly challenging, in particular because many survivors are so deeply offended by the categorization of abuse and the guidelines under the Memorandum of Understanding. I have had numerous discussions with survivors in which survivors have expressed their views that their experiences and suffering are being demeaned and devalued by this process. These responses are heightened by the fact that the participation in the process by itself is, for many survivors, churning up hugely painful memories and the unresolved effects of the

[3]Details of the instructions by Ms. Scott to the Murphys are outlined in Chapter VIII.

> abuse. I often find myself recommending counselling to survivors not only with respect to the abuse they experienced, but also to deal with the problems they are having with this process.
>
> I am gravely concerned about the potential for this process to compound the harm already inflicted on these survivors. The process of resolving the compensation claims must be governed in this unique process by the principle of ensuring that survivors feel they are believed, respected and acknowledged. I am hopeful that the resolution offered by this process can be one that survivors experience as a reconciliation of their pain and the damage done to them previously by those in positions of trust and power.

In the meantime, Cameron McKinnon had been retained by the Nova Scotia Government Employees Union ("NSGEU") to assist current employees. He contacted Parker by telephone on July 25, 1996, and inquired whether or not any claims had yet been paid. He was advised that the Program would be making 160 offers of compensation on August 1st. McKinnon wondered how offers could be made when "the investigation is not complete because you haven't interviewed the employees to get their side of the story." He protested that it was wrong to pay out claims without speaking to the employees.

Parker advised the Deputy Minister of McKinnon's call. He responded in an e-mail to Parker that the IIU would be delighted to have the opportunity to interview staff if McKinnon would change his advice to his clients not to talk with the IIU. He also commented that it could save the Province money if they had "the other side" of the story before finalizing claims, but there was a time table for processing claims and the Compensation office could only do what was possible during that time frame.

On July 26, 1996, McKinnon wrote to Alison Scott on behalf of 23 clients. He objected strenuously to the payment of compensation before the IIU finished its investigation. He wrote:

> It has always been, and remains, my clients' position that they would co-operate with any Department of Justice investigation, provided they were given adequate disclosure to defend themselves against allegations made. Correspondence to that effect has been sent to Marion Tyson, solicitor for the Internal Investigations Unit. My clients have yet to receive adequate disclosure of any information contained in allegations against them, and therefore, through no fault of their own, have been unable to respond. There have been some people who have received no disclosure whatsoever. Therefore, your indication to me that you understood my clients were not willing to co-operate with any Department of Justice investigation is completely erroneous.
>
> Furthermore, it would seem to me to be totally contrary to the concepts of fundamental justice and due process for the Department of Justice to be giving compensation to alleged

> victims when the Government's own Internal Investigations Unit has not finished its investigation nor given my clients an opportunity to be fully informed prior to discussing the allegations with them.

Shortly after the Province sent out its first batch of Responses to Demands for compensation, a group of six lawyers, representing between 500 and 600 claimants, strenuously objected to how the claims were being handled by the Government. On August 9, 1996, Ms. Derrick wrote on behalf of the group to the Minister of Justice, the Honourable Jay Abbass, requesting an immediate meeting to discuss "serious problems." Derrick asserted that it was evident from the Province's Responses that the manner in which the compensation process was unfolding betrayed the principles on which it was reportedly based. She argued that, as a consequence, it was becoming a discreditable process and was inflicting additional significant injury to survivors.

Amongst other things, concern was expressed over the validation of claims. Derrick advised the Minister that she and others had been led to understand during discussions with the Government's negotiating team in February and April that the Province would not be looking at strict validation or proof of claims – what survivors said to the Murphys or other investigators would be taken as true unless the Province had something that directly contradicted the allegations. She said this was not what was occurring. In some Responses, the claimant's assertions had been dismissed as implausible. In others, claims were being partially or wholly rejected because the description by the claimant was considered by the file assessor to be "unreasonable." Further, several claims were said to have been rejected because they did not "fit the typical profile of a victim of child paedophilia."

Derrick also expressed concern that the Government's offers of compensation were being influenced by budget rather than merit. She noted that, by the end of July, over 800 survivors had come forward, although the budget of $33.5 million for the Program had been set on the basis of an anticipated 500 claimants. She suggested this was "having an influence on the way the Province [was] dealing with compensation," and urged the Minister to take the issue to Cabinet in order to ensure that the Program would have adequate funds to deliver on its undertakings.

The Minister replied on August 13th, assuring Derrick and the other lawyers that staff had been instructed to be guided by the merits of each case and not by the Program's budget.

The concerns raised in Ms. Derrick's letter of August 9th were echoed by Derrick Kimball and Nash Brogan, also counsel for numerous claimants, in a letter dated August 20th to the Minister. They referred to the MOU as a contract. In particular, they wrote:

> The MOU provides compensation to be based on Statements as defined. Unless the Province can actually disprove the specific allegation in a statement, then the statement is the only evidence and must result in the compensation that would follow. "Suspicions" or "concerns" about the accuracy of a statement are of no effect under the MOU. The contract is very specific.
>
> .....
>
> From our point of view, it appears the lawyers responding to claims did not understand, well enough, the specifics of the MOU, or if they do, they are ignoring the Province's clear obligation in favour of other considerations. This is not as it should be. We know, because of the process, that some people will be compensated who probably do not deserve to be compensated. It is our firm belief, that none of our clients fit into this category. But, we also know that virtually everyone compensated under this process, who has a legitimate claim, is going to give up a great deal that would otherwise be obtained in a courtroom.
>
> There is nothing in the MOU agreement that permits the Province to deny a claim outright because certain allegations are questionable. There is no room in the MOU for personal opinions of counsel. The Statements stand alone.

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

On August 27th, 1996, Paula Simon sent a memorandum to the Minister of Justice and to the Minister of Finance, the Honourable William Gillis. Attached was a statistical breakdown of the Demands and settlements as of August 20, 1996: the Program had received 368 Demands and had responded to 222. Seventy-six claims had been settled, at a cost (including counselling) of $3,821,000. The Province had rejected the claims of 17 individuals. Sixteen of them had filed requests for file review. Simon advised that although there were up to 900 persons identified as claimants, the internal investigators had yet to speak with a large number of them. She suspected that many of the persons now coming forward would allege less serious abuse, thereby lowering the amount of the average claim.

In September 1996, complaints from claimants' counsel continued. Ms. Derrick wrote to the Minister of Justice on behalf of herself and five others expressing concern that the compensation process was being guided by the same consideration that guided the Government's response to Donald Marshall's claim for compensation – to pay the lowest amount.[4] She wrote:

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[4]See *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: The Commission, 1989), Vol. I, p. 136. The Commissioners recommended that the methodology of determining compensation and quantum be

> We represent many survivors who believe that little has changed in Nova Scotia since the days of Donald Marshall's experience with respect to the way the victims of state abuse are treated. Many of our clients feel bitter towards the Province and revictimized as a result of the way their claims and the process are proceeding. It is the overall consensus of lawyers representing survivors with whom we have spoken that survivors are not being fairly compensated in this process even within limitations proposed by the Memorandum of Understanding.

My staff interviewed Paula Simon, Alison Scott, Sarah Bradfield and Amy Parker. It is clear that there was a divergence of philosophical approach. Simon was of the view that the claimants were very much victims and that assessors could not tell survivors that they were not telling the truth. She favoured higher awards. Scott was more sceptical of the claims. The others were somewhere in the middle. Parker recalled that file assessors were very upset at what they took to be the suggestions by some claimants' counsel that they were making 'low-ball' offers to the claimants.

There was marked frustration by those involved in the Program over the scarcity of information upon which they were required to base their decisions. In situations where they did not believe in the validity of a claim, there was not enough information to disprove it and, according to the design of the Program, the claim had to be accepted as valid. The assessors stated that the onus was on the Province to disprove the abuse alleged; the benefit of the doubt was given to the claimant.[5]

Once it was accepted that the abuse claimed had occurred, the file assessor would place the claim within a category in the compensation grid. Parker advised my staff that the assessors would compare the abuse set out in the Demand to a book of statements that served as examples for the categories of abuse set out in the MOU.[6] Subject to negotiation with counsel for the claimant, an offer would then be made based on the range of compensation provided in the grid.

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revisited (p. 140).

[5]To be perfectly clear, this is how the assessors interpreted the Program. The MOU did not explicitly set out a burden of proof.

[6]The MOU provided for the use of 'Statement Volumes:' statements taken by the Murphys considered to be representative of each category of compensation. (They could be submitted to a file reviewer to help guide his or her decision as to the proper amount of compensation.) The claimants succeeded in putting together a Statement Volume. The Government attempted to do likewise, but was unsuccessful because they could not obtain the consent of the individuals who gave the statements, as required under the MOU. To resolve this issue, the Government used the statements selected by the claimants, sometimes adopting the claimants' categorization of a statement, and sometimes changing the suggested categorization.

Even with the limited information available to the file assessors, a number of them spoke of their growing disbelief in the nature and extent of the abuse being claimed. They cited instances where claims of serious sexual assaults were shown to be false. This led them to conclude that claims of physical abuse made in the same Demand were similarly untrue. However, compensation was still offered for the alleged physical abuse because the Program office had no information to specifically disprove it.

In Chapter VIII, I referred to the recovery by the IIU in the fall of 1995 of over 1,000 files from Shelburne and the Nova Scotia School for Girls. Investigators from the IIU continued efforts to obtain and review all relevant documentation. In May 1996, IIU investigators reviewed files stored in the Provincial archives (known as the "RG 72" documents)[7] and obtained historical materials relating to the institutions.

On June 7, 1996, IIU investigator Frank Chambers wrote to Fred Honsberger, Executive Director of Correctional Services, requesting his assistance in recovering institutional and correctional files. The IIU wanted to "conduct a full and complete search and report the existence of" all institutional records, documents, and files relating to former residents, and all information with respect to accident injury reports, incident reports, use of force reports, occurrence reports, public or private complaints, and all available medical records.

A similar request was made by the IIU to Gordon Gillis, then Deputy Minister in the Department of Community Services ("DCS"). This resulted in a general directive to all administrators and senior officials at DCS that no files containing information related to any former resident of Provincial residential centres be destroyed pending completion of the IIU investigation.

In early August, the Provincial Records Centre notified Linda Sawler, Chief Records Clerk for Justice, that there were records stored at their centre labelled "NSSG" and "NSSB." They had been scheduled to be destroyed, but the destruction had not taken place due to an omission in the authorizing documentation (namely, two signatures on the destruction order). The Deputy Minister of Justice subsequently issued a memorandum advising all staff that there must be no destruction of files or records pertaining to any Provincial residential centre or former resident of

[7]RG 72 is the code used by the Public Archives of Nova Scotia for historical materials given to them by the Departments of Public Welfare and Social Services, predecessors to the Department of Community Services.

such a centre.[8]

Despite the discovery of records containing additional information, the Compensation Program raised concerns about the amount of information being provided to them. In a memorandum dated September 30, 1996, Paula Simon wrote to the head of the IIU, Bob Barss:

> These [resident summary sheets] are of very little use to us as they are presently filled out. As you can see in your review of the samples, often under the employee summary, question marks are frequently written in and sections are left blank. In addition, important information, for example employment dates, are usually not filled in.
>
> These summary sheets are of no use to us as they are presently completed. Could you please ask the staff to complete them with more accuracy. If that is too time consuming, they can stop sending them.

Meanwhile, it became apparent that the ordinary demands of the investigations already underway, together with the time required to review the newly discovered documents, exceeded the capacity of the IIU. Barss wrote to Simon on October 9, 1996, advising her that the entire unit – investigators and support staff – was working at 100% capacity and it was becoming impossible to meet her increasing demands. He described the situation in the following way:

> We have 3 support staff assigned to the ADR process on a full-time basis. I notice their workload includes a total of 41 files to be completed within the next few working days. While on paper, this may not look like a lot of work, there is an extensive amount of research involved in completing each file. This entails searching through boxes, daily logs, and copious other materials in our possession to ensure all information pertinent to the file is located. This information then has to be photocopied for our own records as well as for your purposes.
>
> We have two support staff assigned to inputting the various files and documents into our database, which will eventually make matters easier for the ADR staff; however, these staff members are also responsible for various assignments from the investigators and are frequently required to interrupt their data entry for other purposes.

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[8] On November 10, 1994, the Minister of Justice wrote to his Deputy, directing that the destruction of files be held in abeyance until the investigator to be appointed (the position eventually held by Mr. Stratton) had an opportunity to examine the allegations of abuse at the former Nova Scotia School for Boys (Shelburne) and at residential facilities operated by DCS. This ban was partially lifted on July 31, 1995, on the condition that Alison Scott review all files before any destruction was carried out. On June 25, 1996, Chief Superintendent Dwight Bishop of the RCMP advised the Deputy Minister of Justice that there may be many documents in the possession of the Government that may end up being inadvertently destroyed through normal retention and destruction schedules. He requested that consideration be given to a directive to all Government departments that documents pertaining to former residents and staff not be destroyed before conclusion of the criminal investigation.

Barss suggested that Simon approach the Deputy Minister for more staff to fill the immediate needs of the Compensation Program and the IIU.

3. EVENTS LEADING TO THE SUSPENSION OF THE PROGRAM

As noted before, by mid-August 1996, the Murphys had identified 900 potential claimants. Paula Simon calculated that the total cost of compensation for that number of claimants, assuming the average award remained constant, would exceed $51 million, rather than the $33.3 million allocated in the budget.

In September, the IIU started interviewing a number of current employees from Shelburne. In the view of the IIU, these interviews shed a different and significant light on at least some of the allegations of abuse.

David Peters, President of the NSGEU, wrote to the Minister of Justice on October 2, 1996:

> I am writing to request legal assistance on behalf of all employees, both management and unionized staff who received allegations of abuse [which were] subsequently found to be nothing more than unfounded allegations.
>
> As you know, the NSGEU has been providing legal support for all employees in the absence of support from the Employer. This is unacceptable. You have a responsibility to your employees who were wrongly accused.
>
> The Department of Justice has been providing legal assistance to anyone who files allegations but absolutely none for its employees. The Department's lack of understanding and total disregard for its employees' rights to natural justice and fair representation must not be allowed to continue. We hope the Department will review its previous position in light of the fact that so many of the allegations are frivolous in nature or simply not true.

Alison Scott wrote a memorandum dated October 10, 1996, to the Deputy Minister. She reported that the Murphys had advised her they had interviewed, or scheduled for interview, in excess of 1,000 former residents of Provincial institutions. She suggested that there may be potentially another 300 or more claimants who might come forward. She wrote as follows:

> Lawyers acting for the Province in the ADR program, including myself, have expressed concern about the lack of tools available under the MOU to assess credibility of the claims. During the negotiations we expected to be able to rely heavily in the ADR

> settlement negotiations on the judgment of our investigators as to the credibility of claimants. Unfortunately, this approach has not worked as the investigators are unable in many cases to offer an opinion.
>
> In those cases where the investigators are unable to offer opinions, the lawyer reviewing the file is left to discern credibility on the basis of the Facts-Probe Inc. statement and whatever documentary evidence is available. Frequently there is a dearth of institutional information that might explain injuries or predispositions to fantasy or otherwise. Under the MOU there is no right of cross-examination, and no right to lead contradictory evidence from independent sources. If the statement provided by the claimant is internally consistent, makes allegations against "known" perpetrators, and it checks out that the claimant was there when the alleged perpetrator was also there, the claim is essentially validated. It is very difficult in any claim under the MOU to challenge the type or frequency of abuse without the tools to test the information. The type and frequency of abuse determine the value of a claim under the grid. This inability has a direct financial impact on the value of the claims.
>
> At the same time, calls have come into the ADR office from other claimants asserting another claimant is untruthful. The Internal Investigation Unit has expressed the view that many of the claimants are fabricating information. The IIU based this opinion from their interviews of claimants and their review of files. Unfortunately their opinion is as much impression as it is fact and can't be advanced in the ADR process unless there is concrete material that can be produced. The RCMP have likewise expressed a similar view to that of the IIU, although the RCMP will not allow us to use any of the information they have to substantiate their view.
>
> The problem is that many of us have impressions as to the credibility or lack of credibility of claims, but none of us in the process are confident the system in use effectively allows false claims to be denied. As one of our lawyers put it: "In the criminal justice system, it is accepted that it is better that nine guilty men go free, than have one innocent person convicted. In the ADR process, we compensate 9 people to get to the one who deserves the compensation." While we have no way of knowing if the ratio is as high as nine to one, the point is that we are uncertain as to what the ratio might be, but I believe the potential is high, in light of the validation process.

Scott raised concerns that a complete abandonment of the Program could have a deleterious impact on some of the claimants and suggested other less harsh methods of ending the Program. She identified two alternatives. The first was the one used in New Brunswick, where early termination of their program was announced on 24 hours notice. Although this would not address the validation issues, it would reduce the Province's financial exposure by some $15 million (300 claims). Scott expressed the view that although some of the 300 might choose to litigate, the majority would not. The other alternative was to legislate a different process to replace the present one. Scott said this new process could use "similar, although not identical parameters to the present program, and allow more rigorous testing of information."

The first file reviews were not heard until September 1996. The MOU provided few details of the procedure to be followed on such reviews. On September 16, 1996, Ms. Derrick proposed the following procedure:

- As the survivor's lawyer, she would make a brief introduction of the Demand and the Province's response to it, identifying the essential issues;

- Unless she misstated or omitted some central detail, counsel for the Province would make limited comments, reserving argument until after the survivor spoke to the file reviewer;

- The survivor would address the file reviewer directly. The reviewer would be able to ask questions, but there would be no cross-examination of the survivor by anyone;

- Counsel for the survivor may need to draw his or her client out if they are having difficulty expressing themselves. The file reviewer may be asked to assist;

- Once the survivor is finished, Derrick would make her submissions in support of the Demand and the Province would then respond. There would be no formalized rules limiting reply and counter-reply. Any argumentative statements would be between counsel, and not directed to the survivor;

- The review would take place in an informal physical setting, with a seating arrangement around a table being preferred.

The Compensation Program drafted a reply, disagreeing with some of the procedures suggested by Ms. Derrick. However, the reply was never sent, and the actual file reviews usually proceeded in the manner outlined by Derrick.

In discussions with us, the Compensation Program staff expressed the opinion that file reviewers were generally not favourable to the positions taken by the Province. Substantially higher compensation amounts were being awarded on file review than had been offered by the assessors. For example, the first review decision was released on September 26, 1996. The Province's initial offer had been $2,000. The file reviewer awarded $40,000. An examination of other early file review decisions indicates a similar pattern. As further file reviews were held, the

assessors became alarmed by decisions that imposed what they (the assessors) considered to be an unforeseen liability for abuse alleged to have been committed by non-employees, such as other residents, but "condoned" by provincial employees.[9]

On October 11, 1996, the Minister of Justice wrote to the Minister of Finance, telling him that the budget would be insufficient to meet the needs of the Compensation Program. He reported that the Province had received 503 Demands for compensation, but that Facts Probe Inc. (the Murphys) had taken 721 statements from survivors, with another 389 waiting to be interviewed. The Murphys projected an additional 200 requests for statements to be taken before the December 18th deadline, for a total of 1,310 Demands for compensation. The Minister of Justice commented that with a total population at Shelburne and the Truro School for Girls of 9,620, the projected 1,310 applications was not out of line with the experience of compensation programs in New Brunswick and Ontario.

The Minister of Justice enclosed a revised budget which estimated a total cost of $86 million – an over-expenditure from the initial budget of approximately $53 million. This was based on the assumption that the average award for compensation and counselling would remain constant.

Department of Justice officials held extensive meetings on October 15, 16, and 17, 1996.[10] An *ad hoc* committee (sometimes referred to as the 'Review Team') was formed to identify the range of options available to the Government and present a report to a 'Steering Committee' composed of the Deputy Ministers of Finance, Justice, and Community Services and P&P. The Review Team was to identify the expected maximum and minimum over-expenditure risks for the current and next fiscal years, to review the Program administration procedures in place in order to ensure efficiency and effectiveness, and to document efforts to recover some of the Program expenditures from the Province's insurers.

The Review Team formulated a number of scenarios and different options within each scenario. They can be broken down into two alternatives: 1. changes to bring in expenditures for compensation under or at the budget target, and 2. changes to "minimize the over-expenditure

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[9]As indicated in Chapter VII, the MOU provided that survivors whose claims were validated were to be compensated for abuse "perpetrated, condoned, or directed by employees of the Province" during the time the survivors were resident in the named institutions. The MOU did not provide any further guidance as to the meaning of condonation.

[10]Among those present were Douglas Keefe, Alison Scott, Sarah Bradfield, Paula Simon, Averie McNary, Brian Seaman, Michele McKinnon, Clarence Guest and Kit Waters.

risk."

Some of the options identified to bring in expenditures for compensation at or under the budget target were to pass legislation terminating the existence of the MOU, and removing the right of claimants to litigate. In the place of the existing Program, the Government would unilaterally substitute a new program which could include: 1. the prorating of all claims according to severity, 2. settlement of all claims on a first come first serve basis, 3. restriction of eligibility (either based upon the date of the alleged abuse or specific alleged perpetrators), or 4. the establishment of a private trust, with trustees to determine criteria for distribution. Other scenarios included opting out of an ADR process and reverting to civil litigation.

As for the alternative of minimizing the over-expenditure risk, one method proposed was to enact legislation to restrict the MOU, but still permit civil litigation. Another method was to top up the Program budget in conjunction with a more restrictive MOU, thereby improving the current process to allow for greater control for the payment of claims.

On October 18, 1996, Paula Simon wrote a detailed letter to the Deputy Minister of Justice. In it, she referred to the recent meetings with senior officials from Justice and Finance and voiced her objections to the direction the Government appeared to be taking. She wrote:

> It appears after our discussions that there is a leaning towards breaking the MOU and making minor or wholesale changes to the process. Ms. Nancy Muise, Director of Auditing for the Department of Finance, stated a number of times over the past day and a half that an over-expenditure will not be tolerated. She also stated that they planned to audit the project and make changes to our process, assuming they can lower the projected budget over-expenditure. While I would welcome any assistance/suggestions auditing can give in relation to maximizing cost efficiency, it would appear that they are recommending breaking the MOU in order to accomplish this objective.
>
> Although we are encountering significant difficulty in implementing the MOU, the problem areas were identified as potential difficulties during the negotiations, and in meetings where we sought instructions from Dr. Gillis, the Minister of Justice at the time. The agreement that the Government had asked us to negotiate was based on the principles of fair compensation and early resolution for the survivors. It was also driven by concern over the cost to the Government, in terms of embarrassment and resources, of litigation and a possible public inquiry. Dr. Gillis has said publicly on many occasions that we have a moral responsibility to the survivors. I am concerned that the moral responsibility to the survivors may now be denied based on a larger number of survivors being identified than had been initially projected. It is my view that as the scale of the problem of abuse at these institutions has become increasing more apparent, the moral responsibility to the Government has also increased, not lessened.

.....

> It was my understanding that the validation process was never intended to be rigorous. It was agreed that we should, for the most part, believe the statements given to Facts-Probe Inc. This was based on the premise that the majority of the survivors were telling the truth. Both the Government and the survivors had confidence in Messrs. Murphy, the Facts-Probe Inc. investigations [sic]. I have spoken to Messrs. Murphy, and they still feel that by far the vast majority of survivors are telling the truth.
>
> Notwithstanding the above, it was acknowledged during discussion[s] with Minister Gillis that this validation process would leave the process open to fraudulent claims. At the time, it was accepted that a small percentage of invalid claims would be paid, but, on balance, that this was an acceptable price to pay to meet the stated goals of fair and early compensation for survivors of abuse.

It is clear from this letter that Simon believed strongly that the Government should not consider breaking the MOU. She maintained that the abuse occurred, and that compensation should be paid accordingly.

In the meantime, in at least four compensation files that had been settled, information subsequently came to light that could have had an impact on the assessment of the claims. In one of these files, the information was sufficiently cogent to lead the file assessor to suggest that even though a settlement had been reached through negotiation, the payment should not be made (and it was not).

On October 22, 1996, the Deputy Minister instructed Ms. Simon to ask the IIU to begin investigating immediately the claims contained in a list of files that were then in the file review process. Forty-seven claims were on the list. On the following day, the Deputy Minister instructed Simon that the Compensation Program was not to process any new claims. Any new Demands received should simply be acknowledged. All claims that had not been paid were to be investigated by the IIU before any further action was taken.

In a letter dated October 23, 1996, Anne Derrick called for a public explanation about what was going on with the Compensation Program. She also sought an assurance that the Province would honour its obligations.

On October 31st, Paula Simon wrote to the Deputy Minister. She expressed her deep concern about the implications of breaking the MOU. Since it appeared to her the Program would be restructured, and her position would be terminated, she tendered her resignation effective that date.

On November 1, 1996, the Province issued a press release announcing the suspension of the Program. The Minister of Justice cited the overwhelming volume of claims, as well as new information, as justification for the suspension. He said the Government needed to take time to "fully review this information." The press release did not say how long the review would take, but assurances were given that it would proceed as quickly as possible. The Minister maintained that the Government remained committed to an ADR process to provide compensation to those who legitimately deserved it.

4. AUDIT OF CLAIM FILES

As noted in Chapter I, my staff carried out a review of claim files. A list of files was produced from the database maintained by the Compensation Program. According to this list, 1,235 claims were processed by file assessors in the Compensation Program.[11] Of the 1,235, my staff randomly selected 90,[12] and reviewed all material that was available, first, to the file assessor in responding to the Demand, and second, at the file review stage, where applicable. In so doing, I have tried to better understand the way in which claims were processed, and to ascertain some of the difficulties encountered in the operation of the Program, and the reasons for them.

For purposes of examining how they were processed, the randomly selected claim files were sorted according to what I considered to be the three phases of the Compensation Program:

- The first, which began on June 17, 1996 and lasted until the Program was put on hold November 1, 1996. This phase was governed by the MOU;[13]

- The second, which began in December 1996 and lasted until November 1997. As will be set out in a subsequent chapter, this phase was governed by the MOU as varied by the Government on December 6, 1996;

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[11]As will be discussed later in this Report, a definitive number as to the total caseload processed by the Program is difficult to ascertain. Statistical reports prepared in March 2000 and July 2001 show the caseload to have been 1,252 and 1,249 respectively. A final statistical report shows the total number of claims processed to be 1,246.

[12]The file names were provided to us in alphabetical order and every 14th file was reviewed.

[13]Even if completed after November 1, 1996, a claim was still considered to be within the first phase if it was processed according to parameters of the original MOU.

- The third, which began on November 6, 1997 and lasted until the end of the Program. As explained later, this phase was governed by the Compensation for Institutional Abuse Program Guidelines.

According to statistical reports provided by the Program office to the Minister of Justice, 580 Demands were made in the first phase of the Program. The assessors responded to 431. In 23 cases, the claim was denied. In 14, the assessor accepted the amount demanded. Three hundred and ninety-one offers were made, and in three cases the assessor requested more information. On the whole, 278 cases were completed.[14]

Of the 90 files we reviewed, 31 were completed in the first phase of the Program. Those 31 files are discussed here.

In none of the 31 files was there any employee input. I cannot say whether there was any employee input in the rest of the 278 files completed during this period, but it is clear that in the first phase of the Program the MOU did not provide any opportunity for the employees' voice to be heard.

In a small percentage of the files we reviewed, the alleged abusers were deceased or otherwise unavailable to provide input.[15] However, in a majority of the files, allegations were made against former and current employees who were available to be contacted. In those files, 63 former and current employees were named as abusers. To the best of my knowledge, only 10 of them were deceased at the time the statements were given. My staff could not find any indication of an attempt having been made to contact any of the remaining employees to seek their response to the allegations asserted by the claimants.[16]

The manner in which the claims were submitted was similar in most cases that we reviewed. As prescribed by the MOU, claimants submitted a Demand together with a statement taken by Facts-Probe Inc. (the Murphys), the IIU, or a police agency. In the Demands submitted

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[14]A November 21, 1996 statistical report suggested that 276 claims were completed. The Minister of Justice also informed the Legislative Assembly on November 20th and 21st that the Province had settled 276 cases. However, later statistical reports of December 3 and 11, 1996, as well as a November 30, 1996 letter from an actuarial firm to the Minister, indicated that 278 cases had been settled.

[15]Unavailability could be due to health problems.

[16]As mentioned later in this section, in one file an allegation was made against an individual whom the file assessor did not consider an employee. Prior to file review an IIU investigator located the individual. She confirmed that she had been a provincial employee at Shelburne for two brief periods of time. However, no statement was taken from her regarding the allegation that she had sexually abused a claimant.

by counsel on behalf of claimants, the allegations made in the Murphy statements were usually summarized, submissions were made as to the categorization of the abuse claimed (according to the grid set out in the MOU), and the amount of compensation requested was stated. In the majority of cases, the compensation requested was at the upper limit of the suggested category.

Our review shows that in 28 files only a Murphy statement was relied upon. In two cases, RCMP statements, taken in 1991 during the Nova Scotia School for Girls criminal investigation, were available to the file assessors. In one other case, the claimant also submitted a transcript of his testimony in the MacDougall criminal trial.

Our review revealed that, during this phase of the Program, the IIU investigative support to the assessors consisted of providing them with institutional records (index cards, journal entries, employment records). There were instances where the institutional records included such things as medical reports, social history reports, incident reports and school documentation. The provision of such other documentation seemed to depend on which institution was involved, and how recent the allegation in the claim was: the more recent it was, the more likely it was that additional documentation was available.

The written Responses by the assessors to Demands were generally short, usually just over one page. They reflected the problems that assessors were facing during the process. In many cases, the assessors indicated to claimants' counsel that:

> Further information may be forthcoming; however, due to the deadlines in the Memorandum of Understanding (MOU), I am unable to consider any further documentation which may be received. I have reviewed: the information received from the ADR investigators; the MOU; the Demand; institutional employee information available to me and relevant case law.

In formulating the Response, the assessor would check the available institutional records. If the records showed that the claimant and the alleged abuser were both at the institution at the time of the alleged abuse, the assessors would accept the claim as valid. However, in most cases the assessors put the claim in a lower category, or at least at the lower end of the same category.

As stated before, the MOU provided that if a claim could not be settled by negotiation, the claimant could proceed to file review. According to a statistical report from the Program, as of

December 11, 1996, 101 claimants had opted for file review.[17] Thirty-three of the reviews had been completed. In the 31 cases reviewed by my staff, six claimants had proceeded to file review. All of their reviews had been completed.

The following summaries of files we reviewed illustrate how the Program operated.

P.B., a former resident of the Nova Scotia Youth Training School during the mid-1950s, filed a Demand on June 17, 1996, requesting $30,000 compensation (category 9 – minor sexual and minor physical abuse). She alleged that employee X grabbed and rubbed her breast, and that employee Y struck her hands with a heavy wooden ruler (because she was in class looking out the window at a ball game) and dragged her to a "cell" and kept her there for approximately one hour. The Murphys advised Alison Scott that the alleged abusers were probably deceased. The records for the claimant were available from the School.

The file assessor offered $2,500 plus a $5,000 counselling allotment. She stated that the Program office could not locate any employment records for the alleged sexual abuser, that back in 1955 corporal punishment in schools was accepted, and that there had been no "cell" at the school. She suggested that P.B. may have been taken to a quiet room to settle down.

The claimant requested that her claim go to file review. The review was held by way of conference call on October 9,1996, with the claimant participating. Despite the lack of records to show that the alleged sexual abuser was employed at the School, at the end of the call the file reviewer assessed the claim at $20,250. The decision was confirmed in a letter dated October 9, 1996. In setting out how the award was determined, the file reviewer commented as follows: "Credibility – Ms. [file assessor] acknowledged that [P.B.] was telling the truth." The file reviewer found the grabbing of the breast to be at the low end of the minor sexual abuse scale. She found that the use of a heavy ruler-like object on two occasions, causing redness, swelling and stinging, to be minor physical abuse, albeit at the low end of the scale. She also found that the claimant was placed in a jail-like room with bars on the door and window, holding that this was not a 'timeout' to quiet P.B. down, but was "unjustified." It was, accordingly, an aggravating factor, adding $250 to the award.

G.B., a former resident of Shelburne, alleged he was the victim of physical abuse (hitting, beating, punching or slapping) perpetrated by a number of unnamed and named counsellors, including employees A and B. A Demand was filed on June 17, 1996, requesting $25,000

[17]As noted above, by this time, assessors had responded to 431claims, accepting 14, rejecting 23, and making an offer in 391.

(category 10 - medium physical abuse). In a Response dated August 1, 1996, the file assessor noted that according to the Province's records, employee A did not start his employment until well after the time that G.B. attended Shelburne, and that there was no record of a school employee with the name of employee B. The assessor asserted that the other abuse alleged by the claimant was minor in nature (category 12) and offered $2,000.

The claimant requested that his claim go to file review. The file review was held by telephone conference call with the claimant participating. In a written decision dated October 18,1996, the file reviewer commented as follows on the issue of credibility:

> Before dealing with the issue of category and quantum, I would like to comment on credibility as it was an issue in this case. [G.B.] claims abuse at the hands of [employee A] and [employee B]. The Province does not have records of either man being employed by them at the time [G.B.] was at the Shelburne School for Boys, but do have records of [employee A] being employed at a much later date. [G.B.] is clear on the names and descriptions of the employees involve [sic] and does not feel it possible that he is mistaken.
>
> I accept [G.B.'s] allegations with regard to these two employees. Records are not always indicative of the way things were at the time and [G.B.] as pointed out could have used other names of employees if it was his intention to deceive as records of those employees are consistent with his recall. Also [G.B.] had an out so to speak, and could have said that he may be wrong but stood steadfast to his recollection. These points coupled with the overall credibility of [G.B.] lead me to accept his allegation in relation to those two employees.

The file reviewer went on to conclude that the abuse fell within category 10 (medium physical abuse), as being chronic physical abuse, and awarded $18,000 in compensation plus the applicable counselling allotment.

D.H., a former resident of Shelburne submitted a Demand on June 17, 1996. In it, he claimed he had been subjected for months to repeated and persistent intercourse with X, a woman alleged to have been an employee, whom he could not name but described by her function at the school. He further claimed that he was fondled by a second employee, and that a third employee digitally penetrated him during a strip search. In respect of physical abuse, D.H. alleged that a number of named counsellors had "beat him at least three time a week." He requested compensation under category 2 (severe sexual and medium physical abuse) in the amount of $100,000.

The file assessor, in her Response of August 1, 1996, disputed the contention that D.H.

had been "subjected" to repeated and persistent intercourse with X, given that D.H. was almost certainly over the age of consent at the time they had sexual relations. The assessor also stated that X was listed in the records as being in a "job shadowing program," at Shelburne to learn job skills, and was therefore not a Nova Scotia Government employee. The assessor further argued that X was not in a position of authority over D.H. With respect to the strip search, the assessor contended it did not constitute sexual abuse: it was initiated because D.H. was caught with a lighter he was not supposed to have. Finally, the assessor suggested that the alleged physical abuse constituted minor physical abuse. She made an offer of $3,000.

The claimant elected to go to file review. In the course of preparing for the file review, the assessor contacted the IIU and asked for any further documentation about X, the person that was at Shelburne doing the job shadowing. The IIU reported back that a search of all available records had failed to turn up any employment records for X, but that they had contacted her and she had said she had been a provincial employee on two short occasions. There is no indication that X was ever asked if she knew D.H. or had had any relationship with him. The information that X was indeed employed at Shelburne at the relevant time was disclosed to the claimant and to the file reviewer.

The file review was held on October 30, 1996, with the claimant present. A written decision was released November 12, 1996. The file reviewer noted that there was extensive questioning of D.H. by her and by the file assessor. In relation to the claim of physical abuse, D.H. named 10 employees as having punched, slapped or hit him with objects. He claimed permanent hearing loss from one such incident, but advanced no medical evidence to support the injury. The file reviewer observed that the Province had originally taken the position that the physical abuse was minor, but upon hearing the claimant's evidence changed their characterization to that of medium physical abuse.

In relation to the sexual abuse, the reviewer stated that the Province did not dispute that the strip search occurred, but contended that it was a valid search. The reviewer accepted that it did occur, and found on a balance of probabilities that it was a sexual assault. With respect to the allegation of repeated sex acts with X, the file reviewer concluded:

> I find that [X] was an employee at Shelburne, and if she did not have actual authority over [D.H.] she had the appearance to [D.H.] of having authority or influence over him, and she had an obligation to exercise good and proper judgment in her interaction with the residents at Shelburne. If this allegation was in a public school scenario I submit that the [X] in question would have been fired for abuse of her position, judgment and sexual abuse of a student. Clearly [X] acted inappropriately and she abused her apparent or real authority to gain sexual favours from [D.H.].

> In discussion with Ms. Derrick [counsel for D.H.] and [the file assessor] at the review hearing, it was agreed that the allegation regarding [X] was either severe sexual abuse or not sexual abuse at all. The frequency and nature of the sexual abuse alleged does not fit within the classification of medium sexual abuse. The only use [sic] is whether or not the sexual relations were consensual. I find that the sexual relations between [D.H.] and [X] were not consensual and they must be characterized as severe sexual abuse.

The file reviewer concluded that this was a category 2 (severe sexual and medium physical) claim, and awarded D.H. $90,000 plus a $10,000 counselling allotment.

During our audit, we also reviewed three files where the claimant had been a complainant in the criminal proceedings against former employees of either Shelburne or the Nova Scotia School for Girls ("NSSG"). In the first file, the claimant was G.C., a former resident of NSSG. She had given a statement to the RCMP in 1991 alleging that George Moss had fondled her on five - six occasions. In addition, she had provided a statement to the Murphys during the Stratton investigation recounting the same misconduct by Moss.[18] G.C.'s Demand, dated June 12, 1996, requested an award in the range of $35,000 to $40,000 (category 8 – medium sexual abuse). The assessor wrote a Response on July 30,1996, that accepted the claim as being properly classified as medium sexual abuse, but made an offer of $30,000 (placing it at the low end of the category 8), plus a counselling allotment of $7,500. G.C. accepted the offer.

In the second file, the claimant was R.G., also a former resident of NSSG. She gave a statement to the Murphys during the Stratton investigation alleging sexual abuse by Moss in the nature of "french" kissing, fondling, masturbation, digital penetration and vaginal intercourse.[19] She submitted a Demand on June 12, 1996. In it, she requested an award at the top of category 8 (medium sexual abuse) in the amount of $50,000. The Response by the file assessor, dated August 2, 1996, agreed that the incidents were properly classified as medium sexual abuse, but offered the claimant $32,000. Through her counsel, R.G. submitted a counter-offer to settle for $42,000; counsel also indicated that if this was not acceptable, he had instructions to proceed to file review.

The assessor responded in a letter dated August 13, 1996. He indicated that additional information had been brought to his attention, including R.G.'s 1991 statement to the RCMP in

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[18]On October 9, 1992, Moss pled guilty to four out of seven charges of indecent assault, and was sentenced to 12 months incarceration. G.C. was not one of the complainants named in the four charges to which Moss pled guilty. She was a complainant in one of the charges to which he did not plead guilty.

[19]Moss pled guilty to indecent assault in relation to R.G.

which she had complained of only one incident of abuse involving Moss (involving fondling). He stated that he had not known of this statement and other related materials at the time of his initial Response, but in light of them his first offer was generous and would not be increased. R.G. accepted the offer.

In the third file, the claimant was P.H., one of the 10 MacDougall complainants. He submitted a Demand on July 2,1996, which enclosed his two Murphy statements (one given during the Stratton investigation and the other given on April 22,1996) and a transcript of his testimony from the MacDougall trial. P.H. claimed not only for the sexual abuse perpetrated by MacDougall, but also alleged that MacDougall and eight other counsellors had physically abused him. He requested compensation under category 6 (medium sexual and physical abuse) in the amount of $60,000. The file assessor responded on August 27,1996. She agreed that the sexual abuse suffered by P.H. may be properly categorized as medium sexual abuse, but at the low end. She also asserted that the allegations of physical abuse did not result in any claimed injury. She offered compensation in the amount of $30,000. The claim was eventually settled on September 17, 1996, for $44,000, plus a counselling allotment of $7,500 as a category 7 claim (medium sexual and minor physical abuse).

5. ANALYSIS

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

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

The number of claims being processed, the time constraints imposed, the limited

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

My review revealed that there were instances where claims of sexual abuse were regarded by assessors as demonstrably false – for example, where abuse was claimed against an employee who had not even been at the institution when the claimant was present. Assessors might nonetheless agree to compensate the claimant for other alleged abuse, usually on the basis that there was no concrete proof to dispute those remaining allegations.[20] *Of course, it is possible that these other allegations were true. But I find it deeply problematic that a deliberate falsehood would not be regarded as virtually disqualifying the claimant from compensation. A program that determines that a claimant has lied about part of a claim, but nonetheless settles the balance of the claim, as if no lie had been exposed, lacks credibility.*

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

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

Generally, file assessors expressed frustration that they did not have sufficient – or, indeed, any – information, nor the tools to adequately test claims that they had reason to doubt.

That being said, it became obvious to me that there was not always a uniformity of approach amongst file assessors. Some viewed the claims more sceptically than others. As well, some who initially regarded the vast majority of claims as credible came to modify their views, even on the limited information available to them, as more and more claims were processed.

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[20]Sometimes, the claimant would purport to 'withdraw' the deliberate falsehood.

When assessors did respond by highlighting dubious aspects of the claim – often in the context of a counteroffer – claimants and their counsel, who had been told that their allegations would be accepted unless there was concrete evidence to the contrary, became frustrated. Counsel for the claimants submitted that, at times, file assessors arbitrarily rejected claims, and harmed their clients through insensitive challenges to their veracity. They felt that their clients were being re-victimized through the process itself, which, they said, should have been governed by the need to ensure that their clients felt that they were "believed, respected and acknowledged." The point was repeatedly made to the Government that the assessors were contravening the MOU since it contemplated that, absent evidence specifically disproving the Murphy statements, compensation was to be provided. "Suspicions" or "concerns" about the accuracy of a statement were said to be of no effect under the MOU. Claimants also advised me that their counselling often had to focus on the adverse effects of the compensation process, rather than the original abuse.

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

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

Additional evidence as to the flawed character of the validation process is drawn from the fact that the Compensation Program sought input from the Murphys respecting the credibility of claimants. For the reasons reflected in Chapter V, the Murphys were not well situated to provide accurate assessments of credibility. They had collected information from complainants, but had not tested the statements, either through further questioning of the complainants, a comparison with previous statements made by the complainants and others, or a

review of medical or institutional records. Indeed, some assessors and file reviewers remarked that obvious, follow-up questions were not asked by the Murphys. The post-Stratton statements taken by the Murphys were similar in form. Again, this is not a criticism of the Murphys: it reflects the instructions they were given.

Any opinions expressed by the Murphys on the issue of credibility would have been largely based on their assessment of claimants' demeanour. Credibility assessments based on demeanour alone are notoriously unreliable. As was said by the British Columbia Court of Appeal in Faryna v. Chorny:[21] *"If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box."*

In Alison Scott's e-mail to Amy Parker, the point was made that, in the absence of any right to test statements through cross-examination or to lead contradictory evidence, the only control – albeit minimal – that the Province had to evaluate truth and credibility was found in the information that the Murphys could impart to assessors. Hence, she felt that claimants should not be permitted to introduce non-Murphy statements which would not permit the Province to bring the Murphys' judgment to bear on the issue of credibility. It was obvious to me that some file assessors looked to the Murphys largely because they (the assessors) were otherwise devoid of information to make proper assessments. With respect, the perceived need to resort to the Murphys' assessment of credibility demonstrated the bankruptcy of the Program's validation process.

The Murphys themselves recognized the limited value of their assessments of credibility, certainly in discussions with my staff. They indicated that they would advise assessors that the claimants seemed convincing, but that they (the Murphys) were not psychologists and could not make a real determination of the claimants' veracity. Regardless of what was precisely communicated to assessors by the Murphys, Ms. Scott's October 10, 1996 memorandum to the Deputy Minister did reflect that they were unable in many cases to offer an opinion (leading her to comment that any expected reliance upon the investigators as to credibility had proven to be unworkable).

During this period, the NSGEU and counsel retained by them to assist current employees

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[21][1952] 2 D.L.R. 354 at pp. 356-7.

expressed their concern that compensation was being paid before IIU investigations were complete and before the employees' side of the story had been heard. Ms. Scott's October 10, 1996 memorandum to the Deputy Minister reflected the concern that the MOU did not provide those involved in the Program with the tools to properly assess claims. It was felt that the potential for compensating many false claims, given the validation process, was high. I agree that all those concerns were fully warranted.

The Minister of Justice issued a press release on November 1, 1996, suspending the operation of the Compensation Program to permit a review of the Program. He cited the number of claims, the discovery of new information, and the responsibility to fully review this information. He explained that the review would take time, but that the Department of Justice was still committed to an ADR process.

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

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

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

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

The suspension undoubtedly caused turmoil to true victims of abuse. Nonetheless, I am unable to conclude that the Government acted unreasonably in suspending the Program, given

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

XVI

Events Outside Nova Scotia

1. INTRODUCTION

In the previous chapters, I summarized the deficiencies or problems associated with the Nova Scotia response to reports of institutional abuse. The more challenging task is to make recommendations as to how such reports should be addressed by government in the future. Elsewhere, I described such recommendations as a 'blueprint for the future.'

What is obvious is that there is a serious need to consider the future of government responses to reports of institutional abuse. The Nova Scotia response represents only one in a series of government programs that have met with varying degrees of success. There is no reason to believe that allegations of institutional abuse elsewhere in Nova Scotia or, indeed, Canada will end here. On the contrary, there are indications that such allegations are continuing to surface.

Having said that, one must recognize that there are significant variables that prevent a government from simply superimposing one program – however successful – upon a different factual situation. These variables include, but are not limited to:

- the kind of abuse alleged;
- how the alleged abuse came to light;
- whether current employees are implicated;
- the size of the pool of potential claimants;

- the extent to which allegations of abuse have already been tested in criminal or other judicial proceedings;
- the existence of parallel investigations;
- how recent the alleged abuse is;
- the nature of the institutions involved and their residents;
- the gender, colour, and cultural or ethnic background of those alleging abuse;
- their psychological backgrounds;
- whether such individuals are mentally or physically challenged;
- the existence of factors affecting their access to legal services; and
- the availability of government resources.

The approach, therefore, is to identify those considerations that properly underlie a government response, and to examine the components of both successful as well as unsuccessful approaches to the issues. In that regard, I examine the responses made to reports of institutional abuse in other Canadian jurisdictions, as well as a study of the topic prepared by the Law Commission of Canada. The responses of other jurisdictions are considered here. The Law Commission study is reviewed in the next chapter.

2. ONTARIO - GRANDVIEW TRAINING SCHOOL FOR GIRLS

The Government of Ontario operated a training facility for adolescent girls in Galt (now part of Cambridge) from 1932 to 1976. Originally known as the Ontario Training School for Girls - Galt, the facility was renamed the Grandview Training School for Girls in 1967. It housed girls between the ages of 12 and 18. Under the Ontario *Training Schools Act*,[1] the girls became wards of the Province and the parents of the girls relinquished their rights as guardians. The institution housed an

[1]R.S.O. 1980, c. 508.

average of 120 girls annually, with approximately one-quarter of them in a secure facility known as Churchill House. While some girls had committed minor crimes such as shoplifting, many were sent to the school because they had been pronounced "unmanageable" under the *Juvenile Delinquents Act*[2] for reasons such as truancy, the use of drugs or alcohol, or "sexual immorality." Many of the young women sent to Grandview had been physically, sexually or emotionally abused by family members; some were orphans, and some were from very poor homes whose families were unable to care for them.

A number of students at the school were abused during their residency there. The most significant period of abuse occurred in the mid-1960s to the early 1970s. The school was closed in 1976 after an investigation into the abuse. Residents alleged that they had been subjected to physical, sexual and psychological abuse at the hands of guards and other staff. Some of the allegations had been made contemporaneous to the abuse, but had not resulted in any legal proceedings at the time.

The abuse came to public light in 1991, when two women who were being treated by the same psychologist told him of very similar experiences of abuse that occurred at Grandview. The psychologist was shocked by the details, introduced the two women to each other and said that he would support them if they went public with their stories. The women subsequently made appearances on television, asking others who had been at Grandview to contact the police or the provincial Government. In the summer of 1991, the Waterloo Regional Police Service and the Ontario Provincial Police began a joint investigation into claims of physical and sexual abuse at the school.

In December 1992, a Victim Witness Program site was established in Kitchener, Ontario, with the express purpose of dealing with Grandview.[3] Some women retained lawyers and initiated civil suits. At the same time, a small group of women formed the Grandview Survivor's Support Group ("GSSG") to investigate options for seeking compensation on a collective basis. They also hired legal counsel (whose services were ultimately paid for by the Ontario Government). The group later expanded to include more than 300 women.

The Province decided to pursue, through mediation, an out-of-court strategy to settle Grandview claims. In May 1993, negotiations began between the Government and the GSSG. Over

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[2]R.S.C. 1970, c. J-3.

[3]The Program provided support to the abuse victims, who might become witnesses at criminal trials. Specifically, it offered information about the court process and available community-based support services.

the next 10 months the executive of the GSSG and the group's legal counsel held extensive meetings with counsel from the Ministry of the Attorney General and the Government's Grandview Project Manager in an attempt to draft a compensation agreement. The Government provided funding during the negotiations for a crisis line dedicated to Grandview survivors and for continued participation in the discussions by the GSSG executive.

In early 1994, a Draft Agreement was formulated by the Government and the GSSG executive and put to a vote by the members of the GSSG. Over 127 women participated in the vote, and the Agreement was ratified by over 80%. After Government approval, the program was announced in June 1994.

The Agreement allowed all former residents of Grandview to apply for specified benefits and financial compensation from the Government through an alternative dispute resolution process rather than individually pursuing civil suits. It was a group agreement, but it permitted individual women to choose whether or not to participate in the program. Individuals were required to obtain independent legal advice (for which the Government provided $1,000 per applicant) before electing to seek compensation under the Agreement. Those who elected to do so had to provide a complete release of any claim they might have had against the Government of Ontario for damages arising out of their mistreatment at Grandview. Participation in the Agreement, however, did not restrict the individual's rights to bring criminal charges or civil claims against individual perpetrators of abuse.

An application cut-off date was set for January 2, 1996. Applications received after that date were not automatically rejected, but were considered on a case by case basis.

The purpose of the Agreement was outlined in its Overview:

> The purpose of this Agreement is to engage in a process to afford any eligible person real opportunities to heal and to introduce real hope for a better future ... [It] is designed to address the consequences of "abuse" and "mistreatment" as those terms are defined, of those who were actually resident at Grandview ... It is an objective of the various components of this Agreement to facilitate a path of healing and recognition of self-fulfilment for its beneficiaries. It is hoped that the coordination of the various components, will, as an integrated whole, produce a more accountable and effective response for survivors of institutionalized and sexual abuse.

(a) Details of the Compensation Package

The Agreement provided for three different types of benefits: general benefits (intended to benefit society as a whole), group benefits (for all former residents of the institution), and individual benefits (for those who claimed specific incidents of abuse). An Eligibility and Implementation Committee ("EIC") was established as an advisory body to oversee and superintend the implementation of the benefits package. This committee was composed of two GSSG-appointed members, one Government-appointed member and a chair jointly appointed by the Government and the GSSG. The Agreement also provided funding for the GSSG to enable it to continue to offer support to its members through meetings, outreach and a newsletter.

(i) General Benefits

General benefits were not necessarily confined to benefits to former residents of Grandview. They were defined in the Agreement as "programs, actions or commitments that the Government may undertake or foster and which may provide benefits to survivors of sexual, physical and institutionalized abuse generally."

The Agreement included specific provisions for legislative and research initiatives.

The main legislative initiative outlined in the Agreement was a bill to amend various provincial laws to extend or eliminate limitation periods for commencing civil proceedings in relation to sexual abuse. The Government also reviewed its hiring, training and abuse-reporting practices for programs involving youth in institutional settings or under state supervision.

Three research initiatives were contemplated in the Agreement. First, there was a proposal to evaluate the effect and effectiveness of the Agreement itself. This work was later conducted by Deborah Leach.[4] Results of her study are referred to in the applicable contexts below. Second, a recommendation was made to conduct research to better understand the dynamics of the consequences of abuse and to determine when and how to provide effective intervention. In this regard, the Government supported the production of a video and a booklet entitled "Until Someone Listens." Third, every applicant was given the choice to tell of her experiences at Grandview and have her history recorded.

The idea of establishing a Healing Centre was also discussed but not acted upon. Instead,

[4]Leach, D., "Evaluation of the Grandview Agreement Process: Final Report" (June 1997).

some money was put aside for a needs assessment. However, these funds eventually went back to the Government's general revenue fund.

(ii) Group Benefits

Group benefits consisted of a dedicated crisis line, money for the removal of self-inflicted tattoos and scars, and a general acknowledgement by the Government recognizing the efforts of the GSSG to bring to the attention of provincial authorities the allegations of abuse and to develop a non court-based process to assist the victims. The crisis line and money for the removal of tattoos and scars were available to all former residents of Grandview. Individuals applying to have a self-inflicted tattoo removed were required to swear a statement declaring when they attended Grandview and that the tattoo was inflicted during that time.[5]

The crisis line which was established by the Government of Ontario during the negotiations leading up to the Agreement was continued pursuant to the terms of the Agreement. Again, it was available to any former resident of Grandview without proof that she had been subjected to conduct at the school that could have caused or contributed to her crisis. The crisis line existed for four years and was closed March 31, 1997. Ms. Leach reported that a large majority of the women who accessed the service felt it made a positive difference in their lives. However, some felt that the counsellors were not always sufficiently knowledgeable about institutional abuse or Grandview.

The Government allocated $120,000 for a tattoo removal fund and $50,000 for a scar reduction fund. Fifty-two women had used this benefit as of December 1996, the latest date for which information was available. Ms. Leach found that the impact of tattoo removal was significant in improving self-esteem and the ability to live in the present.

The general acknowledgement referred to above was read out in the provincial legislature by the Attorney General, the Honourable Jim Flaherty, on November 17, 1999. It included an apology to all the Grandview survivors.

(iii) Individual Benefits

[5]The individual also had to have resided at Grandview for at least six months.

A number of individual benefits, including direct financial compensation, were available to former residents of Grandview whose assertions of abuse were accepted. Individuals had to apply for these benefits. Their applications were reviewed by an adjudicator who determined whether the claimant was in fact the victim of abuse and/or mistreatment (as defined in the Agreement) which caused injury or harm and, if so, what financial award was appropriate. An applicant whose claim was validated was also entitled to apply for a variety of additional non-financial benefits that were purchased by the Government from existing service providers on a case-by-case basis. The total Government expenditure on awards and benefits was $16,400,000.[6] The various available benefits are described below.

Successful claimants were entitled to a financial award for pain and suffering as a result of abuse and/or mistreatment. "Abuse" and "mistreatment" were defined as follows:

> 1.1 ABUSE means an injury as a result of the commission of a criminal act or act of gross misconduct by a guard or other official at Grandview or in some circumstances by another ward and includes physical and sexual assault or sexual exploitation. It is acknowledged that sexual abuse includes arbitrary or exploitative internal examinations for which no reasonable medical justification existed and which resulted in demonstrable harm.
>
> Act of abuse is the act that causes injury.
>
> 1.2 MISTREATMENT means an injury as a result of a pattern of conduct that was "cruel" and for which no reasonable justification could exist (arbitrary) and includes conduct that was non physical but had as a design the depersonalization and demoralization of the person with the consequent loss in self esteem, and may involve discipline measures unauthorized by any superior authority. This is conduct that is plainly contrary to the policies and procedures governing conduct at Grandview and the purpose of the governing legislation. Proof must establish a pattern of conduct directed towards the individual personally and errors of judgement will not be sufficient. This conduct may include taunts, intimidation, insults, abusive language, the withholding of emotional supports, deprivation of paternal visits, threats of isolation, and psychologically cruel discipline or measures which were not officially permitted in the management and control of the residents of the facility.
>
> The general environment of Grandview, the discipline and regulation of the conduct of the wards in accordance with policies and procedures established for the governance and management of the institution cannot constitute mistreatment.

[6]Some sources put the figure closer to $12,000,000.

The act of mistreatment is the act or acts that cause the injury.

In order to qualify for a financial award, an applicant had to demonstrate injury or harm which justified compensation beyond a nominal damages award. The range of available awards was from $3,000 to $60,000.[7] The precise amount conferred upon an applicant depended on the nature, severity and impact of the abuse and/or mistreatment. In determining the amount, the adjudicators were directed to use a prescribed matrix as a guide. This matrix set out the minimum and maximum award ranges for various categories of misconduct, and also itemized the type of evidence expected as proof. The adjudicators had the discretion to fix the award within the range prescribed. The matrix is reproduced in full below.

ACTS ALLEGED	HARM/INJURY	EVIDENCE/PROOF	AWARD RANGE
Repeated serious sexual abuse (sexual intercourse anal/oral) & physical beating and threats.	Continued harm resulting in serious dysfunction. Adjudicator applies standards set out in Agreement.	Possible: Medical/ psychological/therapist/ police reports/direct evidence of victim if credible/witnesses/ documentary- conviction of perpetrator.	$40,000.00 - $60,000.
Physical abuse involving hospitalization with broken bones or serious internal injuries.	Harm sufficient to justify award must be demonstrated. Adjudicator applies standards set out in the Agreement.	Same as above	$20,000.00 - 40,000.00 "mid range"
Isolated act of sexual intercourse/oral or anal sex or masturbation with threats or abuse of position of trust.	Harm sufficient to justify award must be demonstrated. Adjudicator applies standards set out in the Agreement.	Same as above	$20,000.00 - $40,000.00 "mid range"

[7]The Agreement provided that this money would not be counted in determining eligibility for Family Benefits and General Welfare Assistance.

No physical interference- forms of "mistreatment" i.e. cruel conduct that was prolonged and persistent. Confinement in segregation alone will not attract an award. Segregation may be justified in accordance with administrative authority. Abusive segregation cannot be.	Long term detrimental impact - conduct must not have been lawful or condoned. The nature of the harm will determine once proof of the acts are accepted whether a minimal recovery or a higher award.	Same as above	$3000.00 on proof of acts of abuse or mistreatment. $10,000.00 - $20,000.00 where serious harm found by the adjudicator.

The Government of Ontario was responsible for 100% of the financial award. The average award conferred was a little under $40,000. In general, financial benefits were awarded for physical and sexual abuse and mistreatment. In certain cases, psychological abuse and mistreatment were compensated, but few awards were granted as a result of psychological abuse only.

Ms. Leach's study found that the vast majority of recipients thought the financial award helped them make a positive change in their lives. Most importantly, it contributed to a sense of validation, gave them some security and independence, improved their ability to take better care of their children and other important people in their lives, and helped them plan for their future with more skills. For a small number of recipients, the award caused difficulties in such matters as money management and demands from others for assistance.

In addition to any direct financial award, an adjudicator was also able to direct the Government to pay service providers additional sums up to $10,000 to cover exceptional medical or dental costs related to the consequences of the abuse and/or mistreatment where no insurance coverage was available.

The Government had established an interim therapy protocol to provide counselling and therapy, pending completion of the Agreement. Former wards were then entitled to apply under the Agreement for access to longer-term counselling and therapy. In order to qualify for such services, the applicant had to submit an application for individual benefits within six months of the ratification date of the Agreement. The application had to be accompanied by a treatment plan prepared by a

therapist experienced in treating cases of abuse, and the therapist had to support the claimant's position that her experiences at Grandview likely caused or contributed to her present circumstances and that counselling was required. Alternatively, an applicant could request an assessment by a Government-approved counsellor.

All applications for counselling were reviewed by the Eligibility and Implementation Committee. Interim counselling services remained in effect pending the review. If a majority of the members of the EIC was satisfied that the requested counselling was appropriate, such services of a value not exceeding $5,000 for a period of one year could be approved. This could occur in advance of validation of the claim, but was subject to confirmation by the adjudicator. Provision was also made for additional funding in appropriate situations. Disputes between the EIC and the applicant (or her treating therapist) were to be resolved by designated independent experts.

In exceptional circumstances, applicants could also obtain up to $5,000 in funding for short-term residential treatment programs. Appropriate evidence of need was required, as well as evidence of the unavailability of alternative private or public funding. Applicants could access individual counselling services following completion of the residential program.

The vast majority of women interviewed by Ms. Leach indicated that the therapy and counselling benefit made a significant difference to them. It helped them with improving their self-esteem, going through the Agreement process, coping with their tragedy, and moving on in life. At the same time, many women were concerned about the limits to the funding. Many were unaware of the limits, and said they would have used the funding differently if they had been aware. Some recommended that the cap on this benefit be eliminated.

The Agreement provided for access to educational or vocational training or upgrading. The Government agreed to pay the "basic costs" of education or vocation programs approved by the EIC. Basic costs were defined to include tuition, books, course materials, a transportation allowance and, where need was established, child care and computer costs. The Government also agreed to pay for psycho-educational assessments to assist applicants in determining a suitable program of study or training. The only conditions of the benefit were that the applicant attend all classes, fulfill all course requirements and successfully complete the course of study. Ms. Leach reported that many applicants thought this benefit was extremely important, especially since education was something stolen from them at Grandview.

Successful applicants could obtain free debt counselling and debt consolidation and budget

assistance. Ms. Leach reported that the reactions of those who availed themselves of this benefit were mixed, some finding it helpful and others finding it shameful.

A contingency fund of $3,000 per validated claim was set up. It was intended to cover expenses for the following matters not covered, or not covered sufficiently, by other benefits: medical and dental needs, child care and travel expenses incurred in relation to attending counselling sessions, books and other materials required for a course of study or therapy, and fees for attending workshops. Applications for specific expenses had to be submitted to and approved by the EIC, and need had to be established. Multiple applications could be submitted, but the money had to be used within two years of the date the Agreement was ratified. This was the most widely-used benefit. Most applicants used it for medical or dental purposes. All said it made at least some positive difference in their lives.

Finally, the Agreement provided that each successful claimant was entitled to receive an individual acknowledgement from the Government of the abuse or mistreatment, recognizing that each of the women was harmed and there could be no justification for the abuse. Delivery of these acknowledgements was delayed until the completion of all related criminal proceedings.

Reproduced below is a chart prepared by Goldie Shea for the Law Commission of Canada detailing the number of applicants who took advantage of the various available benefits as of October 1999.[8]

Grandview - Usage of Benefits

BENEFIT	NUMBER OF WOMEN WHO HAVE USED BENEFITS	PERCENTAGE OF WOMEN WHO HAVE USED BENEFITS
Therapy/counselling	123	91.8
Tattoo/Scar Removal	52	38.8
Contingency Fund	132	98.5
Educational/Vocational Assistance	46	34.3
Financial/Budget counselling	6	4.5

[8]Shea, Goldie, "Redress Programs Relating to Institutional Child Abuse in Canada" (October 1999), p. 33.

Total number of women who used at least one of the Agreement benefits	134	100

(b) The Process

As stated in the Report of the Grandview Adjudicators,[9] the adjudication process had multiple goals. First, it was a forum for the review and assessment of evidence relating to validation of claims and the assessment of damages. To this extent, the hearings were similar to other, more traditional, legal proceedings where judges review exhibits, listen to evidence, and make findings of fact based on legal standards and principles, including the onus of proof. Second, the Grandview hearings were intended to offer the applicants an opportunity to describe their experiences in their own words to someone with authority. Adjudication was to empower the survivors of institutional abuse to define the wrong that was done to them, to explain the repercussions on their lives, to demand accountability and the restitution of their dignity, and to claim official recognition of the injustice.

The procedure for validation of a claim was as follows. Applicants were restricted to former residents of Grandview or its predecessor, the Ontario School for Girls. Each applicant was required to complete an application outlining the abuse and consequent injuries she allegedly suffered. This had to be accompanied by a sworn statement as to the truth of the information given in the application, a statement releasing the Government from any further liability, and a declaration of having received independent legal advice.[10] The application could also be accompanied by supporting documentation gathered by the applicant.

Two investigators appointed by the Government reviewed the information and determined if and when the applicant had been a resident at Grandview. They also reviewed the Crown ward files of the applicants to determine whether there was evidence of corroboration, inconsistency or other information relevant to the application. The application and all related documentation were then submitted to an independent adjudicator for review, assessment and validation.

The adjudicators were all female professionals in the law jointly chosen by the GSSG and the

[9]*Report of the Grandview Adjudicators* (May 13, 1998), p. 10.

[10]The legal advice was to ensure that the applicant understood the terms of the Agreement and the legal implications of signing a release.

Government. Six in total were appointed. As a group, they had expertise in human rights, feminist legal theory, tort law, criminal law, family law, constitutional law, property law, access to justice, health law, aboriginal legal rights, minority language rights and adjudication within administrative tribunals. Feedback from the applicants suggested that it was very important that the adjudicators were female, with many indicating that they would have been uncomfortable discussing the intimate details of their claims with a man. In addition, the fact that one of the adjudicators was a native woman who could appreciate the unique experiences of aboriginal claimants was noted as being very important.[11]

Each applicant was entitled to an oral hearing before an adjudicator. The hearing was held in private and no transcript was maintained. The Government, the applicant and the GSSG were all parties to the proceeding and entitled to submit information to the adjudicator. The Government was entitled to attend the hearings and make representations, although no adverse inferences were to be drawn from the fact that the Government chose not to do so. The applicant was entitled to be represented by counsel. In practice, most hearings occurred without lawyers present.

The burden of proving the claim was on the applicant on a standard of a balance of probabilities. The applicant had to satisfy the adjudicator that the conduct complained of occurred, was not minor, and the injury sustained was substantial and prolonged. The decision of the adjudicator was final and not subject to appeal or other form of judicial review.

Hearings were held in various locations across the country. Efforts were made to select a venue that would accommodate the particular applicant's needs, and to provide as comfortable a setting as possible. As a result, hearings were sometimes held in an applicant's home or in an institution where an applicant was detained.

The hearings were designed to be informal and non-confrontational. Applicants were advised at the start how the hearing would proceed, and were given the opportunity to ask any questions they might have. Applicants were also informed that any notes taken during the proceeding would be private and confidential, and destroyed after a decision was rendered.

Applicants were asked at the outset to promise to tell the truth. The adjudicator then asked to hear about the applicant's experiences at Grandview, and any impact those experiences may have had. The adjudicators sought to give each applicant the chance to tell her own story. Follow-up

[11]Report of the Grandview Adjudicators (May 13, 1998), pp. 5-6.

questions were then asked to clarify confusing points and ensure that all the relevant issues were canvassed. Applicants were always given the opportunity to explain apparent inconsistencies.

According to section 4.2.5 of the Grandview Agreement, in assessing a claim, the adjudicator was obliged to consider the following:

> (A) How long was the claimant in residence?
>
> (B) What was the age of the applicant?
>
> (C) Were complaints made and if so when?
>
> (D) By whom were the acts committed? What was the relationship of the claimant to the person?
>
> (E) What was the frequency of the abuse and mistreatment? Was it an isolated act or a series of acts?
>
> (F) What was the nature and severity of the abuse and mistreatment?
>
> (G) What was the impact on the claimant? What was/is the consequence of the abuse? What treatment has been received for the injuries identified?
>
> (H) Were criminal charges laid; was there a conviction; was conduct criminal in nature? (It is understood that many of the hearings may be concluded before the on-going criminal investigations are concluded, and accordingly, no adverse inference should be made with respect to beneficiaries whose alleged perpetrators have not yet been charged or convicted. Furthermore, neither the laying of criminal charges nor a conviction are preconditions for certification and relief under this agreement.)
>
> (I) Was the claimant a resident of Churchill House?

As suggested above, the types of material reviewed by the adjudicators included the following:

> 1) the applicant's written application outlining the abuse which she alleged that she experienced and describing the injuries suffered;
>
> 2) the applicant's sworn statement as to the truth of her application;

3) a certificate demonstrating that the applicant received independent legal advice regarding her options;

4) a statement releasing the Government from further liability, signed by the applicant;

5) documentation from the applicant's Crown ward file relevant to her claim, such as medical and dental records, reports of discipline, reports from the staff regarding the applicant's behaviour and progress (collected and compiled by the investigator);

6) transcripts from interviews conducted with the applicant by police officers investigating criminal charges, if any existed; and

7) supporting documentation, such as therapists' reports or other medical reports submitted by the applicant.

In practice, the primary focus of the fact finding exercise rested upon the oral evidence given by the applicant herself. The adjudicator assessed the applicant's credibility by observing her demeanour and considering the content of her evidence and any previous statements she had made on the issues.[12] The adjudicators found that the Crown ward files sometimes provided useful information, but were concerned that these records were primarily compiled by the staff of the institution, and therefore might have been coloured by self-interest. As such, they did not always represent reliable accounts of what transpired. Supporting written materials submitted by the applicant (usually reports of therapists, psychiatrists and other medical personnel) were also of some use, but these documents were created long after the applicant's time at Grandview, and thus were not always cogent evidence about what actually happened to the applicant at the school.

Once an application had been validated, the applicant received a decision prepared by the adjudicator.[13] The Agreement stated that the reasons for the decisions were confidential and were not to be published by the parties. At the outset, the four original adjudicators deliberated as a group to establish a template that would be used to structure the reasons for the decisions. This template was developed after consultation with counsel from the Ministry of the Attorney General and counsel for the GSSG. The actual decisions generally conformed to the template, but adjudicators departed

[12]The adjudicators sought to account for factors which might affect an applicant's style of communication, such as culture, race, personality, and emotional and psychological state.

[13]The applicant was also sent a package of information describing the benefits for which she could apply.

from the standard format where particular cases so warranted. Most decisions were, therefore, uniform in structure, but unique in their description of the facts proven in the individual case.

The decisions included both a narrative account of the incidents of abuse and a description of the consequences of the abuse – the harm or injury experienced by the applicant and the effect of the abuse on her life. At the outset, the adjudicators agreed that the account of the incidents should be quite detailed so as to capture the extent and range of abuse and mistreatment that occurred at Grandview, using the applicant's own words to the greatest extent possible. In this way, each decision would create a detailed historical record of what transpired at the training school. By contrast, references in the decision to the detrimental effect of the abuse on the applicant's lives were deliberately left brief to avoid freezing the applicant's life in relation to the damage done, or labelling an applicant in stereotypical terminology. These practices were adopted in light of the goal of the Agreement to make the process one in which healing could take place.

The reasons for the decision were written primarily for the applicant, not for the other parties to the proceeding or as a precedent for other cases. The narrative was designed to recount what the adjudicator concluded had been proven on a balance of probabilities. In addition, the narrative sometimes mentioned an incident which was not compensable, but was a source of pain and frustration for the applicant. The decision thereby sought to provide justification for the adjudicator's findings and also served as a record of the applicant's perspective of wrongs suffered. Feedback from the applicants after receiving their decisions suggested that this aspect of the decisions was very important to them.

Although adjudicators sat individually, each decision was informally reviewed by a second adjudicator before release. Two adjudicators were responsible for reviewing each other's decisions for a defined period of time, with the pairs being changed every few months to ensure overall consistency. The review adjudicator made suggestions regarding changes to the draft decision, but the final determination remained with the adjudicator assigned to the case. Where a particular decision required special or difficult interpretation of the Agreement, drafts were circulated to all adjudicators for comment. The goal of this review process was consistency in the quantum of compensation and the interpretation of the language of the Agreement. In addition, it provided adjudicators with much wider knowledge and exposure to evidence being adduced during the hearings. Adjudicators also held group meetings regularly to review the procedures being used in the hearings and the decisions being rendered. The adjudicators found these meetings extremely useful and recommended that they be incorporated as an on-going and integral part of adjudicators' workload in future adjudicative processes.

In the end, 329 claims were resolved within two-and-a-half years. Most were validated. The adjudicators determined, on a balance of probabilities, that some former residents had been sexually, physically and/or psychologically abused and mistreated at Grandview. They also determined that the abusive treatment contributed to serious, prolonged and substantial harm.

In their Report on the process, the adjudicators suggested that the Agreement process allowed them to make reliable findings of fact, and that it may be preferable to evaluate evidence of institutional abuse without requiring all the elements of the adversarial model of litigation. In her evaluation, Ms. Leach found that applicants also viewed the adjudication process positively. In particular, they liked that the process offered the opportunity, in a relatively safe context, for women to tell their stories and have their experiences acknowledged. One notable area cited for improvement related to the use of more understandable (i.e., less legalistic and complex) literature for use by applicants to assess their rights and access benefits.

3. ONTARIO - ST. JOHN'S AND ST. JOSEPH'S TRAINING SCHOOLS

St. John's Training School was a training school for boys, located in Uxbridge. St. Joseph's Training School was another training school for boys, located in Alfred. Both were operated by the lay order of the Brothers of the Christian Schools under the supervision of the Government of Ontario. Residents at the schools included orphans, truants, Children's Aid Society referrals, juvenile delinquents (as they were then known), physically and perceptually challenged children, "incorrigibles" from reservation schools, and children of broken or poor homes which could not adequately support them. St. Joseph's was closed in the 1970s. St. John's continues to operate as a youth detention centre, under a different name, but it no longer has any association with the Brothers of the Christian Schools.

Allegations of abuse at St. John's and St. Joseph's surfaced publicly in 1990. Following the Winter Commission's inquiry into sexual abuse at church-run institutions in Newfoundland,[14] former residents of both schools came forward with allegations of physical and sexual abuse at the two Ontario schools. This abuse had occurred mainly between 1930 and 1974, with some isolated cases in the 1980s. The Ontario Provincial Police began a extensive investigation in the early 1990s and eventually laid charges against 28 Christian Brothers from both Schools and one employee from St.

[14]Winter, G.A., *Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy*, Submitted to the Most Reverend A. L. Penney, D.D., Archbishop of the Archdiocese of St. John's (St. John's, Nfld.: Archdiocese of St. John's, June 1990).

Joseph's. The charges covered almost 200 counts of abuse, ranging from assault causing bodily harm to indecent assault and sodomy. Some of the accused were ultimately convicted.

Recognizing a commonality of interest, the former residents who had come forward in 1990 decided to form an unincorporated association in order to seek some kind of redress. They named the association Helpline. By December 1990, Helpline had about 300 members.

Helpline proposed that an alternative dispute resolution model be negotiated amongst the Toronto District of the Brothers of the Christian Schools (which ran St. John's), the Ottawa District of the Brothers of the Christian Schools (which ran St. Joseph's), the Government of Ontario and the Roman Catholic Archdioceses of Toronto and Ottawa (the two Archdioceses in which the Schools were located). All parties except the Toronto Brothers agreed to participate, and negotiations began in early 1991. The Toronto Brothers occasionally sat in on the negotiations, but never became an active participant. They also never joined the redress program that was ultimately negotiated.[15]

The negotiation process involved the use of a Convenor acceptable to all parties, as well as the assistance of an expert in alternative dispute resolution. Funding for Helpline was paid by the other negotiating parties (except the Toronto Brothers) on the basis of a cost-sharing agreement arrived at in June 1991. Interim counselling services were offered to Helpline members.

After more than one and a half years of intense negotiations, an Agreement was reached in August 1992. Helpline, the Ottawa Brothers, the Archdioceses of Ottawa and Toronto and the Ontario Government were all "participants" in the Agreement. This Agreement was later ratified by 95.3% of the membership of Helpline,[16] each of whom signed a release waiving any right to sue the participants in civil proceedings. (The waivers did not prevent them from suing the actual perpetrators.) Implementation of the Agreement began in January 1993.

The Agreement entitled former residents of the schools who had been abused to financial compensation as well as access to various other benefits. Specifically, the Agreement stated that the

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[15]Legal action was later commenced against the Toronto Brothers by several Helpline members. The Toronto Brothers began making financial offers to the former students, some of whom accepted and some of whom did not. Details of the settlement agreements are not available because they are considered private agreements between the former students and the Catholic Church.

[16]For purposes of the vote, the membership of Helpline was defined as the members of Helpline "with whom it was in active contact, which in the opinion of the Chair [were] representative of the overall profile of Helpline members."

objective of the package was to meet the participants' "collective moral responsibility to work to heal the impact of abuse in those cases validated through access to the opportunities contained in [the] Agreement and to help restore lost trust in the spiritual and secular institutions of ... society." A commitment to help eradicate abuse generally and its underlying causes was said to transcend the Agreement.

In the end, the total number of Helpline claimants was 1,025. All the claims have now been resolved. The costs of the Agreement, including the implementation costs and the operating expenses of Helpline,[17] were borne by the Government, the Ottawa Brothers and the two Archdioceses.

(a) The Process

All former students of St. John's and St. Joseph's were eligible to apply for benefits. Claimants were processed in three groups. Group I consisted of 354 former students who were members of Helpline or who had made a statement to the police as of June 24, 1992.[18] Group II consisted of 241 former students who had joined Helpline or made a statement to the police after June 24, 1992, but before April 1, 1993.[19] A third group, known as post-Group II, consisted of both former students on a list submitted by Helpline on March 3, 1995, and any individuals who came forward after that date. As explained below, the process and available benefits for claimants from post-Group II varied somewhat from that for claimants from the first two groups.[20]

Each claimant had to fill out a sworn Application for Compensation detailing, among other things, the nature of the abuse experienced, the injuries suffered, any treatment received, and the particulars of any report made to the police about the abuse.[21] The claimant was also required to sign an Authorization for Release of Information, consenting to the release of information from treating doctors, employers, insurance and pension companies, and various public bodies. Supporting

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[17]A maximum of $120,000 was designated for Helpline's operating expenses.

[18]Spouses of these individuals who had become widowed after January 1, 1990, were also eligible to apply.

[19]Again, spouses of these individuals who had become widowed after January 1, 1990, were also eligible to apply.

[20]The dates defining the various groups were of no particular significance. Cut-off dates were simply required for budgeting purposes, and to allow the participants to decide whether to continue the program.

[21]If the claimant had not made a report to the police, he was asked to explain why he had not.

documentation could be given along with the application. Collectively, all this information was called the Claim Form.

A Reconciliation Process Implementation Committee ("RPIC") was established to help implement the Agreement. RPIC was composed of two representatives of Helpline, one representative of each of the other participants, and an independent third party who sat as Chair.[22]

Within two weeks of receipt, RPIC would review each Claim Form and make any comments it considered appropriate.[23] It would then forward the materials to a member of the Ontario Criminal Injuries Compensation Board who had been designated to hear claims under the Agreement ("CICB-designate"). RPIC would also forward any records that it thought might support or undermine any part of the claim.

RPIC had the right not to forward claims that it deemed to be unfounded. These claims were rejected, without prejudice to the claimant's right to reapply. A claim could only be rejected if all the members of RPIC agreed that it was unfounded. In the absence of consensus, the Chair determined whether the claim would be forwarded to the CICB-designate without qualification or with the recommendation that it be closely scrutinized. In practice, some claims were returned to the claimants, together with the releases they had signed. They were told that they were free to pursue civil actions, if they saw fit.

The CICB-designate determined whether the claimant was entitled to an award for pain and suffering from abuse suffered at one of the schools. Abuse was defined as an injury (as defined in the *Compensation for Victims of Crime Act*)[24] resulting from a criminal act. In making the determination, the CICB-designate was directed to consider the Claim Form, the comments of RPIC, and any evidence and information from the claimant. The burden to prove the abuse rested with the claimant on a balance of probabilities.

Each claimant was entitled to a hearing before the CICB-designate. The hearings were private

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[22]Douglas Roche, now Senator Roche, who had acted as Convenor during the negotiations, was named in the Agreement as Chair. There is no doubt that Mr. Roche, a prominent Catholic and former ambassador, brought a great deal of credibility to the process; his involvement greatly facilitated the negotiations that led to agreement.

[23]If the claim was not complete, RPIC would assist the claimant in perfecting it.

[24]R.S.O 1990, c. C-24.

and claimants were directed not to discuss evidence revealed at the hearing with anyone until all the hearings had been completed. The claimant, his family, legal or other advisor, and counsellor were entitled to attend the hearing, as were RPIC and the Recorder (a person designated to make a record of the events which occurred at the schools). The claimant was also entitled to request the assistance of legal counsel. If RPIC considered the request reasonable, it would make efforts to ensure that counsel was made available through (what was then called) the Ontario Legal Aid Plan.

At the hearing, the claimant would tell the CICB-designate his story of what happened. The evidence was given under oath, and the claimant was advised of the seriousness of not telling the truth. The CICB-designate evaluated the credibility of the claimant's evidence.

A claimant could waive an oral hearing if RPIC determined that the claim was complete and supportable without a hearing, and the CICB-designate concurred that the determination may be made without a hearing.

For claimants in Group II, a provision was added that allowed participants not satisfied with an application to subject the claimant to videotaped testimony prior to the hearing. This option was exercised for 15 claimants, none of whose claims were denied by the CICB-designate. Later on, a system of documentary hearings was initiated for Group II claimants, for which a personal appearance by the claimant was not required,[25] although claimants retained the right to a second, personal appearance if they so desired.

Once a determination was made that the claimant suffered abuse, the CICB-designate would make an award for pain and suffering. In making the award, the CICB-designate was directed to consider the Claim Form, any information from the claimant, as well as "such materials as it (sic) deems appropriate." For claimants resident in Ontario, the CICB-designate would also make a determination, based on "appropriate material," of the counselling costs for the benefit of the claimant and his or her family. No appeal was available from any of the CICB-designate's decisions.

The total number of Group I and II claims considered was 595. Of these, 580 (97.5%) were validated. Only 15 were denied. Douglas Roche, the former Convenor and Chair of RPIC, said later that the process proved to be victim-friendly.[26]

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[25]This could only occur with the consent of all the participants to the Agreement.

[26]Roche, Douglas, *Reconciliation: An Ongoing Process. RPIC Chairman's Personal Report*, p.7.

For post-Group II claimants, a new Memorandum of Understanding was signed by the Government of Ontario, the Ottawa Brothers of the Christian Schools and the Archdioceses of Toronto and Ottawa. The Memorandum indicated that the participants wished to conduct the process in an accelerated manner. The RPIC administrative process was abandoned, and claims were sent directly to the Abuse in Provincial Institution Office of Ontario. The participants wrote to each claimant by March 31, 1996, and provided them with background information, a release form, an application and other pertinent information. A claimant had until July 1, 1996, to send in his application.

Each application was processed by a CICB-designate by either a documentary or oral hearing, although any of the participants or the claimant could insist upon an oral hearing. A participant was entitled to submit comments on the application. Any such comments were sent to all the other participants and the claimant. To enable the claimant to respond to comments of a legal nature, legal services up to a maximum of $450 were provided.

After reviewing all the information, the CICB-designate decided whether abuse took place and harm resulted. If so, an appropriate award for pain and suffering was granted. No appeal was available.

(b) Details of the Compensation Package

Both financial and non-financial benefits were available under the Agreement to validated claimants. The details of the various benefits available to Group I and II claimants are outlined below. The available benefits differed slightly for post-Group II claimants. Details of those benefits are outlined at the end of this section.

As indicated above, each claimant whose claim of abuse was validated was entitled to an award for pain and suffering. The Agreement contemplated that an average award would be $10,000.00. As it turned out, the average award was $10,258 for Group I claimants and $8,129 for Group II claimants.

The Government of Ontario was responsible for covering the cost of the awards. The Agreement stipulated that the Government was to pay the award to RPIC within 30 days of validation or eight months of ratification of the Agreement, whichever was later. RPIC was then responsible for disbursing the funds to the claimant. A claimant could receive the award as a lump-sum payment

or request that all or a portion of the award be paid as a structured settlement over a number of years. A claimant could also request investment counselling advice.

For each validated claimant from St. Joseph's, Additional Compensation for Pain and Suffering equal to 1.6 times the CICB-designate award was made by the Ottawa Brothers of the Christian Schools. Where a claimant was abused at both St. John's and St. Joseph's, the Ottawa Brothers contributed according to the proportion of time the claimant spent at St. Joseph's. The funds were disbursed through RPIC, and were to be paid within 30 days of the award or 18 months of ratification. A total of $5,708,000 was disbursed to Group I and II claimants under this heading.

The Ottawa Brothers also contributed as Discretionary Compensation a further 25% of the award they granted as Additional Compensation for Pain and Suffering. These funds were distributed as directed by the CICB-designate on a pro rata basis. A total of $1,427,000 was disbursed to Group I and II claimants under this heading. The money was distributed after all the Group I and II claims had been considered.

During negotiations leading to the Agreement, it was always hoped that the Toronto Brothers of the Christian Schools would sign on to the Agreement. Mr. Roche has indicated that when that did not occur, Helpline found itself in a dilemma. The organization wanted to maintain solidarity among its members, irrespective of which school they attended, but the former St. John's students could not expect to receive the Additional and Discretionary Compensation that would have come from the Toronto Brothers. In order to resolve this situation, and to raise funds to launch legal action against the Toronto Brothers, Helpline devised an Internal Sharing Agreement, whereby former St. Joseph's students would share their extra compensation with their St. John's colleagues, with a certain amount dedicated for anticipated legal expenses. Additional and Discretionary Compensation funds were thereafter paid not to individual claimants, but to a holding company that allocated the funds accordingly. Mr. Roche has noted further that when the Toronto Brothers managed to settle claims with some former students of St. John's, difficulties arose when the St. Joseph's members did not receive back the monies advanced under the Sharing Agreement.[27]

Each of the participants other than Helpline jointly contributed $3,000 per successful claimant to an Opportunity Fund. This was a fund intended to assist claimants with medical and dental needs, vocational rehabilitation, educational upgrading, and literacy training. A validated claimant (or a member of his family) was eligible for such assistance when the claimant expressed such a need, it

[27] *Ibid*., pp. 9-10.

appeared that the need was realistic and that the claimant might be expected to benefit, and the need could not readily be met by other private or public programs. The assistance was available as of 12 months after the date of ratification. The amount of assistance was determined by RPIC, but could not exceed $3,000 per claimant until 12 months had passed since the last claim was dealt with by RPIC. After that date, the funds were disbursed until exhausted on a first come first served basis. As of June 30, 1996, 547 validated claimants had been paid a total of $643,271 out of the fund.

A concern was expressed during the negotiations by some members of Helpline that they had not been paid for menial and farm labour performed during their stays at St. John's and/or St. Joseph's. The Ottawa Brothers denied owing any such wages, but as a gesture of good faith contributed money towards wage loss. The money was paid six months after ratification and distributed according to a formula worked out by Helpline. The total funds disbursed for Groups I and II amounted to $283,500.

Successful claimants were entitled to assistance with counselling costs for both themselves and their families. As noted above, for residents of Ontario the CICB-designate would make a determination of counselling costs at the same time as making an award for pain and suffering. These counselling costs were borne by the Ontario Government, which entered into an agreement with the Family Service Centre of Ottawa-Carleton. The Centre determined the needs of claimants and approved service providers. Once a treatment plan was in place, the Government disbursed the funds. Counselling requests were only entertained for a maximum of five years, unless the Government authorized an extension.

The counselling costs of those claimants and claimants' families who resided outside of Ontario were paid by the Ottawa Brothers and the Archdioceses of Toronto and Ontario. Each participant contributed $250,000 to a fund administered by RPIC.

Four hundred and sixty-eight individuals in Groups I and II took advantage of the counselling assistance, for a total cost of $1,570,561. In-province counselling paid for by the Ontario Government accounted for approximately 80% of these costs. Out-of-province counselling covered by the other parties accounted for the rest.

The importance of collective and individual apologies was recognized in the Agreement. However, there was no specific provision for the giving of apologies; the participants simply agreed to develop criteria to address the issues of entitlement, content and timing of apologies. This was done so as not to prejudice any related criminal proceedings. The participants later signed a

confidential Companion Agreement. That Agreement entitled all validated claimants to request a personal apology "by a particular individual or representative of the participant making the apology." One hundred and nineteen claimants requested such apologies. The Government of Ontario and the Archdioceses of Toronto and Ottawa also delivered separate public apologies.

The participants to the Agreement stipulated that they were committed to ongoing research and public education with respect to the prevention of child abuse. In that regard, the Agreement spelled out measures already taken by the Ottawa Brothers and the Archdioceses of Toronto and Ottawa in response to the St. John's and St. Joseph's experience. Among other things, the groups had adopted new policies on how to respond to allegations of child abuse, and had funded educational programs about such abuse. The Government of Ontario also committed itself to developing and improving policies and strategies directed at the prevention and early identification of child abuse. The Ministry of the Solicitor General and Correctional Services subsequently adopted several different initiatives in pursuit of those goals.

The last element of the Agreement was provision for a Recorder. The Recorder's task was to record the experiences of each person who attended or worked at either school and who wished to be heard. The participants believed that the abuse should be memorialized so that lessons could be learned and similar events prevented through public education. The Recorder was also required to prepare a report containing an outline of the relevant history of the schools and recommendations designed to assist in the prevention of abuse in institutional settings. This Report was submitted to RPIC on September 30, 1995.

A total of $14,500,000 in cash benefits was awarded to validated claimants in Groups I and II. The highest amount paid to one claimant was $107,944, the lowest $2,500. An average of $33,700 per claimant was paid out in awards, benefits and support costs.

As noted above, a separate Memorandum of Understanding was signed to deal with post-Group II claims. In many respects, the benefits available under the Memorandum were the same as under the earlier Agreement. However, there were some differences. Discretionary Compensation was no longer available. Money for lost wages was no longer given to claimants. Instead, the Ottawa Brothers agreed to donate $200 in the name of each validated claimant to the Family Service Centre of Ottawa-Carleton to further public education in societal response to child abuse. Counselling both in and out of Ontario was still available, but only for one year (absent demonstrated need for an extension). The maximum amount available for counselling was $10,000 per validated claimant. The claimant's immediate family was only entitled to short-term counselling based on

clinical need. Finally, money was no longer contributed to an Opportunity Fund. Instead, the Archdiocese of Ottawa and the Ontario Government agreed to pay each St. Joseph's validated claimant $3,000 to use for educational and medical purposes. The Archdiocese of Toronto agreed to pay the same amount to St. John's validated claimants.

4. ADDITIONAL OBSERVATIONS ON ONTARIO INSTITUTIONS

There are differences between the approaches agreed upon by the Ontario Government for responding to the Grandview claimants as opposed to the St. John's and St. Joseph's claimants. Although this is explained, in part, by distinctions between the two situations and the negotiations that accompanied each, it also reflects the fact that the Helpline agreement predated Grandview. Lessons learned were incorporated into the more detailed Grandview agreement.

As described earlier in this Report, the Nova Scotia Government invited Tom Marshall, Q.C., one of the architects of both Ontario programs and a senior official with the Ontario Ministry of the Attorney General, to explain the Ontario approach to Cabinet and other officials. Mr. Marshall also met with my staff on several occasions, for which I am grateful, to outline some of the nuances of the Ontario programs not necessarily captured in the documents. I wish to highlight several here.

In both Ontario programs, the formation of a claimant or survivor advocacy group was regarded as fundamental to the creation and implementation of the agreements. These groups provided a single point of access to claimants. They gave those claimants ownership of the programs in a way that multiple lawyers, each representing one or more claimants at a negotiating table, might not. The direct involvement of the advocacy groups with the Government promoted a degree of trust, and facilitated reconciliation, healing and a sense of empowerment on the part of claimants. Marshall was also of the view that the advocacy groups recognized the detrimental effect that false claims would have on the overall credibility and success of the program and, as a result, engaged in some self-regulation or screening of claims brought forward, as did counsel on their behalf. Indeed, he felt that the legal profession must assume some ethical responsibility in this regard, and not just take a story and put it forward without any scrutiny or introspection as to its truth.

Although the lawyers for each of the advocacy groups played an important role in the development of the agreements, they ultimately had a much diminished part in the implementation of the agreements. Most claimants chose to be unrepresented by counsel during the fact finding process.

Like the Nova Scotia Compensation Program, both Ontario programs ran concurrently with extensive police investigations. Indeed, a number of criminal prosecutions also took place. Mr. Marshall advised that the programs recognized the importance of not interfering with or harming ongoing criminal investigations or prosecutions. Claimants were not assured that their claims for compensation would be kept confidential. On the contrary, they had to be prepared to disclose to the police. Indeed, many claimants who alleged serious abuse were directed to the police who took their formal statements.

The programs recognized that compensation could be awarded prior to the conclusion of any related criminal proceedings. Nonetheless, in practice, a number of claims were deferred until the completion of the criminal process. As well, the police shared information with the programs as to the product of their investigations and the veracity of individual claimants. This information was utilized in evaluating the merits of the claims.

Neither Ontario program had to contend with multiple claims of abuse directed against current staff members. Mr. Marshall recognized that this represents a significant distinction between the Ontario and Nova Scotia situations. In his view, this factor might well compel a redress program to defer processing an application for compensation until any existing criminal proceedings against a current employee are completed. (Indeed, this is generally the way in which this issue was dealt with when it arose in connection with alleged abuse at the Sir James Whitney School for the Deaf in Belleville, Ontario.) As well, Mr. Marshall felt that a mechanism would have to exist to permit such employees to be heard before the completion of the criminal process.

5. ONTARIO - GEORGE EPOCH

Father George Epoch was a Roman Catholic priest and a member of the brotherhood of Jesuit Fathers of Upper Canada ("the Jesuits"). He served the native communities on the Saugeen and Cape Croker reserves between 1969 and 1983. He was then transferred to Holy Cross Mission in Wikwemikong, where he stayed until his death in 1986.

Father Epoch sexually abused a number of the male and female residents of the reserves during his tenure. After his death, the community of Cape Crocker began to demand that the Jesuits acknowledge the abuse and compensate the victims. Twenty-two lawsuits were also filed by residents of the Cape Crocker reserve.

The Jesuits responded to the claims by conducting an investigation into Father Epoch's actions. It uncovered an extensive history of sexual abuse by the late priest. The Jesuits accepted moral but not legal responsibility for the abuse, and attempted to help the victims by providing financial assistance through an informal program known as "Appropriate Assistance." The program was not a success. Funds were distributed somewhat arbitrarily – some victims obtained compensation while others did not – and no provision was made for counselling or other benefits. In 1993, after spending approximately $2,000,000, the Jesuits abandoned the program, believing that few concrete results had been achieved.

On August 30, 1992, the Ontario Jesuit community issued a public apology for the abuse. Some informal meetings followed between a small group of victims and the Jesuits. Both parties wanted to achieve reconciliation, and formal negotiations began in 1993 towards an alternative to traditional civil litigation. Legal counsel on behalf of the victims and the Jesuits conducted the negotiations, assisted and advised by a neutral third party who had experience in such matters. Funding for the negotiations was provided by the Jesuits.

The negotiations were ultimately successful. On October 31, 1994, the Reconciliation Agreement between the Primary Victims of George Epoch and the Jesuit Fathers of Upper Canada was ratified. The "primary victims" were a number of women and men who alleged that they had been abused by Father Epoch on the reserves. Additional primary victims ratified the Agreement over time. In the end, a total of 97 ratified the Agreement.[28]

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[28]Eleven individuals who claimed they were abused but did not ratify the Agreement instituted civil proceedings against the Jesuits and the Diocese of Hamilton for the abuse. As of July 24, 2001, the Jesuits had settled with each of the litigants. Proceedings against the Diocese of Hamilton were still ongoing.

The spirit and objective of the Agreement were reflected in its Overview:

> The Participants have agreed that the healing of all those who were abused by George Epoch is most likely to occur through a process of reconciliation. Thus this Agreement represents the best alternative for those who were abused. The Jesuits wish to provide benefits that are accessible, fair and just, to those victims whose claims of abuse are validated. Moreover, the reconciliation process also benefits the Jesuit community. For the Jesuit Order recognizes that it has a moral responsibility to work to heal the impact of abuse on the victims, and to help restore lost trust in the spiritual and secular institutions of our society.

Applications for benefits under the Agreement were accepted until May 1, 1995. The program closed at the end of 1998.[29]

(a) The Process

All persons who had been subject to "physical sexual abuse" were entitled to apply for benefits under the Agreement. The Agreement did not provide a definition of physical sexual abuse. A condition of every application was that the claimant release the Jesuits, the estate of Father Epoch and the Diocese of Hamilton from any further claims for compensation arising out of the abuse.

A claimant began an application for benefits by completing a Claimant Information Form and Request for Apology. The Form sought information as to the particulars of the claimant, as well as the details of the claimant's past and present medical treatment. The claimant was also required to complete a Story of Abuse, outlining the details of the abuse committed by Father Epoch, the psychological injuries suffered as a result, and the particulars of any previous reports of the abuse made by the claimant to any person in authority. If the claimant had not reported the abuse, he or she was asked to explain why. Claimants were assisted in completing these forms by the Assessor, the person responsible for deciding whether to validate the claim.

The application forms were received by the Reconciliation Implementation Committee ("the Committee"). The Committee was composed of one representative of the primary victims, one representative of the Jesuits, and an "independent and impartial" Chair. It was responsible for

[29]Some primary victims who ratified the Agreement subsequently instituted civil proceedings against the Jesuits and the Diocese of Hamilton, claiming that they did not agree to the compensation program with full knowledge and awareness of the consequences. As of July 24, 2001, the Jesuits had settled with all the litigants. Proceedings against the Diocese of Hamilton were still ongoing.

ensuring the proper implementation of the Agreement. It also appointed the Assessors. It did not review or evaluate the applications for benefits. One hundred and fifty thousand dollars was set aside for its work.

The Assessors were responsible for conducting the validation process. Two Assessors were appointed. Both were aboriginal with a community or social work background. Neither had legal training.

The Assessor reviewed the application completed by the claimant, as well as any supporting documentation provided. The Assessor also conducted one or more private interviews with the claimant "in order to encourage a spontaneous, detailed statement." All information was received in confidence.

In evaluating the claim, the Assessor was entitled to consider the statement-validity analysis developed by John Yuille of the University of British Columbia. Yuille was a professor of psychology who had developed a method for determining the validity of a claim, based on "the presence or absence of certain characteristics, which are typical of how humans recall and describe remembered events, particularly in the area of sexual abuse."

The Assessor determined a claim on a balance of probabilities. If the Assessor found that the claimant was physically sexually abused by Father Epoch, then the claim was validated, and there was no appeal. If the claim was not validated, the claimant was entitled to repeat the application process with the second Assessor, who was available on a standby basis. The second Assessor could either validate the claim or reject it. In either case, there was no further appeal. In the end, 83 of 97 claims were validated.

The Jesuits paid for the costs of the validation process. The Agreement stipulated that the costs were not to exceed $40,000.

(b) Details of the Compensation Package

Each validated claimant was paid $25,000 as financial compensation for the abuse. The money was paid by the Jesuits and delivered to the claimant within 30 days of validation. However, each claimant had the option of receiving payment periodically over time or of placing the money in a trust fund for the benefit of the claimant and his or her family. The Agreement stipulated that the

compensation was deemed to be an award for pain and suffering, and thus it was generally not subject to income tax. It was also excluded from income for purposes of determining eligibility for social assistance payments.

The Jesuits also agreed to pay up to $25,000 for the services of a financial consultant. The consultant was named by the Committee, and offered financial counselling to validated claimants.

Within 30 days of validation, each claimant was sent an application form for seeking payments from a Vocational Opportunity Fund. This was a fund dedicated to providing assistance to the claimant and his or her family for educational upgrading, vocational training, and medical and dental treatment. The maximum available award (for claimant and family) was $4,000. No additional money was set aside for the fund. Instead, payments came out of the $150,000 allocated to the Committee for its fees and expenses. Applications for payments were reviewed by the Committee, and all payments were made as directed by the Committee. The Agreement stipulated that the Committee was to make awards based on the best interests of the validated claimant.

Every validated claimant received an individual written apology from the Jesuits, delivered within 30 days of validation. Claimants submitted a request for an apology along with their application for benefits. They were entitled to outline what they wished the apology to contain, and the Jesuits agreed to comply with any reasonable requests in that regard. If the Jesuits did not consider a request to be reasonable, they were entitled to seek the opinion of the Chair of the Committee. The Chair's decision as to whether the request was reasonable was binding.

The Jesuits also agreed to publish an institutional apology, in which they expressed their "sorrow, regret and humility" for Father Epoch's acts. The apology was sent to the Chiefs of the Band Councils at Cape Crocker, Saugeen and Wikwemikong, with a request that it be printed in Band newsletters. It was also sent to the principal newspapers serving each of those communities, again with a request that it be published. A model homily based on the institutional apology was sent to the parishes where Father Epoch served, to be delivered by parish priests at a Mass dedicated to victims of child abuse. All claimants were notified by mail of the dates and locations of these Masses.

All claimants were entitled to receive counselling services of various types (including individual and family counselling, group counselling, self-help support teams, and telephone crisis intervention). Eligibility was not dependent on validation of a claim, but simply upon submission of a claim. Family members of claimants were also eligible for counselling services, although priority was given to those who were actually physically sexually abused by Father Epoch.

The Jesuits contributed $400,000 towards the establishment of a multi-faceted counselling program. This was a program in which various therapists and support personnel were specifically contracted to provide individual and family counselling services to claimants and their families. It lasted for three years, and was established and supervised by a Counselling Advisory Group ("the CAG"), made up of one representative of each of the Jesuits, the primary victims and the "applicable Chiefs and Council." The CAG was accountable to the Committee. A Co-ordinating Therapist was hired to supervise and direct the contract therapists.

The Jesuits also contributed an additional $100,000 for discretionary counselling. This money was used to permit primary victims to seek counselling outside of the established counselling program. The victim's choice of therapist for discretionary counselling was subject to the approval of the CAG.[30]

The frequency and length of counselling for particular claimants was determined at the discretion of the therapists providing direct clinical services, subject only to the financial limitations of the program and the overriding discretion of the Co-ordinating Therapist, the CAG and the Committee. Efforts were made to make the counselling services geographically accessible to the claimants. The CAG was also directed to maximize the available counselling services by applying for access to cost-shared counselling programs funded by one or both of the federal and Ontario Governments.

A Recorder was appointed by the Committee for the purpose of memorializing the history of abuse by Father Epoch. The Recorder afforded a private interview to any claimant who wished one, as well as to anyone else who had relevant information and who wished to be heard. He outlined the abuse in a Report to the Committee, and also made observations and recommendations designed to assist in the prevention of future abuse in institutional settings. A copy of the Report was sent to all validated claimants.

The total cost of the Agreement was approximately $2,500,000. All expenses were borne by the Jesuits. The amount allotted for counselling was not all spent, and the remainder was released for use in education programs for the prevention of sexual abuse.

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[30]The CAG was entitled to consider the qualifications of the therapist, the prospective benefit of the proposed therapy to the victim, and "any other criteria which the Committee deem[ed] to be reasonable."

6. NEW BRUNSWICK

In December 1992, a former employee of the New Brunswick Training School at Kingsclear, Karl Toft, was convicted of having sexually assaulted a number of former students at the school. This brought to public attention the issue of institutional abuse in New Brunswick. A Commission of Inquiry was subsequently held, and a compensation program established in an attempt to provide redress to those who were victimized while under the care of the Province.

The New Brunswick Training School at Kingsclear was an institution operated by the Ministry of the Solicitor General. It was home to minors who had committed delinquencies, as well as to children who had committed no crimes, but who were wards of the state awaiting placement in foster care.

In 1985, a counsellor at the school reported an incident of sexual molestation involving Mr. Toft and a male student. Toft was transferred as a result of the report, but no other action was taken. A few years later, a colleague and three other male students filed further complaints of sexual assault against Toft. The regional police and the RCMP investigated the complaints, but no charges were laid. Toft was later rehired at the school to work at a summer camp.

Toft was finally arrested in September 1991 and charged with 27 counts of sexual assault. Twelve additional charges were laid in 1992. He ultimately pleaded guilty to 34 counts of sexual assault and was sentenced to 13 years in prison.

Two more individuals have since been convicted of abusing child residents of New Brunswick institutions. Another was charged but not convicted. A fifth has been charged and will be tried in the near future.

On the same date that Toft was sentenced, the New Brunswick Government set up a Commission of Inquiry headed by the Honourable Richard L. Miller, a former Justice of the New Brunswick Court of Queen's Bench. The Inquiry investigated allegations of physical and sexual abuse at three provincial institutions: the New Brunswick Training School at Kingsclear, the Boy's Industrial Home in Saint John and the Dr. William F. Roberts Hospital School.[31] The Boy's Industrial Home was the predecessor institution to the School at Kingsclear. The Roberts Hospital School was a facility operated by the New Brunswick Department of Health for mentally challenged minors and

[31]The Miller Report paid special attention to how the Toft case was handled by the authorities.

other wards of the state.

Mr. Miller released his Report in February 1995. Included amongst his recommendations was one for the creation of a compensation program. In June 1995, the Government responded to this recommendation by establishing the Compensation for Victims of Institutional Sexual Abuse Program.

The stated objective of the program was "to allow for the orderly, appropriate, timely resolution of claims, made against the Province, by persons who indicate they were sexually abused, by employees of the Province" at one of the three institutions examined during the Miller Inquiry. Lawyers from the New Brunswick Department of Justice and those representing the victims had established a process through which settlements could be negotiated. It was hoped that this would provide an opportunity to address legitimate claims outside of the court system.

The program commenced on June 8, 1995. On August 29, 1996, the Department of Justice announced that the Program would end the following day. In a press release, the Minister of Justice, the Honourable Paul Duffie, explained the reasons for the termination:

> [T]his package has been in effect for 15 months, and now I believe that it's time to bring closure to the process ... I believe that at this point, the majority of claims have been filed and are currently being investigated and processed.

Claims received after August 30, 1996, were initially treated as ordinary civil court actions, but on August 19, 1999 the Government re-opened the program and extended the deadline to November 19, 1999. This was done to accommodate claimants who had been unable to file a claim within the initial claim period.[32]

By June 15, 2001, a total of 413 claims had been received. Two hundred and eighty-four of them had been settled, resulting in a payout of $10,159,744.66.

(a) The Process

All persons who had been sexually abused by an employee of the Province at one of the three

[32]Any claim made under the renewed program was subject to the terms of the New Brunswick *Limitations of Actions Act*, S.N.B., c. L-8. The Government had agreed not to plead limitations in the initial process.

institutions were eligible for compensation. Physical abuse was not compensable under the program.

There was no formal organization representing claimants in the process. They were encouraged to retain the services of counsel, but they were free to proceed without one. As it turned out, about 20 different lawyers represented all the claimants. Counsel were not permitted to charge a fee greater than 20% of the total compensation paid to a claimant. Legal fees were paid by the claimants.

Claimants commenced an application for compensation by filling out a statement of claim describing the actions of the alleged perpetrator. This statement was delivered to the Legal Services Branch of the Department of Justice, where it was reviewed by lawyers employed by the Province. Claimants were eligible for benefits when the Government was satisfied it was likely the claimant had suffered the harm alleged.

In order to arrive at an opinion, the Government usually requested authorization to review the contents of the claimant's medical files, psychological reports, young offender files, and the like. A claimant was also asked to consent to the release of all information relating to him or her which was obtained in the course of the investigation and conduct of the Miller Inquiry. None of this information was released to the public.

The claimant was interviewed by a lawyer from the Department of Justice and asked to recount in detail the actions that were committed against him. The Government had the right to ask that the claimant be sworn and the testimony transcribed. The Government could also ask that the claimant be psychologically tested, although no testing could occur without the claimant's consent.

Whenever a name was provided by the claimant, the alleged abuser was contacted by the Government to obtain his or her side of the story. If he or she was still employed by the Province, the relevant department was also contacted.

After reviewing all of the available information, the Government chose whether to accept or reject the claim:

- If it appeared that the claimant did in fact not suffer sexual abuse, as claimed, while in the care of the Province, the claim was refused. The claimant could then decide to either withdraw the claim (and possibly sue the Government instead) or avail himself or herself of the adjudication process described below.

- If it was deemed "likely that harm was done to the claimant," a determination of the severity of the harm was made and an offer, in keeping with the amounts offered to other claimants who suffered similar harm, was made to counsel for the claimant.[33] If it was accepted, it was processed as outlined below. If it was not accepted, the amount could be negotiated. If an agreement could not be reached after a reasonable effort at negotiation, the claimant was permitted to refer determination of the award to an arbitrator. Alternatively, the claimant could decide to opt out of the program and proceed with legal action in the normal course.

In the end, only allegations against the five employees who were charged criminally were considered credible by the Government.

As indicated above, in cases where the Government and the claimant did not agree on the veracity of the claim and/or the quantum of damages, the matter could be referred to an independent arbitrator.[34] The procedure for the arbitration hearing was based on the New Brunswick *Arbitration Act* of 1973[35] (although the parties could agree to dispense with some features of the Act). It was an informal proceeding in which the rules of evidence were relaxed. Evidence could be presented by the Province and the claimant, but no witness could be forced to testify. Damages were proven in the same manner as in a civil case.

The arbitrator decided on the veracity of the claim being presented and, if necessary, the quantum of damages. The decision was binding and not subject to appeal. Judicial review could be sought, however, pursuant to the normal rules of court for such matters. In total, 14 cases went to adjudication. Ten were decided in favour of the Province and four were decided in favour of the claimant.

In cases where the Government and claimant agreed on both the veracity of the claim and the quantum of damages, the settlement recommendation was forwarded to various other departments of the Government for approval and verification:

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[33]The amount of the offer was based upon an award grid developed by the Solicitor General's office in light of past compensation awards and the nature of the abuse suffered. The grid was never made public.

[34]The same arbitrator was used for all cases to ensure consistency.

[35]R.S.N.B. 1973, c. A-10.

- The recommendation was first sent to a policy advisor at the Department of the Solicitor General. The advisor would examine the facts of the case and determine whether the amount appeared to fall within the guidelines of the compensation program and the normal parameters for claims of a similar nature. If it did, the advisor would forward the recommendation to the Director of Policy Planning and Public Affairs.

- The Director of Policy Planning and Public Affairs would determine whether the recommendation was "satisfactory." If it was, the Director would order the Director of Financial Services to prepare a cheque for the amount suggested.

- The Director of Financial Services would determine if he was "in accord." If he was, a cheque in the appropriate amount would be prepared and sent to the Department of Justice lawyer in charge of the case.

- The Department of Justice lawyer would examine the cheque and determine if it was satisfactory. If it was, he or she would deliver it to counsel for the claimant.

This multifaceted approval process was not required for damage awards ordered by the arbitrator. Instead, a cheque would simply be issued by the Director of Financial Services and given to counsel for the claimant. In all cases, funds would only be disbursed after the claimant had released the Province from further liability in relation to the claim.

Information received from claimants in the course of the compensation program was not referred to the police. Claimants were told that it was their choice whether or not to go to the police.

(b) Details of the Compensation Package

A variety of financial and non-financial benefits were available under the compensation program. In all cases, however, the total value of compensation (including non-financial benefits) could not exceed $120,000, excluding any costs for counselling.

Validated claimants were eligible for a financial award. This award was normally given in one lump sum payment, but in exceptional circumstances (determined by counsel for the Province) a claimant could be provided with a small interim payment as part of his or her overall settlement.

Claimants also had the option of receiving their compensation, in whole or in part, through a structured settlement.[36] Claimants who received awards of less than $50,000 did not have to include the money as income for the purpose of determining eligibility for social assistance.[37]

Financial counselling was offered to assist successful claimants in managing the investment of their awards. The Province established a contact person to facilitate the provision of those services and generally assist the victims with inquiries.

Vocational training was made available through New Brunswick Community Colleges. The Province agreed to pay the $800 fee for tuition and reimburse claimants for the cost of books and materials. In addition, where possible, claimants were given priority for placement in programs of their choice. The usual admission criteria for the programs still applied, but the Province agreed to waive the $100 admission fee for academic upgrading. Claimants could also avail themselves of free assessment and counselling to determine their academic level and to discuss career options and community college programs that might be of interest or benefit.

Claimants were entitled to receive psychological counselling either through Community Mental Health Clinics or private counsellors. This benefit was available to anyone who submitted a claim; eligibility did not depend on validation of the claim. A fund of $5,000 was set up for each claimant. When that amount was exhausted, a claimant could apply to the Director of the Mental Health Commission for an additional year, or $5,000 worth, of counselling. Approval would only be given if the Director received a satisfactory opinion from a private counsellor as to the progress of the claimant which established the need for treatment and set forth an appropriate plan. There was no limit to the number of times that a claimant could apply for additional counselling, but the compensation program policy stated that psychological counselling should be viewed as relatively short-term.

Apologies were not originally part of the program. However, the Minister of Justice later decided to issue apologies on behalf of the Departments of Justice and Solicitor General and the Province of New Brunswick. According to one representative of the Solicitor General, the apologies

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[36]Some claimants who were incarcerated had their lawyers manage the money until their release.

[37]The onus to report income was on the recipient of social assistance benefits. However, when an award exceeding $50,000 was made to a New Brunswick resident, the Department of Justice advised the Human Resources Department of the amount of the award.

were extremely helpful for all victims.[38]

7. NEWFOUNDLAND

Mount Cashel Orphanage was an orphanage in St. John's, Newfoundland. It was run by the Christian Brothers of Ireland and their Canadian counterparts, the Christian Brothers of Ireland in Canada. The Province began placing children who had become wards of the state into the institution in 1966, although it had provided funding to the institution prior to that time.

A number of children were physically and sexually abused while at Mount Cashel. Allegations have been made of incidents of abuse dating from as early as the 1950s to as late as 1982. Several Brothers have been convicted of criminal offences in relation to their conduct at the orphanage. Others are currently facing charges.

The police investigated complaints of abuse at Mount Cashel in the mid-1970s. Two reports were prepared (in 1975 and 1976), but no charges were laid.

In 1989, the Province set up a Royal Commission to inquire into the conduct and outcome of the police investigation, as well as the past and current policies and practices for handling allegations of child abuse. The Honourable Samuel Hughes, Q.C., a former Justice of the Ontario High Court of Justice, was appointed as Commissioner.

Mr. Hughes produced his Report in 1991. Although most of the Report dealt with issues other than compensation, Mr. Hughes did recommend that the Province establish some sort of arbitration scheme whereby victims of abuse could obtain redress for their injuries. The relevant portion of the Report is reproduced, in part, below:

> I have already mentioned that my terms of reference contain no explicit direction as to this commission's mandate on the question of compensating those who make claims against the government as victims of sexual abuse at the hands of persons at Mount Cashel entrusted with their care by the Director of Child Welfare and I was careful not to consider any evidence relevant to the issue. However, Mr. John Harris, acting as counsel for some, if not all, of the alleged sufferers made an eloquent plea in his final argument for recommendations on it. ... After prolonged reflection I am of the opinion that the question becomes relevant under the

[38]Jakubec, A. and C. Loewen, *Summaries of Institutional Abuse Models: New Brunswick's Compensation Summary for Victims of Sexual Abuse* (June 27, 1997), p. 4.

general authorization to make recommendations for the "furtherance of the administration of justice" and that to ignore it on the grounds that it was once explicitly provided for and subsequently abandoned would not be in the public interest.

Further inducement to make an extended comment and a recommendation on the subject of compensation has been provided by the Minister of Justice who made a public statement suggesting that the principle of compensation might be favourably considered by the government, subject to some qualifications as to a determination of liability by the courts which appeared to postpone any out-of-court assessment of damages to a time perceivably far in the future. If the mechanism of settlement by arbitration is decided upon the process should be prompt and contrast favourably with proceeding by way of civil litigation. The arbitration should be consensual and based upon the assumption without the admission that the government is liable to the complainants as victims of sexual abuse while wards of the director of child welfare during a designated period, and confined to those who have already made complaints to the police or this commission or both.

It is suggested that submission to arbitration should be voluntary, and that no attempt should be made to make arbitration conditional upon all the claimants submitting to it, but those who do must provide the government with a release of all claims relating to their complaints in consideration of receiving the compensation awarded by arbitration. All claimants submitting to arbitration should be on equal footing including those whose claims would otherwise be statute-barred. Those who reject arbitration and choose to pursue their causes in the courts should not, it is suggested, be given the latter consideration by a government however benevolent which has the interest of taxpayers in mind.

If the government decides to allocate a "global" sum within the confines of which the arbitrator would assess the compensation payable to each claimant, with consequential abatement if the sum set aside proves less than the sum of the individual amounts as at first calculated, such a limitation on assessment would emphasize the *ex gratia* nature of the resulting payments as contrasted with compensation based upon a confession of liability or a finding of such by a court. It is also desirable as being in keeping with normal constitutional practice in estimating expenditures and informing the public through the House Assembly of their place in the public accounts. The course of arbitration should be expeditious, particularly if the arbitrator selected is generally familiar with the evidence before this commission and the nature of the police investigation. To require an arbitrator to begin afresh, viewing all the evidence accumulated over the last eighteen months with an inexperienced staff, would be to ensure substantial delay.

Recommendation 33:

> That the Government of Newfoundland and Labrador invite all claimants against it for compensation on the grounds of having suffered sexual abuse at the hands of persons entrusted with their care at Mount Cashel Boy's Home and Training School as wards of the Director of Child Welfare pursuant to the provisions of the *Child Welfare Act, 1972* with respect to all complaints made in good faith during a designated period to consensual arbitration, on the assumption, but without an admission, that it is liable to the said claimants.
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> Recommendation 34:
> The Government of Newfoundland and Labrador set aside a sum of money within which the arbitrator may assess the amounts payable by it to each of the claimants referred to in recommendation 33 submitting to arbitration.
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> Recommendation 35:
> That the provisions of the *Limitation of Actions (Personal) and Guarantees Act,* R.S.N. 1970, c. 206 as amended be inoperative as against those claimants who submit to arbitration without prejudice to the position of the Government of Newfoundland and Labrador in defending an action in court.

The Government of Newfoundland did not act upon the recommendations of Mr. Hughes. It was facing a number of lawsuits from former residents of Mount Cashel at the time,[39] and it decided to respond to claims through the court system in the traditional manner. More lawsuits were launched against the Government as time went by.

In December 1996, the Government announced that it had reached a settlement with 39 of the civil claimants.[40] Four further claims were settled shortly thereafter. The Christian Brothers of Ireland in Canada were involved in two of the settlements before being ordered to wind up under the *Winding Up and Restructuring Act*.[41] The Government is currently trying to obtain reimbursement for its costs from the Roman Catholic Church.

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[39]The Christian Brothers of Ireland in Canada and the individual alleged perpetrators were also commonly named as defendants in the lawsuits.

[40]The Government refused to consider compensation for individuals abused before 1966, the year when the Province first began to place children at Mount Cashel.

[41]R.S.C. 1985, c. W-11.

The process undertaken in Newfoundland to address the claims of child abuse at Mount Cashel cannot truly be characterized as a compensation scheme or program. It is more accurately described as an out-of-court settlement with several individuals who had commenced civil proceedings against the Province. All settlements were negotiated on an individual basis, and no formal process for validation or review was ever established. However, the informal process adopted bore some resemblance to the schemes employed in other provinces, and for that reason is briefly summarized here. Very few details of the settlements have been released to date.

Lawyers for the Government assessed the claims underlying the lawsuits by examining materials that were available from various sources. Testimony given before the Hughes Inquiry and during the criminal trials of the Brothers charged in connection with the abuse was reviewed. RCMP records were examined; the police had investigated 27 complaints in 1975, and had conducted another investigation concurrent with the Hughes Inquiry in 1989. Church and Provincial records were also consulted. The Government often determined that such sources provided enough detail to validate claims.

The size of the financial settlements varied depending on the nature of the abuse suffered. No formal compensation matrix was ever developed, although near the end of the process an informal grid of damages was produced to ensure consistency. In the end, individual settlements ranged from $50,000 to $250,000. Most of the money was awarded for pain and suffering, although some money was designated for counselling and healing.

The Government provided financial counselling to claimants who desired it. It also negotiated with insurance companies to provide services for payment of awards in structured settlements, the costs of which were borne by the Province. Money awarded in financial settlements was not excluded from income for purposes of determining eligibility for social assistance.

No counselling services were offered to claimants. As indicated above, some of the money awarded was designated for counselling and healing, but the Government had no way of ensuring that this money was used in any particular way. Paying for the costs of counselling was the responsibility of the claimant.

The Roman Catholic Archdiocese of St. John’s, facing civil claims for abuse at Mount Cashel

and other institutions, established a counselling program for the victims of sexual abuse.[42] The program is still ongoing. Counselling services are extended to anyone who claims to be a victim of sexual abuse, as well as members of his or her family. Travel costs to and from counselling are covered in some circumstances. If an individual is already in therapy and/or wishes to obtain services from a private counsellor or clinic, the Archdiocese will pay for the costs of those services.

The Archdiocese also took other steps in response to the incidents of child abuse. In 1992, it established a Chair in Child Protection at Memorial University, the purpose of which was to institute a program of study into how society deals with child abuse. The Catholic Church has committed $1,000,000 over 10 years to fund the Chair. The Archdiocese also provides approximately $30,000 to $40,000 a year in bursaries for educational upgrading by social workers who work with victims and perpetrators of sexual abuse.

The Government did not provide claimants with any kind of apology. Instead, the Minister of Justice expressed regret in a statement to the Provincial legislature in December 1996. The Christian Brothers issued an apology to the residents of Mount Cashel Orphanage, and in 1990 former Archbishop A.L. Penney of the Roman Catholic church tendered an apology for the abuse and the pain that it caused.

8. BRITISH COLUMBIA

For many years the British Columbia Ministry of Education operated the Jericho Hill School in Vancouver to provide education for deaf children. Prior to 1979, blind children were also enrolled in the school. The school offered classes from kindergarten to grade 12. Students ranged in age from five to 20. Some were day students and some were in residence. Until 1987, many of the students in residence were at the school seven days a week because their parents could not afford to bring them home for weekends. After 1987, the Province paid for transportation home every weekend and major holiday. In 1993, the school was moved to Burnaby, and re-established as a “school within a school” at South Slope Elementary School and Burnaby South Secondary School.

In 1982 and 1987, allegations of sexual abuse of children in residence at Jericho were made

[42]It also commissioned its own inquiry into abuse within the Church: Winter, G.A., *Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy*, submitted to the Most Reverend A. L. Penney, D.D., Archbishop of the Archdiocese of St. John's (St. John's, Nfld.: Archdiocese of St. John's, June 1990).

during interviews conducted by Ministry of Human Resources and Ministry of Education personnel. Allegations were made of abuse by both staff members and older students at the residence. The Vancouver Police Department was advised of the allegations, but no charges were laid.

By the early 1990s, six lawsuits had been commenced against the provincial Government in connection with alleged sexual abuse at Jericho. A complete investigation into all complaints was undertaken by the police and various Ministries of the Provincial Government in 1992. The investigators ultimately concluded that charges should have been laid in 1982 and 1987.

The Provincial Ombudsman also commenced his own investigation of the alleged abuse in 1992. He published his Report in November 1993, concluding, amongst other things, that abuse had occurred and that a non-confrontational process should be established to determine compensation for the victims.

The Provincial Government responded to the Ombudsman's Report by appointing former British Columbia Supreme Court Justice Thomas Berger, Q.C., as special counsel. Mr. Berger was directed to inquire into allegations of abuse at Jericho and make recommendations as to how the six lawsuits against the Government, and any others that might follow, could be resolved.

In order to complete his task, Mr. Berger was given access to a variety of materials which had been assembled by the Government and police. An arrangement was worked out so that he would be under no obligation to disclose to the Government any evidence he gathered, statements he received, or documents or other materials he obtained. In particular, none of this information was made available to counsel in the branch of the Government responsible for defending against the lawsuits that had been, or might be, filed in connection with alleged sexual abuse at Jericho.

The material reviewed by Mr. Berger included transcripts of interviews with complainants, a summary of a Government data base relating to allegations of sexual abuse at Jericho, and records of interviews with public servants in the Ministries concerned. Mr. Berger also met with a group of therapists who had been treating some of the victims of the sexual abuse. The therapists did not disclose the identities of their clients, but were able to report generally on their clients' experiences at Jericho. Finally, Mr. Berger held meetings with the deaf community and deaf organizations to discuss the history of Jericho, the allegations of sexual abuse generally, the difficulties of language and communication for students at Jericho, and the relationship of those difficulties to the incidence of sexual abuse.

Mr. Berger produced his Report in 1995. He concluded that sometimes widespread sexual abuse had taken place at Jericho. There had been abuse by staff as well as abuse by some older children against younger children. The abuse had taken place over a period of many years, but was most prolific during the period from 1978 to 1987. In 1978, the Province decided to house all the residents, of both genders and all ages, in the same dormitory. Mr. Berger concluded that the Government had been aware of the problems at the school as early as 1982, but had failed to take adequate actions in response. He found that the protective agencies of the state had been unable to adequately address the needs of deaf children. The police and Crown had been unable to communicate with deaf children, let alone assemble their evidence.

Mr. Berger recommended that the Provincial Government accept responsibility for all claims of sexual abuse suffered by students who had attended Jericho Hill School. He also made detailed recommendations as to the form and content of a compensation program.

On June 28, 1995, the then Attorney General of British Columbia, the Honourable Colin Gabelman, acknowledged the allegations of sexual abuse at Jericho as well as the Provincial Government's responsibility to ensure the well-being of children in its care. In response to the recommendations contained in the Berger Report and the Report of the Ombudsman, the Government made a commitment to develop and implement a redress program to assist former students who had been sexually abused while at Jericho. This resulted in the Jericho Individual Compensation Program, which commenced operations in 1996. The program was designed by the Government and was not the result of a negotiated agreement with the victims.

(a) The Process

All deaf, hard of hearing, deaf-blind and blind students of Jericho were eligible to apply for benefits under the compensation program. Compensation was only awarded for pain and suffering from sexual abuse which occurred before December 31, 1992. Physical and emotional abuse (no matter when it occurred) was not compensable under the Program.

A claimant commenced an application for compensation by filling out an application form. The form required the claimant to state in writing that he or she was sexually abused in connection with his or her attendance at Jericho, that the abuse occurred before December 31, 1992, and that the claimant was younger than 19 at the time. It also required the claimant to provide the names of individuals to whom he or she had disclosed the abuse.

All applications were reviewed by a Compensation Panel. The Panel was composed of two hearing lawyers and a deaf-blind therapist, appointed by the Attorney General after consultations with representatives of the deaf community. Together, the Panel members had expertise in the law, sexual abuse issues and the needs of sexual abuse victims, and the needs of deaf and hard of hearing persons. The Terms of Reference of the program also specifically directed the Panel to develop an awareness of 1. the needs of the deaf community and the importance of skilled interpreters for comprehending the claim information of deaf claimants, 2. the cultural differences between deaf and hearing persons, and 3. the needs of deaf-blind, hard of hearing and blind persons.

The onus was on the claimant to establish to the satisfaction of the Compensation Panel that there was a reasonable likelihood that he or she was sexually abused at Jericho. The abuse could have been perpetrated by a school employee or another resident. It also could have occurred on or off site, but it had to have been associated with attendance or residence at the school while the Government was responsible for the claimant's care and custody. Sexual abuse was defined in part as follows:

> Sexual abuse means any sexual exploitation of a child and may include any behaviour of a sexual nature towards a child. Sexual abuse may exist even where there is consent to the sexual behaviour. Sexual activity between children may constitute sexual abuse if the difference in age or power between the children is sufficient that the older or more powerful child is clearly taking advantage of the younger or less powerful child ... Normal affectionate behaviour towards children and normal health or hygiene care are excluded.

The Compensation Panel was directed to operate informally. It would determine whether the abuse occurred and, if so, the appropriate amount of financial compensation. It was anticipated that

most claims would be determined on the basis of documentary evidence, although an oral hearing could be held if the claimant desired it, the Panel thought it necessary to decide the claim, or the Panel wished to review additional information from the claimant. Claimants were not permitted to have an advocate appear with them or on their behalf in the application process. Interpreter and intervener services were provided free of charge.[43]

Compensation Consultants were appointed to assist both claimants and the Compensation Panel in the process. The role of the Consultants was described in the Terms of Reference:

> (1) to ensure that the claimant is fully aware of the parameters, procedures and possible outcomes of the claim process, in the context of the other avenues of redress available to a claimant: a civil suit or a criminal injury compensation claim;
>
> (2) if requested by the claimant, to assist the claimant in the preparation and presentation of a compensation claim, by locating, detailing, organizing, transcribing, or otherwise ensuring the completeness and accuracy of a compensation claim;
>
> (3) to ensure that the panel is presented with a sufficiently complete and coherent claim for the purpose of the panel assessing claim validity and the amount of compensation;
>
> (4) to assist the panel in reviewing its decision with the claimant if requested by the claimant.

In order to be able to assist the claimants, each Consultant was fluent in American Sign Language and other modes of communication used by the hearing-impaired, knowledgeable about deaf culture, and knowledgeable and experienced in dealing with sexual abuse and interviewing traumatized individuals.

A claim was assessed on the basis of pre-existing documented information, interviews with the claimant by a Compensation Consultant and, if applicable, the presentation made by the claimant at an oral hearing. Claimants were asked to consent to the release of records from outside sources for review by the Panel, and all such information was treated as confidential. Claimants were also entitled to file any prior statements they gave to the authorities in connection with the alleged abuse and, in appropriate cases, reports from therapists. In cases where the Panel required a report from a therapist to decide a claim, the program would request and pay for it. Alleged perpetrators were not contacted or asked for their side of the story.

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[43]Interveners provided assistance to deaf-blind individuals. Whenever possible, claimants were permitted to choose their interpreters and interveners.

Once a claim was accepted by the Panel, a determination of an appropriate amount of compensation was made. The claimant then had 30 days in which to accept or reject the settlement offer. One thousand dollars was set aside for each claimant to pay an independent lawyer (and interpreter) to review the offer. If the claimant decided to accept the offer, he or she was required to sign a release, waiving any further claims against the Government.

There was no appeal against the decisions of the Compensation Panel concerning the validity of a claim or the amount of compensation. However, the Panel was entitled to review its decisions if the claimant asked for the opportunity to provide new or additional information about the claim.

The deadline for submitting applications was September 30, 1998. Four hundred and five applications were received, although 40 were later withdrawn, leaving 365 to be considered by the Compensation Panel.

(b) Details of the Compensation Package

Individual victims of sexual abuse at Jericho were entitled to a financial award for pain and suffering. As indicated above, the amount of compensation was determined by the Compensation Panel upon review of a claim. The Panel was directed to fix the level of compensation having regard to the nature, extent and impact of the sexual abuse. Relevant considerations in determining the nature and extent of abuse included its duration, frequency and type, and whether it was accompanied by threats, coercion and/or force. The impact of the abuse related to its long-term impact on the claimant's physical and psychological well-being, as evidenced by such things as the presence or absence of psychological dysfunction, physical trauma, alcohol and drug abuse, sexual dysfunction and personal and marital problems. The impact of the abuse on lost vocational or income potential was not compensated.

The program prescribed three tiers of financial compensation, devised in accordance with the recommendation of Mr. Berger and the precedent set by the Grandview program in Ontario:[44]

[44]The following table is reproduced from Shea, Goldie, *Redress Programs Relating to Institutional Child Abuse in Canada* (October 1999), p.13.

	ABUSE	COMPENSATION AMOUNT
Tier 1	Sexual Abuse	$3000
Tier 2	Serious Sexual Abuse	Up to $25,000
Tier 3	Sexual Abuse - Serious and Prolonged	Up to $60,000

Any compensation for the abuse that a claimant had already received from a lawsuit, an out-of-court settlement, or a Criminal Injury Compensation Program claim was deducted from the compensation awarded under the Jericho program.

Compensation was paid in a lump sum, although it could be placed in trust or paid out by way of annuity through a financial service provider. Any compensation paid to a minor was placed in trust until the claimant had reached the age of 19. No compensation was provided to members of a victim's family.

The compensation was deemed to be an award for pain and suffering, and was therefore exempt from income tax. Further, the Province did not include the compensation in determining eligibility for social assistance.[45]

The program ended on March 31, 2001. Of the 365 applications that were considered by the Panel, 359 were validated. The Panel's offer of compensation was accepted in 344 of those cases, resulting in a total of $12,665,000 compensation paid. The average award was $35,500.[46]

It was anticipated that some successful claimants would require financial advice about the impact of the award on their personal finances, or about maximizing its financial benefits. The program covered the cost of interpreters for meetings with a financial advisor of a claimant's choice. However, the program did not cover the fees of the advisor.

Some claimants had consulted lawyers for the purpose of commencing legal proceedings against the Government in connection with the abuse, or for determining their options in that regard.

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[45]This was not initially an element of the program, but was incorporated at a later date.

[46]There is currently before the British Columbia Supreme Court a class action suit brought against the Province by former residents of Jericho for the abuse they suffered. Some of the members of the class accepted compensation under the Jericho Individual Compensation Program and signed releases waiving any further claim against the Government. It is expected that the validity of the releases will be challenged in the lawsuit.

A successful claimant could have the attendant legal fees paid by the program if they were incurred prior to the time frame for submitting applications under the program. The fees had to be reasonable, and payment had to be recommended by the Compensation Panel. The funds were disbursed once a claimant accepted compensation and signed the release.

Each successful claimant received an individual apology from the Government. The apologies were confidential and written in non-legalistic language.

As a form of community compensation, the Government donated $1,000,000 to be used generally for the benefit and advancement of the deaf community throughout the Province. The money is administered by The Deaf Community Trust of British Columbia, an organization whose membership is representative of deaf persons throughout the Province. The Government also constructed new residences for students of the Provincial School for the Deaf.

The Jericho Individual Compensation Program was designed primarily to provide financial compensation to the victims of sexual abuse. However, at the time the program was established the Government also committed itself to continue and enhance a program called the Residential Historical Abuse Program ("RHAP"). This was a program established in 1992 in response to the allegations of sexual abuse at Jericho. It provides counselling and therapy services to any individual who alleges he or she was a victim of sexual abuse while in the care of the Province. To qualify for services, individuals did not have to prove that they were sexually assaulted. They simply had to have attended a provincially-funded residential facility, which was defined to include foster homes, group homes, hospitals and correctional facilities for children and adolescents. RHAP funded up to six counselling sessions per month for qualifying individuals.[47] There was no limit on the amount of time that an individual could participate in the program. The only financial constraint was the program's overall budget.

As many of the alleged Jericho victims who came forward to RHAP were deaf, hard of hearing or deaf-blind, the Government developed a separate program to administer mental health services to them: The Deaf, Hard of Hearing and Deaf-Blind Well-Being Program. The program is available free of charge, and the Province pays for any interpretation services required for the therapy. The program also provides sign language lessons to parents of deaf children and to professionals and staff who work with the deaf.

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[47]Qualifying individuals were initially given a short assessment, and then a treatment plan was prepared. The plan was reviewed and updated every six months.

9. FEDERAL GOVERNMENT

For over a century, Canada had an aboriginal residential school system. It was initially operated solely by religious organizations, but in 1874 the federal Government became involved in order to meet its obligations under the *Indian Act*.[48] The schools were then run jointly until 1969, when the Government assumed full responsibility. It is estimated that over 100,000 children attended the schools over the years in which they were in operation. The last school closed in 1996.

In 1996, the Royal Commission on Aboriginal Peoples ("RCAP") released its Report, entitled *Gathering Strength - Canada's Aboriginal Action Plan*. The Report contained personal accounts from aboriginal people who had suffered from sexual and physical abuse while at residential schools. It also documented the far-reaching impact of the abuse.

In January 1998, as part of its response to the Report, the Government of Canada issued a Statement of Reconciliation. It contained the following expression of regret and apology:

> The Government of Canada today formally expresses to all Aboriginal people in Canada our profound regret for past actions of the federal Government which have contributed to these difficult pages in the history of our relationship together.
>
> .....
>
> To those of you who suffered this tragedy at residential schools, we are deeply sorry. In dealing with the legacies of the Residential School system, the Government of Canada proposes to work with First Nations, Inuit and Metis people, the Churches and other interested parties to resolve the longstanding issues that must be addressed.

Accompanying this Statement was the announcement of a community healing fund worth $350 million, to be administered by the Aboriginal Healing Foundation. The purpose of the fund is to support community-based healing initiatives to address the legacy of physical and sexual abuse in residential schools. The fund is not used to pay for compensation of individual victims or the costs of litigation respecting abuse claims.

Many individuals have filed lawsuits against the federal Government and other defendants

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[48]R.S.C. 1985, c. I-5.

seeking compensation for damages suffered while they were at residential schools.[49] Given the sensitivity of the issues raised by the plaintiffs, the Assembly of First Nations and others asked the Government to explore a range of approaches to resolving claims of abuse in a timely and sensitive manner.

In 1999, the Departments of Justice, Health, and Indian and Northern Development engaged in a series of exploratory dialogues with survivors of residential school abuse, aboriginal healers, and aboriginal and church leaders. The dialogues helped to open the lines of communication and assist all of those involved to understand the needs of survivors. Agreement was ultimately reached on a set of principles to guide efforts by the Canadian Government to resolve abuse claims. These principles can be summarized as follows:

- Canada has extensive relationships with the former students, their families and communities which will continue well after any individual claim is dealt with. The processes used and outcomes sought in resolving claims should be mindful of these relationships and strengthen and improve them.

- The residential school caseload should be strategically managed as one file, recognizing the need for an overall strategic approach, regardless of whether the claims are advanced in litigation, in the dispute resolution pilots or in other alternatives to litigation.

- Canada recognizes that a significant number of wrongs did occur. From there, Canada seeks to create a climate for the early, safe, credible and effective resolution of the claims. Canada wants to know who was wronged according to existing civil law standards, and whether Canada has or shares liability. Where Canada does, the goal is not to avoid or minimize it, but to provide appropriate redress.

- It is of utmost importance that those acting for Canada keep in mind the continuing, though often unacknowledged, trauma that childhood sexual abuse creates and the health and safety risks involved when survivors are asked to address the procedural or substantive aspects of their claims. These risks extend to families and communities.

[49] As of March 2001, more than 7,200 individuals had filed civil claims. A number of class and representative actions had also been filed.

- Reliable validation of individual claims is a key consideration. "Innovative and safe means to this goal should be sought within the overall context of ensuring the integrity of each resolution, and thus the overall credibility of Canada's resolution strategy for these matters. Survivors have been strong supporters of the need for integrity and public credibility as resolutions are achieved."

- Canada should seek outcomes which advance the short- and long-term health prospects of the survivors, their families and their communities.

- The emphasis on safety and on helping to rebuild relationships also applies where Canada resists claims. The approach can be adversarial respecting a specific issue, but should not appear to put Canada into an adversarial relationship with those bringing it forward.

These principles were included in a set of strategic directions provided to counsel for the federal Government in addressing aboriginal residential school cases. The directions also suggest that Canada should be favourably disposed to requests to resolve claims outside of litigation in proceedings which can be designed in collaboration with those using them. The proceedings can include innovative approaches within litigation, such as discovery mechanisms and redress elements already adopted in certain cases.

The directions further indicate that, whatever process is used, a focus on health and safety should remain. In particular, health supports need to be available whenever survivors are asked to tell the story of their abuse, and Canada should seek ways to assist requests for the involvement of support persons or representatives of the survivors' community in any proceeding. Canada should not use technical defences to prevent or discourage abuse allegations from being determined on their merits. Closure for individuals and healing for their families and communities will not be achieved if provable claims are turned away or compromised on a technicality. Canada also has a direct interest in the fairness of the entire process, including the fairness of the fees survivors are charged by their own lawyers. It is not in Canada's interest that a validated survivor be left with a lingering sense of injustice, whatever the cause. It is also important for closure that others with liability for abuse accept their responsibility and provide redress.

The Government has now instituted 12 pilot Dispute Resolution Projects in various communities across Canada to address alleged sexual and physical abuse of aboriginal children in residential schools. A Dispute Resolution Project requires a group of approximately 40-60

complainants willing to proceed on the terms contained in a framework agreement designed by the group (also known as "a Survivor Group") and the Government of Canada. Our review examined two such framework agreements. In summarizing these agreements, I have not identified the communities or complainants' groups to which they relate.

(a) Framework Agreement #1

The first framework agreement states, at the outset, that the Government of Canada acknowledges its role in the development and administration of residential schools and apologizes to those who were physically and sexually abused at the schools. The agreement between the Survivor Group and Canada is intended to resolve claims within a Dispute Resolution Project in a way that is safer for survivors than litigation, that is credible, and that promotes healing.

The agreement provides that compensation is for physical and sexual abuse, although other actions can be compensated if they constitute a recognized cause of action for which Canada is liable in law. Cultural and language loss cannot be compensated as they are not causes of action recognized by the courts. The determination of whether an act of discipline constitutes physical abuse is based on the standards of the day when the discipline took place. The burden of proving a claim is on a balance of probabilities. Canada will not rely on limitation periods to defeat a claim within the Project.

The agreement articulates the need for a holistic process that incorporates credible validation of claims. Validation is to be safe, efficient, flexible, effective, inclusive, credible and fair. The parties are to minimize to the extent possible the number of times a survivor is required to tell his or her story.

Validation is to occur through a fact finding session, wherein a fact finder determines what did or did not occur, based on the survivor's story, the information of other witnesses, the views of the parties, and the relevant documents.

The agreement stipulates that the fact finders must be lawyers. The parties are to jointly select two fact finders, one male and one female. Each survivor will have the choice of telling his or her story before either the male or female fact finder, but not both. The parties are to look for fact finders who demonstrate sensitivity to the aboriginal culture and issues, and who are fair, sensitive, independent, objective, open-minded, and good listeners. The parties are to provide the fact finders with an agreed-upon suggested reading list and are to arrange a workshop for them on aboriginal

cultural awareness.

Canada is directed to share relevant documents in its possession, subject to privacy legislation or, where a statement of claim has been filed, pursuant to court rules. The Survivor Group must also share relevant documents in the possession of individual survivors with Canada. Based on the shared documents, the parties will agree to as many facts as possible. Where possible, individual survivors are to provide written statements at least two months prior to their fact finding session in order to expedite the process, allow potential witnesses to be contacted, and permit counsel for both parties and the neutral fact finder to prepare for the hearing.

Survivors will tell their story to, and respond to questions from, the fact finder. Survivors will not have to speak to facts previously agreed to by Canada.

The parties may give the fact finder, in advance, a list of questions they would like the fact finder to ask the individual survivor (or a list of issues they would like to have explored). During the session, counsel for Canada and the individual survivor will approach the fact finder together about additional questions either of them would like the fact finder to ask.

Each survivor can be accompanied at the fact finding session by his or her lawyer, family members or another support person. Canada will have one of its lawyers and a maximum of one other person present, unless the individual survivor agrees that more can attend.

Survivors may arrange for additional witnesses to present information. This information is to be given to Canada at least two weeks before these witnesses will be heard, subject to an agreement to waive this notice period.

Canada may present information to the fact finder through its own witnesses, subject to the same disclosure obligations imposed on the Survivor Group. Agreed-upon experts may also provide their assessment to the fact finder.

Witnesses who are members of the Survivor Group are to be questioned only by the fact finder. Other witnesses may be questioned by counsel for any party. Counsel will not ask leading questions of their own witnesses.

Paragraphs 28 and 29 of the agreement are of particular significance. They provide:

1. For the credibility of the validation process, Canada will attempt to contact persons alleged to have committed acts of abuse and they will be given the opportunity to provide their story to the neutral fact finder. For the safety of the survivor, the person will be first advised in writing about the process and in a general way about the allegations. Only if the person decides to participate will more specifics of the allegations be provided.

2. If the person alleged to have committed acts of abuse decides to tell his or her story to the neutral fact finder, it will be in a different location than where the survivor tells his or her story, and at a later time. The person will be accompanied by legal counsel and a support person if her or she chooses and will assume his or her own costs.

All those providing information to the fact finder are to acknowledge the solemnity of the process through oath, affirmation or the holding of an eagle feather. The fact finder will take notes, but the survivor's story will only be recorded if the survivor agrees.

After the fact finding session, the fact finder will prepare a written report. The report is to contain the decision as to what did or did not occur and a non-binding opinion as to the effect of any abuse on the survivor and its impact on the survivor's life.

The parties will then attempt to reach agreement regarding the impact of the abuse through negotiation based on the facts found, and the opinion offered, by the fact finder. The parties will also attempt to reach an agreement regarding the legal significance of the facts. If the parties cannot agree on either issue, they may refer outstanding questions to the fact finder.

The fact finder cannot consider questions concerning the appropriate amount of monetary compensation for validated claims. The parties will attempt to reach an agreement regarding compensation through negotiation. Amounts of compensation are to be based on damage awards from relevant court decisions. Canada will not try to negotiate less than the amount it believes a court would award. If the parties cannot agree, a mediator will be selected to facilitate negotiations based on the facts agreed to by the parties or determined by the fact finder. If the parties cannot agree through mediation, the parties are to meet to consider other options for determining the amount.

The agreement contemplates that Canada will pay a certain percentage of the compensation amount. There are also provisions that contemplate the possibility that Church organizations may ultimately agree to participate. Courts have found that the churches share liability, but the churches

have been concerned about the financial burden that settled claims would impose on them. On October 29, 2001, the federal Government announced that it will pay 70% of the compensation negotiated by validated victims of sexual and physical abuse.

A certain percentage of compensation amounts is to be dedicated to the individual survivor's healing. This money can be used for such things as community healing, education, vocational or training programs, counselling, therapy or trauma treatment. The money will be held in trust for the individual survivor in the trust account of the survivor's lawyer. The individual survivor will provide a written plan for the use of the funds to be presented to the Board of Directors of the Survivor Group. In order to respect the principle of survivors having control over their own healing, Canada will not play a role in deciding the purposes for which an individual survivor uses his or her healing funds.

The agreement indicates that the fact finding sessions are to be closed to the public unless the parties agree otherwise. Subject to any legal requirements, all information relating to the process, including any settlement, shall be kept confidential, except where the information discloses abuse of a child who is presently a minor.

The fact finder is to return materials to the survivor or destroy them, once a matter has been settled or the Project ended. Canada's legal requirement to keep documents that come into its possession is articulated, although the Agreement provides that Canada will keep only one copy of certain materials.

Canada is to provide funding to the Survivor Group for survivor participation costs. It will also assume the costs of the process.

(b) Framework Agreement #2

The second framework agreement is similar to the first agreement, but with some significant differences. This agreement refers to "complainants," rather than "survivors." Disclosure is to be exchanged in accordance with the practice in civil actions. Canada is to utilize its resources to locate relevant documentation regarding each complainant and is to provide copies of background historical documentation, including personnel files, student records and policy statements regarding discipline, to the fact finder and all parties. The fact finders are also to be provided with a bibliography of reading materials in relation to the history of residential schools. The oral evidence before the fact

finder is to be recorded for use later in the process.

Cash compensation is to be paid in a manner that accords with the complainant's preferences. Consideration is to be given to structured settlements. Canada is to pay 50% of the damages. However, if Canada and a church organization come to an agreement regarding the apportionment of responsibility for claims that would apply to the complainant's case, the complainant may require that Canada pay the portion of damages for which it is responsible under that agreement. The complainant may also require that Canada's apportioned share be adjusted based upon any judicial determinations respecting another residential school that would be binding or highly persuasive on a trial judge hearing an action commenced by the complainant for his or her particular claim. Fifteen percent of settlement proceeds are to be directed to healing and related purposes. The money is to be deposited into a trust fund, administered by a steering committee consisting of representatives of the complainants and Canada.

10. ANALYSIS

The above represent some, but not all, of the approaches taken by governments in Canada to reports of institutional abuse. I do not intend to analyze here the elements of each of these approaches and their respective merits or shortcomings. Instead, in Chapter XVIII of this Report, I refer to elements of these approaches which may be helpful to explain my recommendations. Put simply, there are features of approaches taken in other jurisdictions that commend themselves to me and which I have adopted, in whole or in part.

The approaches taken in other jurisdictions are relevant in another way. They collectively demonstrate the variables that exist in each jurisdiction that compel participants in the design and implementation of a government response to recognize that different situations require different solutions, and that one cannot, therefore, blindly follow what has been done elsewhere. In short, there can be no single template for a government response to reports of institutional abuse. Indeed, the approaches outlined above demonstrate that the Nova Scotia situation differed in some respects from the circumstances which presented themselves elsewhere. For instance, the Nova Scotia Government failed to recognize that the existence of multiple allegations against current employees compelled a different approach to the issue of validation than was taken in Ontario. As well, the Nova Scotia Government failed to recognize that Ontario had taken some measures to safeguard against fraudulent claims that were discarded by Nova Scotia without regard to their rationale.

In summary, an examination of the approaches in other jurisdictions has enabled me both to recognize the shortcomings of the Nova Scotia Program and to craft recommendations for the future.