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.
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> 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.
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> 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."
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> 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.