X

Events During the Suspension

1. INTRODUCTION

On November 1, 1996, the Government announced that the Compensation Program was placed on hold so it could take stock of concerns that had arisen during the first few months of the process, including a significant increase in the number of claims and the discovery of hundreds of files that were thought to have been destroyed. The suspension had some immediate effects:

- Outstanding Government offers to settle claims were put on hold, but offers that had been accepted on or prior to October 31, 1996, would be paid in full;
- All file reviews were placed on hold, but where reviews had taken place and decisions were pending, amounts awarded would be paid;
- Claimants who had signed a release as a prerequisite to proceeding to file review could withdraw their release (thereby permitting a claim to be advanced in the ordinary courts);

However, Demands could still be made by claimants, the December 18, 1996 deadline for filing a Notice of Claim remained unchanged, and counselling continued to be available.

The Government maintained that it was still committed to an ADR process, although it was clear that the Program would be reviewed. No mention was made of what might happen to the Memorandum of Understanding ("MOU") or how long the review would take. This chapter looks at the reaction to the suspension and some of the issues canvassed in the course of the Government's review.

2. REACTION TO THE SUSPENSION

Reaction to the announced suspension was immediate. Anne Derrick, John McKiggan and Josh Arnold, counsel for survivors, held a press conference the same day as the announcement. In a prepared statement, Derrick said as follows:

> Survivors of institutional abuse bear terrible scars from their experiences and have been invited by this Government to come forward, tell their stories and apply for compensation. Many of survivors are coming forward for the first time, having been brutalized and ignored as children when they tried to report the abuse they were being subjected to.
>
> For this to truly be a restorative process, survivors must be treated with respect; they must be informed and advised about what is going on. The Government is publicly accountable for this process and their obligations under the Memorandum of Understanding must be rigorously adhered to. Any failure to observe these responsibilities is re-victimization of the survivors and is destructive to their efforts to heal and move on with their lives. We expect the Province to live up to its stated commitment to compensate survivors in accordance with the Memorandum.

A number of lawyers representing claimants wrote to the Minister of Justice protesting the announced suspension. For example, McKiggan wrote on November 4, 1996, stating that "the Province's act is a violation of the MOU and a breach of the contractual obligations owed by the Province to the survivors," and that "the Government's actions are a violation of the legal and moral commitment the Government made to survivors." He requested a meeting with the Minister, indicating that if the issue could not be resolved he would be forced to take steps to enforce the Government's obligation to his clients.

Derrick also wrote to the Minister on November 4th, complaining that the suspension without notice was disrespectful and insensitive towards survivors and, for many, represented yet another breach of trust. She requested a meeting as soon as possible with the Minister and other lawyers who had been centrally involved in the process, for a full and frank explanation about the decision to suspend the Program, the implications of the decision, the time lines involved and the nature and extent of the review contemplated.

The Minister responded by suggesting a meeting on November 12th. Derrick agreed, but cautioned that she and her colleagues, representing more than 600 survivors, would not be coming to the meeting to discuss reopening the terms of the Memorandum of Understanding.

Fifteen lawyers representing claimants met with the Minister and Deputy Minister as scheduled on November 12th. Amongst other things, the following issues were discussed:

- Additional time required to review files.
- Consideration by the Government to pay amounts awarded over time;
- The Government's intention to wait until after December 18th to decide what it was going to do (in order to know the number of claims it was facing);
- Access by claimants to RG-72 (the archival designation for historical records in the Public Archives);
- File reviews;

- The RCMP investigation (Operation HOPE);
- The claimants' views that the IIU interviews were tough, while the RCMP interviews were compassionate.

A joint letter was written by counsel for the claimants after the meeting. They reiterated "as strongly as possible" their position that the current state of affairs was unacceptable. They advised:

> The uncertainty surrounding the status of the M.O.U. is causing a great deal of stress and turmoil for our clients. We are under considerable pressure to take immediate steps to respond to the Province's actions. We are currently investigating all of our client's options, including a representative class action suit for punitive and general damages, individual law suits for compensation, an application to court to enforce the Memorandum, to name but a few.

The lawyers asked the Government to announce its commitment to the ADR process as outlined in the MOU and stated their expectation that the Province will continue with the process, using additional funding if required.

The Minister wrote on November 19th to all counsel for claimants. He referred to the enormous undertaking faced by Operation Hope due to the growing number of allegations and the volume of paper work involved. He noted:

> Normally, a police investigation will occur first, before employee discipline proceedings, and before litigation respecting compensation. We are trying to do everything quickly because of our obligations to survivors and to those who will be in our care in the future. However, there is a real risk the investigation for the purposes of compensation and discipline could jeopardize the criminal prosecution process.

The Minister pointed out that consideration had to be given to greater integration of the operations of Facts-Probe Inc. (the Murphys), the IIU, and the RCMP, as well as the computer systems of the latter two. He suggested that "a more comprehensive approach to the investigation" would both assist those with valid claims and better address concerns about fraudulent claims.

Lastly, the Minister stated that his Department had an obligation to act on information in its possession for the protection of both children who may be in its care in the future and the public who may encounter perpetrators of abuse. He recognized that this obligation may conflict with the wishes of claimants who do not want to provide information for the purpose of disciplinary or criminal investigations, but argued that there was an over-riding public interest to be served. He concluded that there may have to be changes in the use made by the Department of

information provided by claimants.[1] He proposed that a further meeting be held on November 22nd.

Ms. Derrick responded on November 21st. She said she was astonished by the Minister's letter, since none of the issues he mentioned were ever raised or even hinted at during the meeting of November 12th or in the earlier announcement of the suspension of the Compensation Program. This created the impression that the Minister was engaging in an *ex post facto* rationalization of the decision to suspend the process. She agreed to attend the meeting on November 22nd, but added that the concerns she would carry into the meeting were as before: 1. when would the Government restart the compensation process in accordance with its obligations under the MOU, and 2. did the Government intend to fully honour its obligations under the MOU? Derrick also pointed out that the Government had initiated the compensation process, participated in the development of the MOU, and compensated claimants with full knowledge that there was an extensive criminal investigation underway.

3. DIFFICULTIES IDENTIFIED BY THE ASSESSORS

Before dealing with the meeting of November 22, 1996, it is appropriate to refer at this point to the difficulties file assessors perceived in the Program. In a memorandum dated October 30, 1996, Amy Parker, Sarah Bradfield and Averie McNary described the file review process as the biggest problem within the existing framework. They explained:

> The most pressing problem we face with file reviews is that file reviewers are being asked by the Survivors' lawyers to make decisions on things which we feel are not within their jurisdiction. Through negotiations, our plan was that the file reviewers' role would be to review all documentation and correspondence which passed between counsel and make a decision on quantum.
>
> .....
>
> In our opinion, file reviewers should not be making decisions on the following issues:
>
> 1. Whether certain documentation should be introduced at file review (such as negotiation correspondence, case law, others' Statements, etc.).
>
> 2. Whether they can force people to travel to file reviews and whether they hold file reviews in hotel rooms or in available (free) office space.
>
> 3. What constitutes "corroboration," and other similar legal questions. One file reviewer decided that because a student complained to a counsellor that he was being sexually molested by other students; the counsellor did nothing; and the student continued to be assaulted, the case was made out that the student was subjected to condoned sexual abuse. We had offered the person $8,500 based on

[1]The Government's consideration of this issue is outlined in greater detail later in this chapter.

abuse perpetrated by employees; the inclusion of the "condoned" abuse raised the award to $80,000. That is a difference of $71,500.

The lawyers, Anne Derrick particularly, are raising this condonation issue in almost every case. Ms. Derrick argued before a file reviewer last Friday that even though the student never complained to counsellors about sexual assaults by other students, the staff "voluntarily condoned" the abuse by "looking the other way," and that they should have known there was rampant sexual abuse within the institution. It is extremely likely that this type of argument will succeed at some file reviews; this will raise the awards dramatically. Once it becomes successful in relatively clear situations, the lawyers will push it in much murkier situations. Given our "record" at file review, they are likely to be successful.

4. Anne Derrick is now proposing to introduce case law at file review around issues such as condonation and consensual sexual activity. She has also advised that she will attempt to introduce articles and case law surrounding recovered memory of childhood sexual abuse. Increasingly, file reviews are increasingly (sic) becoming similar to administrative or court proceedings. This was not the intention during negotiations, and will require a much more time-intensive commitment from the Department if we choose to respond to these submissions.

5. Anne Derrick and others are taking the position that file review decisions can be introduced as precedents in other file reviews. The MOU makes no provision for this. We object to the introduction of other file review decisions, particularly because each situation os so individual. Additionally, as you know, file review decisions do not favour the Department's position.

6. File reviews are successfully being used by the lawyers as an opportunity to re-open negotiations. File reviewers are taking the opportunity to pass judgment on all aspects of Government's operation of the institutions, including whether there were sufficient numbers of staff, whether supervision methods were adequate, and whether such things as strapping and isolation were appropriate discipline methods.

.....

7. We find it increasingly difficult to adhere to the principles espoused in the MOU (respectful, timely compensation) in situations where file reviewers and counsel take every opportunity to allow survivors to state the "facts." For instance, file reviewers are accepting the survivors' allegations that they should have received medical treatment for a particular injury. They are also accepting survivors' assertions that long-term disabilities must have arisen from abuse suffered at Shelburne because nothing else could have caused it since. The Province is prevented from cross-examining or introducing any evidence to the contrary.

We are very concerned that unless the Department takes a strict stand about what role the file reviewers should play, the file reviewers will ride rough-shod over the Department.

> This will result in much larger awards being made to the Survivors, and will necessitate significantly more resources being assigned to the compensation project.

The assessors sought instructions from the Deputy Minister on some of the issues raised, and then concluded with the following "advice:"

> We wish to make it clear that, in our opinion, file reviews should not continue if the existing program is not maintained. File review decisions are increasingly unfavourable to the Province; because this is so, counsel are pushing the boundaries of file review to achieve more for their clients. We anticipate that the financial impact for government in allowing file reviews to continue will be very unfavourable.
>
> If, as we understand, the rationale behind suspending the program is that the Province cannot afford to compensate the number of victims who have come forward in this fiscal year, we must advise that in our view file reviews pose the most substantial risk of awards which exceed our previous projections. Should the Province suspend the program but continue with file reviews, this risk increases dramatically because file reviewers will respond to the negative impact of the program's suspension.
>
> A mentioned above, we offer these comments in respect of one facet of the existing program. We do not wish to be misunderstood; it is not our advice that the program be suspended. However, if the decision is made to suspend the program, we feel that it must be completely suspended.

Three substantial awards were made in this period, at least in part, for condoned abuse. In one, the claimant alleged sexual assaults by other students. He felt the counsellors knew the assaults were happening and even arranged them. He also alleged incidents of physical abuse by counsellors, including one that resulted in injuries for which he needed stitches. The Demand filed on his behalf claimed severe sexual and medium physical abuse and requested compensation in the amount of $100,000.

The response by the Government was that there was no basis to the assertion that counsellors knew of the alleged sexual assaults being committed by the other residents. The claimant could not provide the names of anyone to whom he purportedly reported the assaults. The Government took the position that, in order for a claim to be made out under the heading of condonation, some positive act by a staff member was required, and not a mere omission to act. With respect to the alleged physical abuse, the Government stated that there was no record of any hospitalization for the stitches the claimant said he received. Nonetheless, an offer of $2,500, plus $5,000 for counselling, was made by the file assessor. In a later attempt to settle the claim, a file assessor "acknowledged" the act of abuse by the employee and offered $5,000, in addition to the $5,000 counselling award.

The case went to file review. In a decision dated November 7, 1996, the reviewer concluded that the allegation by the complainant fell within the scope of condonation: all that was required was for staff to forgive or overlook the claimed abuse. An award was made of $90,000, plus a $10,000 counselling allotment. There is no indication in the file that any of the alleged abusers – staff or residents – were contacted before the file review. However, it appears that

after the file review was concluded, one of the former employee alleged to have physically assaulted the claimant was contacted by the IIU. He offered to provide an affidavit refuting the allegation made against him.

In the second case, the claimant alleged that after one act of anal rape by a counsellor, he was 'fair game' for sexual abuse by residents. He also alleged beatings and physical abuse by staff. A Demand was made claiming severe sexual and medium physical abuse. The claimant requested compensation of $90,000. The file assessor responded that a single instance of anal rape by an employee constituted medium sexual abuse and that the abuse by other residents was not compensable. With regard to the complaint of beatings and other physical abuse, the assessor stated: "I do not take issue with his descriptions." An offer of $45,000 was made, plus $7,500 for counselling.

The matter proceeded to file review. In a decision released on October 11, 1996, the reviewer noted that she had examined the Stratton Report, the survivor's statements, the Demand and the Response. She noted that the Stratton Report found that staff and officials were aware that abuse was taking place, but had taken no positive steps to end it until the mid-1970s. She concluded from the claimant's statement that the alleged rapist was a paedophile and hence in no position to protect the claimant. The claimed abuse was condoned, especially since it happened openly in public areas that should have been monitored and supervised. As a result, she made an award of $80,000, plus a counselling allotment of $10,000. There is no indication in the file that either the former employee alleged to have committed the sexual assault, or any other potential witness, was contacted.

In the third case, severe sexual and medium physical abuse was alleged and compensation of $100,000 was requested. The claimant alleged anal rapes by other residents that were condoned by staff. He had given a statement to the Murphys claiming that he was forced to masturbate one boy and, when he complained to a counsellor, the latter beat him for being a liar. He said that this led to the older residents sodomizing him twice a week for the rest of his stay.

The file assessor agreed that the physical abuse claimed was properly categorized as medium, but took the position that there was no evidence that the counsellors knew about the abuse that the claimant said he suffered at the hands of other residents (other than the incident of forced masturbation).

The file review lasted one hour. The decision noted the Province's concession that the claimant suffered medium physical abuse at the hands of employees,[2] and that there was no issue of credibility for the sexual abuse claimed since the Province did not challenge the claimant's assertions that he was sexually abused by the other residents. What was challenged was whether the Provincial employees had condoned the abuse. The file reviewer observed that the Province did not present any evidence that it was reasonable for the counsellor who received the complaint

[2]The decision made reference to employees (plural) even though only one was named.

to believe that the resident was lying or that he had a history of trouble. She accordingly concluded that the counsellor had not only failed in his obligation to respond to the allegation of abuse, but had greeted it with brutality. The file reviewer held that the requirement of condonation can be satisfied by omission, and that the counsellor condoned the sexual abuse by failing to investigate the complaint. She awarded $80,000, plus $10,000 for counselling. The alleged abuser was available to be contacted, but there is no indication in the file that he ever was.

The Government delayed payment of the file review awards in these three cases. On November 29, 1996, an application was brought in the Supreme Court of Nova Scotia for an order compelling the Government to make payment. It was eventually settled when the Government did so. Letters of apology were also provided by the Minister to the claimants.

During November, the file assessors produced memoranda outlining what they considered to be the problems in the Compensation Program, and some of the options that could resolve or, at least, ameliorate the situation. In considering available options, it was assumed that the review of the Program would be guided by the following principles:

- The Government acknowledges moral responsibility for abuse.
- The Government is committed to an ADR process.
- The ADR process is to be compassionate, confidential, timely and respectful of victims.

The file assessors made it clear that the 45-day time limit for Responses must change. They identified the need to design what they referred to as an upgraded investigation process. They made a number of recommendations, including the need for the Program office and IIU to have a clear understanding of the goals and standards of the Program, the use of sworn statements, and a clarification of the role of the IIU.

Douglas J. Keefe, Executive Director of Legal Services, responded to these early recommendations in an e-mail on November 7, 1996. He wrote:

> I don't think we are trying to save money as much as ensure to the extent possible that payments are deserved. I have no doubt that in the process of improving the validation, money will be saved that would have been awarded improperly, but that is secondary. Not everyone may agree but I think we have to keep coming back to that as a starting point for what we are now doing.

The head of the IIU, Robert Barss, had earlier written to the Deputy Minister regarding an expanded role for the IIU in an amended ADR process. He indicated that the IIU could or should:

- Identify and investigate those ADR files that are deceitful and could lead to

mischief and false pretense charges by the RCMP;

- Conduct interviews of past employees, including counsellors, supervisors, managers, probation officers and medical staff and others;
- Interview all witnesses to the allegations – current employees, former employees, and other residents;
- Interview all claimants;
- Carry out an investigative interpretation of all documents;
- Improve coordination of "initial 'pure version statements' from the complainants and Facts-Probe Inc.;"
- Obtain medical and other release forms from all complainants;
- Ensure that employees and ex-employees are properly identified through photo line-ups;
- Offer the opportunity for polygraph testing;
- Provide investigative findings which could be used in the ADR process;
- Carry out investigations of current employees in parallel with a review of all ADR claims (that is, carry out its original mandate at the same time as its expanded one);
- Prepare an analytical profile of all abusers, relating employee and complainant, corresponding location, date and time of incidents.

In a commentary accompanying this document, Mr. Barss noted the trust that had been built up between IIU staff and current employees and their representatives. He reported that a review of 250 files revealed that 40 claimants made allegations of sexual abuse against two ex-employees who were not present at the institution at the time of the alleged abuse.

Meetings were held in November 1996 between the RCMP, the IIU and officials from the

Department of Justice. The focus of these meetings was the better coordination of investigative efforts. In particular, there was discussion of the use of a computer system to store, analyze and retrieve information.

David Horner, of the IIU, prepared a document dated November 18, 1996, outlining Justice's planned acquisition of computer software and scanning technology. Horner pointed out that the IIU was challenged by the effort to recover, maintain and secure a large volume of documentary materials that had previously been thought not to exist. The effort was hampered by the continued growth of the investigation and by an inadequate computer system. Horner suggested that advanced technology was needed, and recommended a software product known as CLEIMS (Canadian Law Enforcement Information Management System).

It was believed that CLEIMS would substantially decrease the turnaround time on investigations. The IIU would be able to provide a complete investigation file, including documentation and records, not only to officials running the ADR process, but to lawyers representing complainants, counsel for employees, Operation HOPE, civil litigation staff from Justice, and the Public Prosecution Service, "as needed or directed."

In a memorandum dated November 21, 1996, the file assessors further examined the issues that would have to be addressed if the Province was going to move forward with a revised compensation process. They proceeded on the premise that there was to be an improvement in the investigation process in order to increase the program's ability to compensate legitimate claims.[3]

The assessors wrote that an improved investigation was intended to ameliorate the integrity of the program – it may or may not reduce costs. They noted that it is not possible to 'prove' or 'validate' all claims, but suggested that improvement in the investigative process may lead to the "lessening of doubt in many claims." They then raised a number of questions, including the following:

- By what standard will it be said that a claim is proven or disproven? What is the burden of proof?

- How much evidence is needed? This is not now defined.

[3]However, they first asked whether they were correct to assume that the Province was still committed to compensating legitimate claimants in an "alternative" that is compassionate, timely and respectful.

- What is to be evidence? What rules of admissibility do we use?
- What do we do with cases in which part of the claimant's story is clearly disproven and the rest is in the doubtful or proven category?
- What means can be used to reduce the number of doubtful cases?
- By how much can the number of doubtful cases be reduced?
- In reducing "the doubt," will there be an increase in the number of proven as well as unproven claims?
- How will the doubtful cases be resolved?
- Will the benefit of the doubt remain with the survivor? This is the case now.
- How will disputes (with the claimant) about whether a claim is doubtful or proven or disproven be resolved?
- Is there to be a mechanism which replaces the file review process?
- What evidence will be permitted at such proceedings?
- Is the file reviewer to be like a judge or a mediator?
- Could a satisfactory process be designed which eliminated a review altogether?
- Should the reviewer act as a facilitator, with his or her jurisdiction restricted to the credibility of the claim?
- Can use be made of the *Arbitration Act*?[4]
- What knowledge or skills should file reviewers possess?

[4]R.S.N.S. 1990, c. 19.

- How do we maximize their independence?

- Should the process for taking statements be more stringent?

- Will there be more access to information from files and interviews with third parties?

On November 21st, Justice officials considered some of the problems that had been reported to them by file assessors, the IIU and the RCMP. They concluded that it was essential that any statements taken by the Murphys be 'pure version' statements, and that there be no leading questions, no paraphrasing of language, no conclusions, nor any information offered to a claimant.

A meeting was held with the Murphys on November 21st. It was decided that they would continue to take statements from claimants – 'pure version' statements, with greater detail and using the exact words of the victim. The Murphys would also ask follow-up questions if the claimant's statement did not correspond to the relevant documentary evidence. Lastly, it was decided that the Murphys would not take a statement if the claimant did not sign a release authorizing use of the statement in disciplinary proceedings, the RCMP investigation and the Child Abuse Registry.

In a meeting on November 22, 1996, between representatives of the IIU and Operation HOPE, it was learned that the RCMP favoured a software program named Supertext. The IIU, however, took the position that CLEIMS was a superior system for their needs.

4. MEETING OF NOVEMBER 22, 1996

The final meeting between Justice officials and lawyers representing claimants also took place on November 22nd. Notes of this meeting were made by representatives of both sides. The issues discussed and positions articulated were these:

- Although the Minister was aware, from information provided by the claimants and the Family Services Association, about the difficulties for claimants caused by the delay, the Government was concerned about the impact of the compensation process on the criminal investigation, and ultimately the potential to bring alleged perpetrators to justice.

! Operation HOPE had expressed concern over the impact that multiple statements might have on the criminal process. The RCMP had requested that the Compensation Program not restart until March 1997 or later, partly in order to allow time for the integration of an RCMP/IIU computer system. Counsel for the claimants voiced vehement opposition to delaying the entire process until the spring of 1997.

! The Deputy Minister advised counsel for the claimants that the Government now realized that it was inappropriate for claimants to be able to direct that information not go to the RCMP or the Child Abuse Registry. Since the Department had this information, it had to act on it. Counsel for the claimants suggested the Government enact legislation to exempt from the duty to report complaints received from those involved in the Compensation Program.[5]

! The Government intended to change the Compensation Program. Although no specifics had been decided, a number of issues had been identified, including:

- The summary validation process used to date was now unacceptable, and the Government intended to conduct a more thorough investigation of each survivor's statement prior to making an offer of compensation. The Murphy statements were "preliminary," and there was no opportunity built into the MOU for the Government to assess a survivor's credibility. Counsel for the claimants pointed out that they had proposed an arbitration process and the Government had rejected it.

- Credibility issues at file review were almost invariably decided in favour of the claimant and there was no opportunity for the Government to assess the credibility of a survivor prior to the file review.

- A system was being considered in which the current roster of reviewers would be maintained, but the file reviewer would be chosen by rotation, rather than having the survivor choose;

- The 45-day turnaround time was inadequate due to the volume of

[5]The duty to report suspected abuse is examined in the following section.

documents and a more thorough validation process being considered by the Government.

- The Government was considering payment of awards over time (with interest).

! Counsel for the claimants agreed that fraudulent claims should not be compensated and suggested negotiating a clause to deal with fraud. Counsel for the claimants requested information about fraud levels and whether or not 3% of claims were fraudulent. The notes from the meeting do not record any specific response from Government officials. The officials simply expressed concern that there had been fraud, including collusion amongst claimants and exaggeration of claims.

! The Deputy Minister noted the number of claims coming forward, particularly alleging physical violence. He commented that the Government did not have the employee's side of it.

! Counsel for the claimants indicated that on some things they would "hold their fire," but there were other issues that could trigger going to court.

The Deputy Minister wrote to Harry Murphy on December 3, 1996, confirming that in all statements taken after November 25th, the claimant should be told that the use of the statement could not be limited to the compensation process. If a person did not agree that the information could be used for all purposes, then no statement should be taken. The Deputy Minister explained:

> The Department of Justice has an obligation to act on information in its possession for the protection of children who may be in our care in the future, and to protect the public who may encounter perpetrators of abuse. We currently have a statutory obligation to provide information to the Department of Community Services which may be entered in the Child Abuse Registry. This may conflict with the wishes of survivors of institutional abuse who do not want to provide information for the purpose of discipline or for criminal investigations. However, there is an overriding public interest to be served.

5. DUTY TO REPORT ABUSE

While the Government's review of the Compensation Program was focussed on the perceived defects in the compensation process, officials in the Department of Community Services ("DCS") were also addressing another important issue: the duty to report the cases of alleged

abuse. This was dealt with in a document dated November 15, 1996, by Alex F. Shaw, Q.C., a solicitor in DCS. It was entitled *Commentary on Section 25(2) Children and Family Services Act – Institutional Abuse and The Duty to Report It*,[6] and it addressed two issues:

> 1. Do investigative bodies such as the IIU, the RCMP, and even an ADR program, have a duty under the *Children and Family Services Act* to report suspicions of child abuse to the Minister of Community Services? If so, does it follow that they are therefore precluded from receiving allegations from victims "in confidence"?
>
> 2. When the Minister receives information alleging that a person has committed an abusive act, does he have a duty to inquire into whether the alleged perpetrator poses a present risk to children and, if so, does he have to take action to minimize such a risk? If there is such duty to take action, does it yield to any considerations that have to do with interfering in the investigative processes underway by the investigative bodies?

Mr. Shaw identified two interpretations of the Act – one broad, the other narrow – but he concluded that under either interpretation the duty existed to report incidents of child abuse inflicted at any time in the past by current employees. Furthermore, this duty superceded any privilege which might normally apply to that information. In his view, it was therefore inappropriate for any governmental investigative body to receive statements from victims "in confidence" without clarifying that the information may be reportable under the *Children and Family Services Act*. Only an Act of the legislature could remove the duty to report.

Mr. Shaw suggested that a protocol was needed to deal with this matter. He warned that delay was inexcusable and potentially costly, and noted concerns which required further study. For instance, while the IIU was "warehousing information reportable under the Act," did it have the required expertise on when to report abuse, as stipulated in the legislation?

A review of the documentation available to my staff indicates that this important issue – the duty to report – was not considered by government officials during the design of the Compensation Program. There was a recognition by Alison Scott, counsel at Justice, in the summer of 1995 that there could be proceedings under s. 63 of the *Children and Family Services*

---

[6]Section 25(2) of the Act (S.N.S. 1990, c. 5) deals with the duty to report third-party abuse. It provides as follows: "Every person who has information, *whether or not it is confidential or privileged,* indicating that a child is or may be suffering or may have suffered abuse by a person other than a parent or guardian shall forthwith report the information to an agency." (Emphasis added.)

Act to place the names of abusers in the Child Abuse Register.[7] However, it was believed that information that had been and would be provided to the Murphys up until December 1996 could not be used without the prior permission of the persons providing the information. In meetings with my staff, officials involved in the design of the Program confirmed that the duty to report was not considered. They were frank in acknowledging that it was a matter that should have been addressed. The implications of this failure are discussed in other parts of this Report.

6. ANNOUNCEMENT OF THE RESUMPTION OF THE PROGRAM

On December 6, 1996, the Minister of Justice, the Honourable Jay Abbass, announced in a press release that the program would resume, but with a number of changes designed to improve the process:

- Staff resources would be increased to address the sheer volume of claimants.

- The 45-day time limit for responding to demands would be extended to 120 days, though efforts would be made to respond earlier if possible.

- The IIU would expand their investigation from discipline of current employees to include investigation of compensation claims. Resources would be added to enable this.

- Increased resources would allow staff to catalogue and input new information recently found relating to Shelburne.

- To preserve the integrity of the criminal investigation, a statement protocol would be developed by the RCMP, IIU and Facts Probe Inc. All three organizations would share information and coordinate investigations to the fullest extent possible, recognizing the independence of the police investigation.

- Victims would now be advised that all statements provided for compensation purposes would be used for investigative purposes (whether criminal or disciplinary) or the Child Abuse Registry. The Minister stated that "[w]e

[7]A Child Abuse Register was first established in Nova Scotia in 1976. It was upgraded in 1991 to include abuse by perpetrators who are not parents or guardians of the abused child and to make the Register available for screening purposes.

understand it has been difficult for people to come forward, and their wish for confidentiality, but we have a moral and legal obligation to bring perpetrators of abuse to justice."

- To ensure that file reviewers were provided with the best available evidence, claimants and the Province would now be permitted to submit written, recorded or documentary proof from anyone who had evidence relating to a claim. The Minister stated that "[t]his allows victims to bring forward statements from witnesses, and ensures the file reviewers have the most complete information possible when making their decisions."

- File reviewers would now be assigned on a rotating basis.

- All file reviews would be conducted within Nova Scotia. Those claimants living outside the province would be able to participate by telephone. The file review process would resume February 1, 1997.

- Though levels of compensation would remain the same, awards over $10,000 would 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 paid over time with interest. The opportunity to use counselling allotments would remain unaffected – those allotments would still be accessible immediately. Counselling allotments would be available for a four-year period.

- The Government would continue to accept claims or notices of claims until December 18, 1996. The settlement of claims would resume once the total number of claims was known on December 19, 1996.

- Compensation would only be provided for abuse by employees and not for abuse of one resident by another. This was described as a "clarification."

The Minister repeated the Government's commitment that those who were abused would be compensated, and he strongly endorsed the ADR process as the best method to provide compensation.

On the same date as the announcement, the Minister wrote to claimants' counsel to

explain how the changes would affect the compensation process. He advised of some further information not contained in the press release:

- Offers made before November 1, 1996, were reinstated immediately, except that awards over $10,000 would now be paid over time.

- A new release form would be used for all claims.

- During the assessment of claims, Justice or the IIU might require an interview with the claimant, as written statements alone may not always provide enough information.

- File review decisions were not to be treated as precedents in other file reviews.

- Both the claimant and the Province could be represented by counsel at the file review. (Claimants still had the right to appear personally).

- No compensation would be paid for negligence;

- Counselling allotments would be accessible for five years (even though the press release had announced that the allotments would be accessible for four years).

7. ANALYSIS

The Compensation Program was suspended on November 1, 1996. One month later, on December 6, 1996, it was reinstated. To evaluate the decisions to suspend and reinstate the Program, it is important for me here to draw together what we know about the Program up to its suspension.

Up to the suspension, 271 claim files had been completed.[8] *The vast majority had been settled. Approximately 33 had been decided by file reviewers. Compensation was being paid in all these cases. Whether settled or decided by a file reviewer, all of these claims had been processed under the MOU. This meant that assessors generally presumed, in the absence of demonstrable falsehood, that abuse had occurred. As earlier noted, even in the face of some demonstrable falsehoods, the balance of a claim might be settled because it could not be disproven. Most disputes turned on where the abuse fell within the designated categories. Though the documents pertaining to the Compensation Program do not always permit precise calculations, it appears that approximately 424 claims were processed prior to the Program's suspension. Only 22 claims were entirely denied by file assessors (subject to the claimants' right to file review). Offers were made in 383 cases.*[9]

Despite the large number of cases completed (271) and the larger number of offers made (383), assessors and file reviewers had no input from current or former employees as to the merits of any of these claims. No one was interviewing past employees. Such interviews did not commence until January 1997, after the Program was reinstated. As I outline in the next chapter, even then, they were initially only telephone contacts that could not be used in file reviews. Very limited interviews of current employees by the IIU had only commenced in September 1996, and those were directed to the disciplinary proceedings, rather than the compensation process. The IIU was providing file assessors with limited information. In fact, it was made clear to the IIU that the Program did not contemplate that the IIU would truly investigate these claims or conduct witness interviews to assist the assessors. It follows that offers were made to claimants, and file review decisions were rendered, without resort to evidence of fundamental importance. Hence, my earlier determination that the validation

---

[8]Department of Finance, Internal Audit Division, Working Draft Report, January 17, 1997. This Report contains statistics as of October 29, 1996. As the Province was notified of the acceptance of offers that had been made prior to suspension, and file review decisions were released for hearings held before the suspension, the number of completed claim files increased to 278.

[9]There were six requests for further information.

process was seriously flawed and lacked credibility.

It can be debated whether the Program's suspension was primarily driven by financial concerns or by concerns that the Program was not doing a very good job in credibly separating out true and false claims. It is probably most accurate to say that the Government's attention was more easily drawn to the concerns expressed by Program staff and others about the Program's credibility because it was also costing the Government an extraordinary amount of money. (A revised Government estimate as of October 11, 1996, forecast the Program to cost $86 million (assuming no changes to the Program), resulting in an over-expenditure of the original estimate of approximately $52 million.)[10]

Despite the fact that the Government apparently recognized that there were problems with the Program's design and operation, prompting its suspension, I am not convinced that the Government fully appreciated the extent of these problems.

The RCMP had requested that the Program not be reinstated until at least March 1997. It was hoped that this would permit the integration of the RCMP and IIU computer systems. As well, the Minister had noted, in his dealings with claimants' counsel, that normally disciplinary proceedings and litigation respecting compensation follow a police investigation. He expressed concern that the investigation for the purposes of compensation and discipline could jeopardize any prosecution. Despite the concerns expressed both by the RCMP and the Minister, the Program was quickly reinstated. A compelling case could be made for the termination, or a prolonged suspension, of the Program, while, in the least, the criminal investigation ran its course. Of course, terminating the Program would have generated further legal debate over whether the Government could unilaterally do so. This highlights another flaw in the Program's design: inadequate consideration was given to the legal status of the MOU and when, if at all, the Program could be modified or terminated.

Even if the Program was to be reinstated, Government did so – with due respect – in a 'patchwork' fashion. As discussed in later chapters, immediately after the Program was reinstated, it was obvious that the Program required further reworking.

Having said that, I recognize that a number of the changes made to the Program appeared to be reasonable ones. If the Program was to continue, it was appropriate to extend the 45-day turn around time for the Province's Responses and increase staff resources to allow claims to be investigated and newly discovered documents to be catalogued and put in place.

---

[10]Department of Finance, Internal Audit Division, Working Draft Report, January 17, 1997.

Development of a statement-taking protocol, recognition that the IIU would be permitted to interview claimants rather than rely solely upon prior statements, and the right of the parties to submit written, recorded or documentary proof from anyone who had evidence relating to a claim also represented improvements over the MOU.

It made sense to assign file reviewers on a rotating basis. The entitlement of each claimant to select his or her own file reviewer contributed to the lack of credibility of the validation process and invited suspicion that reviewers were selected based upon prior generous awards to other claimants. Another reasonable alternative would have been to provide for selection of file reviewers on a rotating basis subject to a mechanism that would permit selection of a particular file reviewer, on consent, based on special expertise, knowledge or experience.

It was also appropriate to rectify the arrangement that had permitted claimants to restrict the use that could be made of serious allegations of abuse, regardless of the potential dangers to vulnerable young people or the public at large. Such an arrangement was incompatible with the Government's duty to protect young people from suspected abuse.

The Government decided to pay out awards over time, rather than in one lump sum payment. There had been accounts – some of which were verified by individuals who spoke with me – of large awards being squandered by recipients or otherwise misused. Some, although not all, of the claimants who spoke with me suggested that payments over time made sense and avoided abuses. Others favoured an approach that would permit the method of payment to be determined on a case-by-case basis. For example, some claimants used lump sum awards to purchase homes. They felt that it would have been unfair to penalize them for the conduct of others or for the Government to have controlled the manner in which they were to be compensated. In my view, the Government might reasonably have decided, at the outset of the process, that payments would be made in installments rather than in one lump sum. Another reasonable alternative, which I favour, would enable some relief from that method of payment in particular circumstances. I address this issue more fully in my recommendations. This change to the Program was an understandable one, although its timing and the fact that it was done unilaterally did not enhance the Program in the eyes of true victims.

Despite some changes for the better, the Program remained seriously flawed. Continuation of the Program did not await completion of either the criminal or the IIU investigation. Indeed, it did not even await receipt by Government of the particulars of the claims being advanced, which would be contained either in claimant statements or in the

Demands. As I outline later in this Report, true validation of individual claims could not be done in a vacuum; from the perspective of both claimants and employees, validation would benefit from some ability to compare claims and the other evidence bearing upon them. Such investigative comparisons could yield corroborative evidence of individual claims. It could also demonstrate the likelihood of collusion or the contamination of one claimant's account by another.

The Program now contemplated the use of written, recorded or documentary proof, but it would remain difficult to use that material credibly within a process that permitted no witness other than the claimant to be called at the file review. The turn around time for Responses was extended only to 120 days, unlikely to permit a thorough internal investigation and assessment – especially given the likely flood of additional notices of claims to be received on or before December 18, 1996, and the fact that the recently discovered documentation had not yet been catalogued and put in place. Further, the changes to the Program were unlikely to affect a number of files. There were as many as 152 claim files on which the Province had made offers that remained outstanding. It was not contemplated that these offers, albeit made within a flawed process, would be re-evaluated. Finally, the framework within which validation was to occur – a process in which abuse was presumed, absent demonstrated falsehood – was unlikely to be significantly affected by these changes.

An examination of the Program, as reinstated, supports these conclusions. As described in the next chapter, cracks quickly surfaced in the reinstated Program. Assessors and investigators struggled to meet the 120-day deadlines and were forced to decide which investigations should be abandoned in the interests of time and resources. They were 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. Assessors and file reviewers struggled with how, if at all, employee statements could or should be used to resolve issues of credibility.

In the meantime, true victims of abuse suffered. The position advanced by claimants' counsel – namely, that such victims were being re-victimized by unilateral changes in the process – had merit. Undoubtedly, these changes were also seen as a betrayal not only of the spirit, but of the express terms of the MOU, negotiated in good faith.

Some changes were seen as outright reversals of the MOU. For example, the reinstated Program did not compensate for inter-resident abuse. This was a result of the Government's dissatisfaction with how some file reviewers had addressed the issue of condonation. The change was described as a "clarification." With respect, condonation was expressly addressed,

rightly or wrongly, in the MOU. The Government's surprise when compensation was awarded on the basis of condonation represented, at best, a misunderstanding of what its own negotiators had agreed to. I agree with the perspective of claimants' counsel that this change was more properly characterized as a reversal than a clarification.

Be that as it may, on balance, I am of the view that the flaws in the Compensation Program required rectification, despite the potential impact upon some claimants. A Program that lacked credibility and fairness did not ultimately enure to the benefit of true victims either, since their claims were tarred with the same lack of credibility that pervaded the Program itself. However, had the Government structured a credible Program from the outset, it would have better served those whom the Program was designed to help. Further, as alluded to above, and elaborated on in the chapters that follow, the changes which the Government made did not rectify the serious flaws in the Program.