XII

Completion of the Program

1. INTRODUCTION

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

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

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

2. STATUS OF THE PROGRAM AFTER THE GUIDELINES

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

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

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

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

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

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

3. POLYGRAPH EVIDENCE

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

---

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

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

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

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

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

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

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

---

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

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

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

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

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

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

One file reviewer said this about polygraph evidence:

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

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

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

.....

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

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

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

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

.....

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

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

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

Another file reviewer felt differently about polygraph evidence:

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

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

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

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

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

The file reviewer awarded $20,000 compensation.

4. IN-PERSON FILE REVIEWS

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

5. AUDIT OF RANDOMLY SELECTED CLAIM FILES

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

The file reviewer found as follows:

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

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

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

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

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

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

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

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

---

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

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

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

6. SNAPSHOT AS OF NOVEMBER 1, 2001

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

7. SURVEY OF THE FILE REVIEWERS

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. STATISTICS

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

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

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

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

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

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

---

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

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

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

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

9. COSTS

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

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

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

10. ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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