

VII

The Memorandum of Understanding

1. INTRODUCTION

This chapter summarizes the Memorandum of Understanding (“MOU”) that initially served as the framework for the Compensation Program. The full MOU is reproduced as Appendix “F”.

The MOU covered the three institutions at which the Stratton Report found that abuse had occurred: the Nova School for Boys (Shelburne Youth Centre), the Nova Scotia School for Girls (the Nova Scotia Residential Centre) and the Nova Scotia Youth Training Centre. It provided compensation for established survivors¹ of physical or sexual abuse at those institutions.

The MOU stated that survivors, through their legal representatives, “resolved a process and parameters for compensation” for the physical and sexual abuse they experienced. It specified that neither its terms nor the process leading to its creation constituted any admission of liability on the part of the Province. Indeed, the parties specifically agreed that the MOU would not be introduced as evidence in any existing or future legal proceedings.

The MOU listed the following as the fundamental purposes of the compensation process:

- ! To acknowledge moral responsibility for the Physical and Sexual Abuse experienced by the Survivors which was perpetrated, condoned, or directed by employees of the Province during the time the Survivors were resident in the Institutions;
- ! to affirm the essential worth and dignity of all of the Survivors, who were residents of the Institutions;

¹The MOU utilized the term “survivor” throughout, defined as an individual who alleged that he or she was a victim of physical and/or sexual abuse. The term “claimant” was substituted in the later Compensation for Institutional Abuse Program Guidelines (“Guidelines”), released November 6, 1997. Here, the term “survivor” is used when reproducing the language contained in the MOU. Elsewhere, I comment on its use in the MOU.

- ! to assist the Survivors, in a tangible way, with the healing process;
- ! to affirm to the Survivors that they were not responsible in any way for the Physical and Sexual Abuse perpetrated, condoned, or directed by employees of the Province while the Survivors were resident in the institutions; and
- ! to implement financial compensation and other benefits to Survivors in a principled, respectful and timely fashion.

2. ELIGIBILITY

Survivors were eligible for the compensation and other benefits identified in the MOU where it was established, through negotiation or file review, that physical and/or sexual abuse had occurred. Survivors whose claims were validated were to be compensated for abuse perpetrated, condoned, or directed by employees of the Province during the time the survivors were resident in the named institutions.

“Physical abuse” was defined to mean any act of physical assault which was a violation of the provisions of the *Criminal Code*, as that legislation existed at the time the act took place.

“Sexual abuse” was defined to mean:

- (i) acts of oral, vaginal or anal intercourse; masturbation; fondling; digital penetration; and acts of sexual interference, which may include inappropriate watching or staring, comments and sexual intimidation; and includes any sexual act which was a violation of the *Criminal Code*, as that legislation existed at the time the act took place; and/or
- (ii) attempted acts of oral, vaginal or anal intercourse; masturbation, fondling, or digital penetration, which were a violation of the *Criminal Code*, as that legislation existed at the time the act took place.

3. COMPENSATION CATEGORIES

Schedule “B” to the MOU established compensation categories and counselling allotments as follows:

Categories	Description	Range of Awards	Counselling Allotments
Category 1	Severe Sexual and Severe Physical	\$100,000-\$120,000	\$10,000
Category 2	Severe Sexual and Medium Physical Severe Physical and Medium Sexual	\$80,000-\$100,000	\$10,000

Category 3	Severe Sexual and Minor Physical Severe Physical and Minor Sexual	\$60,000-\$80,000	\$10,000
Category 4	Severe Sexual	\$50,000-\$60,000	\$10,000
Category 5	Severe Physical	\$25,000-\$60,000	\$10,000
Category 6	Medium Physical and Medium Sexual	\$50,000-\$60,000	\$7,500
Category 7	Minor Sexual and Medium Physical Minor Physical and Medium Sexual	\$40,000-\$50,000	\$7,500
Category 8	Medium Sexual	\$30,000-\$50,000	\$7,500
Category 9	Minor Sexual and Minor Physical	\$20,000-\$30,000	\$5,000
Category 10	Medium Physical	\$5,000-\$25,000	\$5,000
Category 11	Minor Sexual	\$5,000-\$30,000	\$5,000
Category 12	Minor Physical and/or Sexual Interference	\$0-\$5,000	\$5,000

Schedule “C” to the MOU provided guidelines as to the type and frequency of abuse that would merit inclusion in each compensation category. It read in part:

The number of incidents may not be determinative of category, but may offer guidance to determine category. Cases shall be evaluated in the context of Statements available for review. After determining which category a Survivor shall be placed in, a file reviewer shall consider any aggravating factors present and may, on the basis of the aggravating factors, move the Survivor up within the range of that category. The absence of aggravating factors in any particular situation shall not preclude a Survivor from being placed at the top of a category range.

For purposes of clarity, any act which constituted sexual assault or attempted sexual assault under the *Criminal Code*, as it existed at the time of the act, as well as sexual interference as outlined herein, shall be considered to be Sexual Abuse. (Emphasis in the original.)

An example of the contents of the schedule is provided below:

SEVERE SEXUAL

Type of abuse:

- # anal intercourse
- # vaginal intercourse
- # oral intercourse

Duration/Number of Incidents:

- # repeated, persistent, characterized as “chronic”, “severe”

Aggravating Factors:

- # verbal abuse
- # withholding treatment
- # long-term solitary confinement
- # racist acts
- # threats
- # intimidation

No monetary compensation was available for any psychological consequences of the abuse.

4. PROCESS

Compensation was to be determined by reference to written signed statements of the survivor. These statements had to have been taken by Mr. Stratton's investigators (Facts-Probe Inc.), the Internal Investigations Unit ("IIU") or a police agency.² At the option of either the survivor or the Province, medical records of any of the institutions at issue could also be considered. Reference could be made to medical reports prepared for the purpose of establishing physical abuse, physical injury or physical disability where no other independent records existed.

Survivors were entitled to access any of their statements taken by Facts-Probe Inc. or the IIU. They were also entitled to access any other statement with the prior consent of its author, as well as any medical, educational, social work or probation files kept or maintained by the institutions "in respect of the survivor personally and not related to others."

Disputes respecting the truth of the allegations of abuse or the quantum of compensation were to be resolved either through negotiation (with an official called an "assessor") or, failing resolution, through a file review process.

A survivor was required to make a Demand upon the Province. The Province then had to respond within 45 days. If the demand was accepted, then payment in full had to be made within 20 days of acceptance, and in any event not later than 65 days from the date of the Demand, upon receipt by the Province of a release signed by the survivor.

The release had to be in the form attached as Schedule "D" to the MOU. The form reflected that the survivor understood that the provision of any benefit under the MOU was made without any admission that the Province or its agents were negligent, in breach of any duty, or in any way responsible for the survivor's injuries or damages, and that liability was denied. The Province and its present and former agents who were involved in the administration of the institutions were also fully released from potential civil actions. The survivor was still entitled to sue any employee who committed abuse against him or her.

²Statements given by a survivor and reduced to writing or recorded on audiotape or videotape with a view to validating a claim could not be released to the public without the survivor's prior written consent.

If a negotiated agreement was not reached within 45 days of the Demand or such further time as could be agreed upon, the survivor could continue to negotiate with the Province or give notice that the Demand will be submitted to file review.

5. FILE REVIEW

The MOU stated that the list of file reviewers had been chosen by the survivors and accepted by the Province. The list was attached to the MOU as Schedule “A”.

A survivor was to choose his or her file reviewer from Schedule “A”. The choice could only be rejected by the Province for a conflict of interest.

The survivor’s Demand was to be submitted to the file reviewer, with a copy to the Province. The Province then had 20 days to forward its Response to the file reviewer.

Subject to the file reviewer’s availability, file review was to take place within 30 days of the submission of the Demand. (Non-availability could result in the choice of another reviewer.) The chosen file reviewer could not adjourn or recess a proceeding beyond the prescribed time limits without the consent of both parties.

The survivor was entitled, upon request, to appear personally or by videotape, audiotape or telephone before the file reviewer. If the survivor appeared without counsel, no other party could appear before the file reviewer. If the survivor appeared with counsel to make representations, the Province could appear and do likewise.

The MOU contemplated that a survivor could make allegations not already contained in his or her statement. Where this occurred, the survivor had to choose to either adjourn the file review immediately and make a further statement and Demand (in which event the survivor was responsible for his or her legal costs from the date of adjournment), or permit the reviewer to disregard the new allegations when deciding how much compensation should be paid.

The survivors (as a group) and the Province were each to select interview statements taken by Facts-Probe Inc. which they regarded as representative of each category of compensation (up to four per category). These “Statement Volumes” were to be provided to file reviewers, without names and dates. The file reviewer was directed to take them into consideration when determining the amount of compensation.

The file reviewer was to render a written decision to the survivor and the Province within 30 days of either the Province’s submission or the appearance before the file reviewer, whichever was later. One hundred dollars was to be deducted from the reviewer’s fee for every day the decision was late. The decision had to accord with the guidelines in Schedule “C” and it could not exceed the monetary limits contained in Schedule “B”. The MOU stipulated that the decision

was final and not subject to appeal or judicial review.

Compensation awards were to be paid within 20 days of the decision to the survivor's lawyer, in trust, upon the Province's receipt of a written direction to pay signed by the survivor. The money was deemed not to be income for purposes of Nova Scotia law.³ The Province also undertook to request that other jurisdictions enact reciprocating policies or legislation. (A number of the claimants were no longer residents of Nova Scotia.)

The Province undertook to treat all survivor information it held or received in respect of a claim for compensation in accordance with its *Freedom of Information and Protection of Privacy Act* ("FOIPOP") obligations.

³On June 18, 1996, amendments were approved by Cabinet to the Regulations under *The Family Benefits Act* and *The Social Assistance Act* to provide that the compensation payments under the MOU were not income for the purpose of determining family benefits or social assistance.

6. COUNSELLING AND OTHER BENEFITS

Interim counselling had been available since July 20, 1995, to a maximum of the earlier of one year's counselling or \$5,000. The survivor was entitled to continue interim counselling until compensation was payable, a file reviewer determined that no compensation was payable or the survivor chose to proceed against the Province civilly. A survivor was entitled to long term counselling in accordance with Schedule "B", once compensation became due. At that point, interim counselling was terminated. The long-term counselling allotment could be applied to the cost of employment, psychological or financial counselling. Any portion of the value of psychological counselling could be transferred to a survivor's "spousal partner" or children. The Province was entitled to require that counsellors be accredited in accordance with the Province's earlier agreement to provide interim counselling.

The Province was to provide survivors and/or their counsel with a list of drug dependency programs available in Nova Scotia. As well, the Province had to facilitate and fund the preparation by an independent recorder of a public report of survivors' testimonials.⁴

7. LEGAL FEES

Legal fees incurred by survivors, and disbursements and counsel's travel time and expenses, were to be paid by the Province in accordance with rates established in the MOU. Senior counsel (10+ years' practice) were to receive their usual hourly rate to a maximum of \$175 per hour; intermediate counsel (5 to 9 years' practice) to a maximum of \$150 per hour; junior counsel to a maximum of \$125 per hour; and articled clerks to a maximum of \$75 per hour. These hourly rates were to include time spent by counsel's office staff.

Such legal fees, travel and disbursements could include those incurred:

- ! in connection with discussions to develop the MOU;
- ! in furtherance of a particular survivor's civil case (other than relating to media interviews or lobbying for a public inquiry) from the date counsel was retained to the signing date of the MOU, if it was determined that compensation was payable to the survivor; and
- ! on behalf of a survivor after the signing date of the MOU, not to exceed 10 hours' representation.

Once a survivor has signed a Schedule "D" release, all contingency fee agreements previously entered into between counsel and a solicitor were revoked and no further such

⁴This report has yet to be prepared.

arrangements were to be entered into respecting compensation payable under the MOU.

8. ADDITIONAL PROVISIONS

Entitlement to the lawful heirs/estate of a survivor who had died was established.

The Minister of Justice, on behalf of the Province, within 30 days of the effective date of the MOU, had to convey a public apology to the survivors and their families for the physical and sexual abuse that the survivors experienced while resident in the institutions. Following the settlement of any individual claim, the Minister was also, by personal letter to the survivor, to convey an apology to that survivor.

At his or her option, a survivor who was entitled to compensation could have all or part of that compensation paid by way of structured settlement.

To be eligible for compensation, a survivor, within six months of the effective date of the MOU, had to give written notice of his or her intention to make a Demand upon the Province. Such a demand had to be submitted within six months of such notice.

9. ANALYSIS

I take issue with a number of the MOU's provisions. Some are inconsistent with a meaningful validation of claims. The time lines within which the Province was to respond to an initial Demand, and respond to a submission to file review, not only reflected Government's disinterest in true validation, but also ensured that it could not take place.

The MOU articulated no explicit burden of proof. It identified the parties to appear before a file reviewer, and the "Statement Volumes" to be available to the reviewer to quantify damages, but otherwise was largely silent as to the procedures at the review. There was certainly no suggestion that the file reviewer would hear from employees or others adverse in interest to the claimants. Indeed, not even Government counsel were entitled to attend a file review pertaining to an unrepresented claimant. As for as documentary evidence, the MOU reflected that compensation would be determined by reference to written statements taken by the Stratton investigators, the IIU or a police agency and, at the option of either party, the institution's medical records. Certain medical reports could also be resorted to in certain circumstances. At best, the MOU was mostly silent as to the documents and witnesses that could be relied upon in determining a disputed claim. However, it could also be interpreted – as it was – to significantly limit resort to any materials other than those explicitly mentioned.

In my view, the gaps in the MOU pertaining to validation supported the apparent understanding of claimants' counsel (based on communications from the Government negotiators) that little or no verification would be required. As we will see, conflicting views soon surfaced as to how claims should or should not be validated.

I will defer consideration of other provisions in the MOU until later in the Report, when I discuss changes made to the program.