

# IX

## The Early Days

### 1. PREPARATIONS FOR THE MOU

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

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

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

The resources to validate allegations is [sic] critical in ensuring that sufficient information is available to respond to claims for compensation in a timely fashion. The ability to do so will be important to the integrity of the compensation process.

It is clear that the IIU lacks the investigative resources to meet the expectations of the compensation process. It is critical that investigators be in place as quickly as possible to deal with the volume of material, and to ensure the process is not delayed.

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

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

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<sup>1</sup>Mr. Seaman initially worked part-time.

were expected to make claims.

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

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

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

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

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

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

## 2. THE EARLY OPERATION OF THE MOU

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>3</sup>Details of the instructions by Ms. Scott to the Murphys are outlined in Chapter VIII.

abuse. I often find myself recommending counselling to survivors not only with respect to the abuse they experienced, but also to deal with the problems they are having with this process.

I am gravely concerned about the potential for this process to compound the harm already inflicted on these survivors. The process of resolving the compensation claims must be governed in this unique process by the principle of ensuring that survivors feel they are believed, respected and acknowledged. I am hopeful that the resolution offered by this process can be one that survivors experience as a reconciliation of their pain and the damage done to them previously by those in positions of trust and power.

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

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

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

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

Furthermore, it would seem to me to be totally contrary to the concepts of fundamental justice and due process for the Department of Justice to be giving compensation to alleged

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

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

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

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

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

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

The MOU provides compensation to be based on Statements as defined. Unless the Province can actually disprove the specific allegation in a statement, then the statement is the only evidence and must result in the compensation that would follow. “Suspicious” or “concerns” about the accuracy of a statement are of no effect under the MOU. The contract is very specific.

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From our point of view, it appears the lawyers responding to claims did not understand, well enough, the specifics of the MOU, or if they do, they are ignoring the Province’s clear obligation in favour of other considerations. This is not as it should be. We know, because of the process, that some people will be compensated who probably do not deserve to be compensated. It is our firm belief, that none of our clients fit into this category. But, we also know that virtually everyone compensated under this process, who has a legitimate claim, is going to give up a great deal that would otherwise be obtained in a courtroom.

There is nothing in the MOU agreement that permits the Province to deny a claim outright because certain allegations are questionable. There is no room in the MOU for personal opinions of counsel. The Statements stand alone.

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

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

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

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

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

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

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

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

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revisited (p. 140).

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

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

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

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

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

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

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

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

such a centre.<sup>8</sup>

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

These [resident summary sheets] are of very little use to us as they are presently filled out. As you can see in your review of the samples, often under the employee summary, question marks are frequently written in and sections are left blank. In addition, important information, for example employment dates, are usually not filled in.

These summary sheets are of no use to us as they are presently completed. Could you please ask the staff to complete them with more accuracy. If that is too time consuming, they can stop sending them.

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

We have 3 support staff assigned to the ADR process on a full-time basis. I notice their workload includes a total of 41 files to be completed within the next few working days. While on paper, this may not look like a lot of work, there is an extensive amount of research involved in completing each file. This entails searching through boxes, daily logs, and copious other materials in our possession to ensure all information pertinent to the file is located. This information then has to be photocopied for our own records as well as for your purposes.

We have two support staff assigned to inputting the various files and documents into our database, which will eventually make matters easier for the ADR staff; however, these staff members are also responsible for various assignments from the investigators and are frequently required to interrupt their data entry for other purposes.

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

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

### 3. EVENTS LEADING TO THE SUSPENSION OF THE PROGRAM

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

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

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

I am writing to request legal assistance on behalf of all employees, both management and unionized staff who received allegations of abuse [which were] subsequently found to be nothing more than unfounded allegations.

As you know, the NSGEU has been providing legal support for all employees in the absence of support from the Employer. This is unacceptable. You have a responsibility to your employees who were wrongly accused.

The Department of Justice has been providing legal assistance to anyone who files allegations but absolutely none for its employees. The Department's lack of understanding and total disregard for its employees' rights to natural justice and fair representation must not be allowed to continue. We hope the Department will review its previous position in light of the fact that so many of the allegations are frivolous in nature or simply not true.

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

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

settlement negotiations on the judgment of our investigators as to the credibility of claimants. Unfortunately, this approach has not worked as the investigators are unable in many cases to offer an opinion.

In those cases where the investigators are unable to offer opinions, the lawyer reviewing the file is left to discern credibility on the basis of the Facts-Probe Inc. statement and whatever documentary evidence is available. Frequently there is a dearth of institutional information that might explain injuries or predispositions to fantasy or otherwise. Under the MOU there is no right of cross-examination, and no right to lead contradictory evidence from independent sources. If the statement provided by the claimant is internally consistent, makes allegations against “known” perpetrators, and it checks out that the claimant was there when the alleged perpetrator was also there, the claim is essentially validated. It is very difficult in any claim under the MOU to challenge the type or frequency of abuse without the tools to test the information. The type and frequency of abuse determine the value of a claim under the grid. This inability has a direct financial impact on the value of the claims.

At the same time, calls have come into the ADR office from other claimants asserting another claimant is untruthful. The Internal Investigation Unit has expressed the view that many of the claimants are fabricating information. The IIU based this opinion from their interviews of claimants and their review of files. Unfortunately their opinion is as much impression as it is fact and can't be advanced in the ADR process unless there is concrete material that can be produced. The RCMP have likewise expressed a similar view to that of the IIU, although the RCMP will not allow us to use any of the information they have to substantiate their view.

The problem is that many of us have impressions as to the credibility or lack of credibility of claims, but none of us in the process are confident the system in use effectively allows false claims to be denied. As one of our lawyers put it: “In the criminal justice system, it is accepted that it is better that nine guilty men go free, than have one innocent person convicted. In the ADR process, we compensate 9 people to get to the one who deserves the compensation.” While we have no way of knowing if the ratio is as high as nine to one, the point is that we are uncertain as to what the ratio might be, but I believe the potential is high, in light of the validation process.

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

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

- ! As the survivor's lawyer, she would make a brief introduction of the Demand and the Province's response to it, identifying the essential issues;
- ! Unless she misstated or omitted some central detail, counsel for the Province would make limited comments, reserving argument until after the survivor spoke to the file reviewer;
- ! The survivor would address the file reviewer directly. The reviewer would be able to ask questions, but there would be no cross-examination of the survivor by anyone;
- ! Counsel for the survivor may need to draw his or her client out if they are having difficulty expressing themselves. The file reviewer may be asked to assist;
- ! Once the survivor is finished, Derrick would make her submissions in support of the Demand and the Province would then respond. There would be no formalized rules limiting reply and counter-reply. Any argumentative statements would be between counsel, and not directed to the survivor;
- ! The review would take place in an informal physical setting, with a seating arrangement around a table being preferred.

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

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

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

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

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

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

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

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

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

risk.”

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

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

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

It appears after our discussions that there is a leaning towards breaking the MOU and making minor or wholesale changes to the process. Ms. Nancy Muise, Director of Auditing for the Department of Finance, stated a number of times over the past day and a half that an over-expenditure will not be tolerated. She also stated that they planned to audit the project and make changes to our process, assuming they can lower the projected budget over-expenditure. While I would welcome any assistance/suggestions auditing can give in relation to maximizing cost efficiency, it would appear that they are recommending breaking the MOU in order to accomplish this objective.

Although we are encountering significant difficulty in implementing the MOU, the problem areas were identified as potential difficulties during the negotiations, and in meetings where we sought instructions from Dr. Gillis, the Minister of Justice at the time. The agreement that the Government had asked us to negotiate was based on the principles of fair compensation and early resolution for the survivors. It was also driven by concern over the cost to the Government, in terms of embarrassment and resources, of litigation and a possible public inquiry. Dr. Gillis has said publicly on many occasions that we have a moral responsibility to the survivors. I am concerned that the moral responsibility to the survivors may now be denied based on a larger number of survivors being identified than had been initially projected. It is my view that as the scale of the problem of abuse at these institutions has become increasing more apparent, the moral responsibility to the Government has also increased, not lessened.

.....

It was my understanding that the validation process was never intended to be rigorous. It was agreed that we should, for the most part, believe the statements given to Facts-Probe Inc. This was based on the premise that the majority of the survivors were telling the truth. Both the Government and the survivors had confidence in Messrs. Murphy, the Facts-Probe Inc. investigations [sic]. I have spoken to Messrs. Murphy, and they still feel that by far the vast majority of survivors are telling the truth.

Notwithstanding the above, it was acknowledged during discussion[s] with Minister Gillis that this validation process would leave the process open to fraudulent claims. At the time, it was accepted that a small percentage of invalid claims would be paid, but, on balance, that this was an acceptable price to pay to meet the stated goals of fair and early compensation for survivors of abuse.

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

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

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

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

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

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

#### 4. AUDIT OF CLAIM FILES

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

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

- ! The first, which began on June 17, 1996 and lasted until the Program was put on hold November 1, 1996. This phase was governed by the MOU;<sup>13</sup>
- ! The second, which began in December 1996 and lasted until November 1997. As will be set out in a subsequent chapter, this phase was governed by the MOU as varied by the Government on December 6, 1996;

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

<sup>12</sup>The file names were provided to us in alphabetical order and every 14<sup>th</sup> file was reviewed.

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

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

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

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

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

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

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

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

<sup>15</sup>Unavailability could be due to health problems.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Before dealing with the issue of category and quantum, I would like to comment on credibility as it was an issue in this case. [G.B.] claims abuse at the hands of [employee A] and [employee B]. The Province does not have records of either man being employed by them at the time [G.B.] was at the Shelburne School for Boys, but do have records of [employee A] being employed at a much later date. [G.B.] is clear on the names and descriptions of the employees involve [sic] and does not feel it possible that he is mistaken.

I accept [G.B.'s] allegations with regard to these two employees. Records are not always indicative of the way things were at the time and [G.B.] as pointed out could have used other names of employees if it was his intention to deceive as records of those employees are consistent with his recall. Also [G.B.] had an out so to speak, and could have said that he may be wrong but stood steadfast to his recollection. These points coupled with the overall credibility of [G.B.] lead me to accept his allegation in relation to those two employees.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>19</sup>Moss pled guilty to indecent assault in relation to R.G.

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

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

## **5. ANALYSIS**

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

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

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

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

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

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

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

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

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

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<sup>20</sup>Sometimes, the claimant would purport to 'withdraw' the deliberate falsehood.

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

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

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

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

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

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

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

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

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

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<sup>21</sup>[1952] 2 D.L.R. 354 at pp. 356-7.

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

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

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

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

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

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

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

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