

VIII

The Commencement of Investigations

1. INTRODUCTION

Chapter VI outlined the process from July 1995 to May 1996 which led to the creation of the Memorandum of Understanding (“MOU”). When the Minister of Justice announced at the July 20, 1995, press conference that the Government had approved an ADR process to compensate abuse victims, he also stated that an internal investigation was underway that would determine whether any current provincial employees should be subject to disciplinary action. As previously noted, he said that this examination would reach beyond those who may have perpetrated abuse: the actions or lack of action of those who could, or should, have had knowledge of such abuse was also under investigation. He also announced that the Stratton Report, which had identified criminal activities, had been turned over to the RCMP for appropriate action. He cautioned, however, that the RCMP would only approach those victims who consented to being contacted by the police.

Accordingly, during the period leading up to the negotiation of the MOU, the Internal Investigations Unit (“IIU”) was formed and commenced operations, and the RCMP initiated an investigation. As part of the investigative process, the Murphys (who had first been engaged by Mr. Stratton) were re-engaged by the Government. This chapter of the Report examines these developments.

2. FORMATION OF THE INTERNAL INVESTIGATIONS UNIT

One week before the press conference of July 20, 1995, Paula Simon informed the Deputy Minister of Justice, D. William MacDonald, Q.C., that she had just learned there were five men on staff at Shelburne who had been identified by Mr. Stratton as perpetrators of physical abuse. It was her advice that the Government should take decisive action and release them from their duties.

On July 18, 1995, Fred Honsberger, Acting Executive Director of Correctional Services, wrote to the Deputy Minister, endorsing an investigation of current staff members at Shelburne

who were identified to Mr. Stratton. In Mr. Honsberger's view, the investigative and disciplinary process should be geared towards punishing abusers and protecting young people against further abuse. However, he cautioned that the alleged perpetrators must be informed of the specific allegations against them and that action should not be taken against staff based upon general, unconfirmed allegations. He noted that the three-part response chosen by the Government was inherently victim-oriented, unlike a public inquiry which would focus on wrongdoing. Mr. Honsberger made the following point:

Existing allegations of abuse were made by individuals who understood that the information was being provided, in confidence, for the purpose of obtaining support for emotional problems and financial compensation. I do not believe that the information was provided with the intent of facing accusers. However legitimate the allegations may appear on the surface, the accusers should be questioned further regarding the intent of Government to use their information to take corrective action against the abusers.

Given these considerations, Mr. Honsberger recommended to the Deputy Minister that the Minister should announce that an investigation was underway, but not give details about it until the Department of Justice ("Justice") could gather more information on its likely scope. He further suggested that the investigation should be conducted by experienced investigators who were unconnected with Correctional Services. He even suggested that it may be appropriate to consider some form of a modified inquiry as an alternative to an investigation, depending on the anticipated scope of the review. This memorandum was the first document that began to outline the make-up of what eventually became the IIU.

Alison Scott, a lawyer with Justice, had acted as the main liaison between the Department and the Stratton investigation. After the release of the Stratton Report, she had asked the Murphys to provide the Department with a list of employees who had been named as abusers. The difficulty was that the identity of the named abusers was of limited assistance, absent information as to the identity of their alleged victims, and the Stratton investigators had made a promise of confidentiality to the former residents concerning their statements. Scott accordingly asked the Murphys to seek permission from the former residents to release their names to the RCMP and to Government officials. This would allow the RCMP to conduct a criminal investigation into their claims of abuse. It would also allow the Province to investigate allegations against current employees to decide whether disciplinary action was warranted, and to determine whether the names of any current or past employees should be placed on the Child Abuse Register.

On July 31, 1995, Duane Murphy provided Scott with the list of current and former employees who had been identified as abusers to Mr. Stratton. He also confirmed that Facts-Probe Inc. would endeavour to contact all complainants to determine if they would cooperate with the Department for disciplinary purposes and forego their promised right of confidentiality with respect to a criminal investigation.

Ms. Scott provided a consent form to the Murphys for their use:

I, _____, of _____, in the Province of

_____, hereby consent to the release of my name and any information given by me in the course of the Stratton investigation, or in the course of a follow-up to this investigation, of abuse in provincial institutions to:

Check one, two or all three:

1. The Province of Nova Scotia
2. The Royal Canadian Mounted Police, or other appropriate police force.
3. To determine whether the allegation of abuse can be investigated by a relevant Children's Aid Society or the Province for the purpose of entering the abuser's name in the Child Abuse Register.

DATED this _____ day of _____, 1995.

Witness

Signature

On August 15, 1995, Scott reported to the Minister of Justice on the follow-up to the Stratton Report. She advised him of her instructions to the Murphys, noting that they were to give priority to contacting those individuals who had made allegations against current employees. She also advised that she had directed the Murphys to follow up the new complaints which had come forward since the Report was published.

The Murphys eventually contacted the Stratton complainants with a view to obtaining the requested consent. Some gave their consent; others did not.

In September 1995, the IIU was formed to conduct an investigation respecting current employees alleged to have committed physical or sexual abuse at Shelburne, as well as those who may or should have had knowledge of such abuse. The Deputy Minister of Justice circulated a memorandum within the Government, requesting that the IIU investigators be provided with the same access to Provincial files, records, information, facilities, premises and personnel that he himself would be given.

The IIU was headed by Robert Barss, Executive Director of Policing Services. In addition to Barss, there were three investigators: Dennis Kelly, David Camp and David Horner. Camp left after a month and was replaced in early November 1995 by Frank Chambers.

In a press release dated October 17, 1995, the Minister of Justice disclosed that there were then 60 allegations by 25 complainants of physical abuse by a number of current employees. It was stated that, "[s]hould the IIU uncover anything criminal in nature, the files will be turned over to the RCMP." The Minister also announced that files relating to the investigation were being

collected and that several hundred had been secured. It was expected the IIU investigation would take a few months.

3. OPERATION OF THE INTERNAL INVESTIGATIONS UNIT

On October 12 and 13, 1995, IIU investigators met with some Shelburne employees and gave them written notices that allegations had been made against them. These notices included the name of the accuser and the time frame of the alleged assault. At that point in time, all allegations against current employees involved physical, not sexual, abuse.

On October 18, 1995, Mr. Honsberger sought direction from the Deputy Minister on the procedure that should follow service of notices of allegations. Honsberger suggested that employees should either remain on the job, be redeployed, or be directed to stay at home with pay, pending the completion of the investigation. The choice would depend on the nature of the allegations and the surrounding circumstances.¹

By memorandum dated October 25, 1995, Mr. Honsberger confirmed for the Deputy Minister that the IIU investigation was to:

- ! Provide for the safety of young offenders held at Shelburne now and in the future by assessing the potential for physical abuse by existing staff who have been named as perpetrators.²
- ! Determine whether existing staff should be removed from the facility or redeployed pending the investigation for safety purposes.³
- ! Gather evidence of abuse perpetrated by current employees for consideration in disciplinary proceedings.
- ! Determine whether supervisory staff at the time of the alleged incidents of sexual or physical abuse had knowledge of the abuse. If they had knowledge, what did they do? If they did not know, why did they not know?
- ! Gather evidence of unprofessional conduct by supervisors or management staff for consideration in disciplinary proceedings.

¹I never saw any documentation from the Deputy Minister specifically indicating whether he agreed with Mr. Honsberger's suggestions. However, given the subsequent memorandum from Honsberger, outlined next in the text, I assume he did.

²The IIU's mandate was expanded slightly by Mr. Honsberger on November 15, 1995, to refer to assessing the potential for "abuse" by existing staff, and not just "physical abuse".

³On November 15, 1995, it was made clear that the IIU would simply gather evidence to permit the Departments of Justice and Community Services – not the IIU – to make this determination.

- ! Determine what administrative action is required to prevent abuse in future.

Honsberger stated that the investigative team was in the process of determining the location, type and extent of “material, documentation and potential witnesses that may be required for evidence.” Priority was being given to “allegations against existing staff.”⁴ The Nova Scotia Government Employees Union (“NSGEU”) had been notified of the process that was being followed.

Honsberger added that there were nine current staff members at Shelburne who were facing allegations from 25 former Shelburne residents. Correctional Services administrative staff had reviewed the details of the allegations against each employee to determine:

- ! whether the allegations were of sufficient severity to suggest that existing residents of Shelburne would be in danger if the employee continued to work in his or her current capacity pending the investigation;
- ! whether the nature of the allegations suggested that the employee should be reassigned in a manner that would prevent the employee from having contact with residents pending the investigation;
- ! whether the employee should be asked to remain away from the workplace, with pay, pending the investigation.

Early on, the IIU sought access to the materials generated by the Stratton investigation.

On November 7, 1995, Harry and Duane Murphy wrote to Ms. Scott as follows:⁵

During our conversation, Mr. Horner [one of the IIU investigators] told me that they had been in touch with Judge Stratton with regard to their desire to review the material accumulated during his investigation, which is now stored at 5151 Terminal Road. He said that Judge Stratton told them he didn’t see a problem with this. Mr. Horner also stated that they talked to you and you didn’t have a problem with them reviewing the material either. He then asked me if there was anything contained in the boxes of materials which would be of interest to them. I told him I would review our document list and I would advise them accordingly.

⁴The reference to priority being given to allegations against existing staff may be somewhat confusing since the IIU was formed solely for the purpose of scrutinizing allegations against current staff. My staff spoke to Mr. Honsberger about this. He advised that by “existing staff” he was referring to employees in the institutions who were still assigned to deal with children, as opposed to employees in managerial-type positions or who had been sent home or re-assigned.

⁵While the text of the letter might lead the reader to believe that it was only from Harry Murphy, both he and his son signed it.

I informed Mr. Horner that you, Duane and I discussed the materials stored at 5151 Terminal Road. I told him that you gave us explicit instructions not to release any statements from Judge Stratton's investigation to anyone without [the] benefit of a Release Form.

.....

We will take this opportunity to raise the issue of the confidential nature of Judge Stratton's investigation, bearing in mind that we not only interviewed victims, but we also interviewed abusers. (Emphasis in the original.)

Access to these materials remained a contentious issue both for the IIU and the RCMP for years thereafter. A May 28, 1997 request by file assessors for the code used by Mr. Stratton to refer to complainants and counsellors was declined. On January 5, 1999, Frank Chambers of the IIU also requested access to the Stratton materials and, in particular, to the code used in the Stratton Report. This request was also declined. Justice officials informed Chambers that they did not know the code and that instructions from Mr. Stratton were that this was to be kept confidential. The view was expressed that the Department was bound to honour Mr. Stratton's assurances of confidentiality. Later requests were again declined. Access to the Stratton materials by the Halifax Regional Police Service was obtained through the execution of a search warrant in the Cesar Lalo investigation, but was restricted to those materials pertaining to Lalo.⁶ More recently, RCMP investigators (pursuant to Operation Hope) executed a search warrant and thereby finally obtained access to the Stratton materials.

At an early stage of the IIU operations, concerns were raised about the difficulties caused by simultaneous investigations by the police and the IIU. On November 3, 1995, Chief Superintendent Dwight Bishop, the officer in charge of criminal operations for the RCMP, wrote to Mr. Barss expressing his continued concern regarding the disciplinary investigation being conducted by the IIU at the same time the RCMP were conducting a criminal investigation. He felt that the parallel investigations could, albeit unintentionally, cause or be perceived to cause an abuse of process. He requested that Barss identify who the IIU investigators would be interviewing and document the instructions and precautions that had been established to ensure the criminal investigation was not tainted. He also informed Barss that RCMP investigators throughout the Province were preparing to interview all known victims, witnesses and offenders.

Bishop wrote to Ms. Scott on November 8, 1995, advising that the RCMP had selected four investigators from different parts of the Province, and that he would try to meet with them on November 20, 1995, to formally begin the investigation. He also advised Scott that, despite assurances from Barss that the IIU investigation would not interfere with the criminal process, he still had concerns.

⁶Access was also obtained by the Province's insurers, following an Order for Production under civil procedure rule 20.06 in the litigation by the Province against its insurers: *A.G.N.S. v. Royal and Sun Alliance Insurance Company et al.* (2000), 190 N.S.R. (2d) 208.

The Justice Coordinating Committee⁷ met on November 10, 1995. In a memorandum dated November 16, 1995, Douglas Keefe, Executive Director, Legal Services, summarized to Mr. Barss the discussions which had occurred.

The Committee decided that if the IIU found evidence of sexual abuse, it was to be turned over immediately to the appropriate police department. The IIU would continue its investigation only if that could be done without compromising the police investigation. The IIU was to meet with the relevant police forces to establish protocols for turning over information and continuing the internal investigation. Evidence of physical abuse would also be turned over to the police, and the internal investigation would continue.

The memorandum described “a potentially serious and unresolved problem:”

[T]hrough the efforts of Factsprobe (sic) and now the internal investigation unit, statements have been obtained from former residents that the former residents have directed not be turned over to the police. Potentially we have information regarding the commission of offences which in the normal course of affairs we would turn over to the police but now are honour bound not to. The RCMP may have indicated that they would not ask for information given in confidence to the Stratton Investigation by former residents. This would have to be confirmed and it will also have to be confirmed whether this extends to statements given by former residents to the internal investigation unit. This is a matter that should be worked out in a protocol between the internal investigation unit and the relevant police forces.

Mr. Keefe noted that there were five interests that were potentially competing, but which should be independent of each other, though coordinated:

1. Safety of residents;
2. discipline of misbehaving employees;
3. criminal investigation/prosecution;
4. civil liability;
5. compensation for victims through ADR.

Also discussed at the Justice Coordinating Committee’s meeting was the request by the Department of Community Services (“DCS”) for the IIU to conduct an investigation against current and former employees of DCS facilities. (This request was later refined to extend to current DCS employees only.)

⁷A committee of senior managers of the Department.

In a memorandum dated November 24, 1995, the three IIU investigators reported to Mr. Barss that, several days earlier, they had gone to Shelburne and served the remaining notices of allegations against current employees. During this visit, they learned that there might be file records on site that were not previously known to the Department of Justice. They subsequently recovered at least 800 institutional files, as well as 45 or more files from the Shelburne Academic Centre. The investigators further reported that, on November 23, 1995, they had recovered approximately 450 files, photographs and other related items of evidence from the Nova Scotia Residential Centre in Truro. They indicated that a second visit would be required as they believed that other relevant documents existed but had not yet been found.

On December 6, 1995, the IIU investigators reported to Barss that, as of that date, they were investigating physical abuse allegedly committed by 18 current Government employees on over 147 individuals. These employees had been served with notices of disciplinary misconduct. In addition, the IIU had served notifications of disciplinary default⁸ against five managers or supervisors.

In mid-December 1995, IIU investigators sought interviews with current employees facing allegations. At least some of the employees retained counsel. The position was commonly advanced on their behalf that statements would not be given until they were provided with the substance of the complaints made against them. For example, on January 5, 1996, Raymond Jacquard wrote to the IIU on behalf of nine employees, explaining that his clients were unaware of the substance of the allegations. They regarded it as only fair that this information be provided before they gave statements. Accordingly, he had advised his clients not to give any statements until this was done.

On January 4, 1996, the first disciplinary investigation was completed. The employee was subsequently notified by Mr. Honsberger that no action would be taken; the matter was closed and the employee's file would contain no record of the allegation.

By March 27, 1996, the IIU investigators reported to Barss that they were investigating allegations of abuse made by 283 complainants against more than 40 current Government employees. Approximately 35 interviews of complainants took place between January and March 27, 1996. One current employee was interviewed in the same time frame.

In the meantime, Chief Superintendent Bishop notified the Deputy Minister that the police had adopted a major case management approach in order to properly analyze the available documentation and ensure a coordinated systemic investigation into the allegations stemming from the Stratton Report. By then, the RCMP had nine investigators and four support staff assigned to the operation. Bishop anticipated that the investigative portion of the work would be completed within two years. As reflected in an earlier chapter, as of March 7, 1996, the police had identified 410 victims and 206 suspects, and those numbers were expected to increase.

⁸Notice of disciplinary default were allegations pursuant to the Government of Nova Scotia Management Manual (chapter 12, ss. 4 and 4.04) that supervisors or persons in positions of authority failed to report or direct and/or exercise appropriate action for the prevention of abuse.

Bishop reported that the RCMP investigative team had been correlating the many volumes of documents and conducting interviews with the victims. Priority was being given to those cases involving suspects who were still employed by the Province. They had implemented a protocol to ensure that information that they uncovered regarding the safety of children in jeopardy would be promptly provided to DCS.

On April 24, 1996, Crown Attorney James Burrill wrote to Jack Buntain, Q.C., Regional Crown Attorney for the Public Prosecution Service. Burrill had been assigned in January 1996 to provide pre-charge advice to the RCMP investigation. He reported that, as of April 22, 1996, the RCMP had identified 481 individuals who had complained they were victims of physical or sexual abuse at youth facilities within the Province of Nova Scotia. Eight hundred and ninety-three persons had to be interviewed before the investigation would be complete. There were 242 suspects, 37 of whom were current employees. Mr. Burrill noted that the majority of the complaints appeared to be allegations of common assault and that the RCMP had decided that they would not lay charges in those cases.

Burrill alerted Buntain to the potential problem arising from complainants being asked to give multiple statements. The fact of multiple statements, by itself, was not considered a major concern, but the RCMP were of the view that the Murphys had not taken 'pure version' statements: they had suggested the names of offenders to the complainants.⁹ Further, if the Murphys were using *their own* words to summarize information, then the potential for subsequent inconsistent statements would be high. The RCMP had reported that, upon being re-interviewed, some complainants could not understand or pronounce some of the words contained in the transcripts of their statements to the Murphys.

Burrill also raised the difficulty of disclosure. The RCMP were using a data base named "Q & A". When Burrill visited the IIU offices in February, he noted large volumes of documents in their offices and believed that no data base was in place to catalogue them.

The concerns raised by Burrill were echoed by Chief Superintendent Bishop and by Assistant Commissioner R. F. Falkingham, Commanding Officer, "H" Division, when Falkingham wrote to the Deputy Minister of Justice on May 14, 1996. The Deputy circulated the letters from Burrill and Falkingham to the IIU and to Jerry S. T. Pitzul, the Director of Public Prosecutions. He suggested a meeting with the RCMP as soon as possible to discuss these concerns. Pitzul responded shortly thereafter, suggesting that the IIU, RCMP and those responsible for the compensation investigation "meet to gain a perspective of their mandate and responsibilities and to design a process for resolving, where possible, the practical issues raised."

The RCMP continued to express concerns (in letters dated July 17 and September 11, 1996) over the fact that separate investigations were now being conducted by the police, the IIU

⁹A 'pure version' statement invites the witness, in the most general way, to outline the relevant events in his or her own words.

and the Murphys. The Minister of Justice, the Honourable Jay Abbass, announced on December 6, 1996, that a statement taking protocol would be developed for the three investigations. A joint protocol was eventually signed on April 24, 1997, by the Deputy Minister of Justice and the RCMP.

4. ANALYSIS

In July 1995, Mr. Honsberger endorsed an investigation of current staff members who had been identified to Mr. Stratton. He appropriately recognized that the employees needed to be informed of the specific allegations made against them, and that action not be taken based on general, unconfirmed allegations. He suggested an investigation to be conducted by independent, experienced investigators. Creation of the IIU followed.

The theory that current employees were to be the subject of an independent and fair investigation by experienced investigators had obvious merit, as did Mr. Honsberger's view that disciplinary action could not be grounded upon the Stratton 'findings.' The difficulty I have here is how the Government addressed the interplay between the Stratton, ADR, disciplinary and criminal proceedings.

The Government's response to reports of institutional abuse was based, in part, upon the laudable desire to prevent the re-victimization of true abuse victims that can occur when they are compelled to seek redress through formal litigation. However, complainants were potentially being exposed to multiple statement-taking sessions. The existence of a criminal investigation meant that many of them would have to provide a statement to the police. The existence of an independent IIU investigation meant that many would have to provide another statement for disciplinary proceedings. Further, if the Government was intent on moving forward at the same time with a Compensation Program, and if such a program was to be credible and fair, validation might have required that the claimants provide yet another statement, unless validation could have been merged with the disciplinary process. It is well recognized that forcing true victims to recount over and over their victimization may adversely affect their emotional well-being.

Of equal concern is the possibility that the Stratton investigators, the IIU and the RCMP may have had very different perspectives on how statements should be taken. The IIU and RCMP regarded the Murphy statements, rightly or wrongly, as flawed. It was suggested that they were not 'pure version' statements: they were suggestive and not in the words of the witness. The Murphys, on the other hand, felt that the statements were appropriately taken and accurately captured the words and intent of the witness. It was not until December 1996 that the decision was taken to develop a statement protocol. Such a protocol was finally signed on April 24, 1997. However, it appears to have done relatively little to resolve the conflicts between the RCMP and IIU in particular.

In my view, the Government created parallel investigations without ensuring, up front, that they would interrelate in an efficient and productive way. The parallel investigations meant,

in practice, that witness interviews were uneven – at times supportive and other times adversarial – and that data was shared imperfectly, when it was shared at all.

Generally, a Government response to reports of institutional abuse should ensure, first and foremost, that a criminal investigation is not compromised and that witnesses, including victims, are not subjected to repeated and inconsistent interviews. This often means that an investigation, for disciplinary or compensation purposes, should be deferred, pending completion of the criminal investigation. My recommendations later address this issue.