WORKERS' COMPENSATION CLAIMANT FRAUD INVESTIGATIONS:

DETERRING LIGHT BLUE-COLLAR CRIME

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ABSTRACT

Programme evaluation research examined the criminological and socio-legal issues of a Claimant Fraud Investigation Program (CFIP) operating inside the workers' compensation system. Qualitative and quantitative methods were used to evaluate the programmes' choice of deterrence as an instrumental mechanism for achieving compliance. Key aspects of the programme were analysed from both criminological and socio-legal standpoints. Justice and liberty tensions were examined in reference to the programmes' deterrence mechanisms and the perceptions of fourteen participants' were thematically analysed. The study develops an analytically useful concept of *light blue-collar* crime that could be applied to other organisations and scenarios. The study concluded the programme is not effective and has more of a symbolic than instrumental value. It conducts itself ethically, however, there are problems with its' choice of deterrence and the study indicates there is a low probability for a deterrent effect. Recommendations are made for other actors and institutions to play non-deterrence based roles intended to achieve compliance.

Key words: Deterrence, Justice, Liberty, Light Blue-Collar Crime, Workers' Compensation

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For my father, Honourable Justice J.W. Mahoney, and my mother, Carmel J. Mahoney. Thank you for all you did to support me.

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THE AUTHOR

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1 CLAIMANT FRAUD: DETERRING *LIGHT BLUE-COLLAR* CRIME

1.1 Introduction: Workers' Compensation in Newfoundland and Labrador

This thesis presents an evaluation of a claimant fraud investigation programme operating inside a Canadian workers' compensation system. The fraud programme's goal of deterrence is evaluated based on the criminological literature, the participants' perceptions of the programme, and data from the workers' compensation insurance system under study.

Workers' compensation is a Provincial responsibility, with each of the thirteen Canadian provinces and territories operating a compensation system under their own legislative authority. According to The Canadian Association of Workers' Compensation Boards and Commissions (2011), all of these systems are based on the five Meredith Principles. Sir William Meredith was appointed in 1910 to head a Royal Commission to study workers' compensation systems throughout the world and to make recommendations for a system for the province of Ontario. In 1913, he presented his final report containing five principles, regarded as the foundation of workers' compensation in Canada.

The first principle is no-fault compensation. Workers filing a claim are paid benefits regardless of how the injury occurred because the worker and employer waive the right to sue for liability for an injury. The second principle is security of benefits. A financially sustainable Injury Fund is established to guarantee the funds are available

to pay injured workers compensation for their work related injuries. The third is collective liability. This is the principle that ensures that employers, on the whole, share the total cost and liability for workplace injury insurance. The fourth is independent administration. This means that the Boards and Commissions administering workers' compensation insurance are separate from government and are governed by a Board of Directors. The fifth principle is exclusive jurisdiction. Only workers' compensation organizations provide workers' compensation insurance. All compensation claims are directed solely to the compensation board or commission, and it is the sole decision maker and final authority for all claims. These five principles are the result of a historic compromise in which employers solely fund the workers' compensation system in exchange for a no-fault insurance system (Association of Workers' Compensation Boards and Commissions, "Overview of Canadian Workers' Compensation: What are the Meredith Principles", 2011, p. 57).

This study is carried out in the Canadian province of Newfoundland and Labrador at the Workplace Health, Safety and Compensation Commission (WHSCC, hereafter 'the Commission'). The Commission is a Provincial government agency and its mandate is to provide workers' compensation, ensuring adequate funding through sound financial management. Claimant fraud investigations are a mechanism for ensuring that the financial benefits paid out of the Injury Fund are only paid to legitimate claimants.

Its legislation, the Workers' Compensation Act, came into effect April 1, 1951 and pays benefits based on the claimant's physical disability. In 1984, the system changed from a disability system to a wage-loss system based on a Government approved recommendation from a Statutory Review Committee, and the Commission's legislation became the Workplace Health, Safety and Compensation Act (hereafter referred to as the WHSC Act). Statutory Reviews are conducted every five years and provide a review of the workers' compensation system conducted by an independent committee. Under the authority of Section 126 of the WHSC Act, a Statutory Review Committee is tasked to "review, consider, report and make recommendations to the Lieutenant-Governor in Council upon matters respecting the regulations and the administration of each matter as the committee considers appropriate" (p. 29). In accordance with Section 126, a Statutory Review Committee has the same powers conferred upon a commissioner under the Public Inquiries Act and allows individuals and organizations to give evidence. Since 1984, the Commission's legislation and policies have been changing every five years primarily due to the Statutory Review Committees' recommendations that have been accepted and approved by Government. In particular, this study examines the impact that Statutory Review recommendations made by a Task Force in 2001 had on claimant fraud investigations, policy, and procedures at the Commission.

In order to examine its functioning in a no-fault insurance scheme, this thesis makes explicit how the Claimant Fraud Investigation Program (CFIP) undertakes its work. Chapter Two provides the policies and procedures on which cases are investigated, the *Task Force Report* (2001) that influenced the CFIP's mandate, and how decisions are taken around issues such as surveillance, zero-tolerance, prosecution,

and deterrence. It also includes a review of how the investigators and Case Managers are organised, including the number of each employed by the agency and to whom they are accountable.

The Commission was purposefully chosen as the site to conduct this mixed methods programme evaluation of the CFIP. It considers fourteen participants' perceptions of the CFIP and its goal to deter claimant fraud. The participants provide qualitative data indicating how they perceived a variety of aspects of the CFIP. Quantitative data derived from the CFIP's data base is analysed to determine if the programme is effective. The criminological and socio-legal literature about deterrence and compliance as well as *white-collar* and *blue-collar* crime is also reviewed. The methods focus on collecting, analysing, and mixing both types of data for the purpose of evaluating whether the current claimant fraud investigation programme can work in principle and the extent to which the programme actually works. Recommendations for how the programme can be improved are provided.

The next section on the organization of the Commission includes details about how the workers' compensation scheme is funded, provided to assist with understanding the economic context of the CFIP's goal of deterrence. It also provides an explanation of the relationship between the Case Manager, investigators, and the CFIP.

1.2 Organization of the Commission

The Commission must ensure sufficient funds are available to provide benefits to present and future claimants. Wage-loss and health care benefits are paid from the Commission's Injury Fund in accordance with Section 93 of the WHSC Act. The Commission established the CFIP in 2001 to protect the Injury Fund through the investigation, prosecution, and deterrence of claimant fraud. This study evaluates the CFIP in its conception and construction, its legislation, policy, and procedures, as well as its efficacy. The context giving rise to its implementation, its goals, framework and mechanisms are also evaluated.

The Commission has four primary lines of business. The first is Employer Services consisting of the Assessment Department and the Prevention Department. The Assessment Department assesses the level of risk that each employer represents and collects the premiums the employers are required to pay to be insured against the liability for work related injuries, occupational disease, and fatalities. Employers operating in the province are required to register with the Commission and pay annual assessments based on their total payroll and the level of risk they represent. The Commission is funded entirely by the annual assessments paid by the employers, and these payments must cover the cost of all new injuries that occurred in that same year as the assessment is paid. The Prevention Department is tasked with educating employers about how to prevent injury, death, and occupational disease.

The second line of business is Finance and Information Technology (IT). The finance function includes procurement and accounts payable. The Information Technology Department is responsible for the secure handling of all employer and worker information using information technology systems.

The third is Worker Services, which consists of the Health Care Department and the Compensation Department. The Compensation Department is the claimant area of the Commission where the claims accepted for compensation are managed by thirty-six Case Managers. During the period of study, the Worker Services Department adjudicated and approved an average of 96% of the claims submitted for Compensation.

For a claim to be adjudicated, three completed forms are required. The injury reporting forms are examined as they provide the evidence Claims Adjudicators use in their decision to accept or deny a claim for compensation. The first is the Worker's Report of Injury, Form 6. Specifically, the worker making a claim is required to sign the Consent and Declaration section which states:

> I believe this is an injury related to my work and I declare that all information I have provided to the Commission is true and correct. I understand I must immediately inform the Commission if I return to, or become capable of, performing work of any kind. I consent to the Commission collecting and using all information it considers relevant for the purposes of determining my entitlement to benefits and managing my claim under the Workplace Health, Safety and Compensation Act (WHSC Act). This includes, but is not limited to, collecting and using information from physicians, hospitals, health care providers, and employers pertaining to my examinations, treatment, medical history, injury/incident and employment.

> I consent to the Commission disclosing to my employer or my Employer's Authorized Representative, a summary of my injury costs, which is disclosed to the employer for the purpose of verifying claims' costs. I consent to the Commission disclosing to external physicians, hospitals and health care providers all relevant information necessary for the purpose of determining entitlement to benefits and managing my claim under the WHSC Act.
>
> I understand information may be collected, used and/or disclosed for other purposes and/or disclosed to other parties only as permitted by law, including, but not limited to, the WHSC Act, the Access to Information and Protection of Privacy Act, and the Personal Health Information Act, and I agree that this consent is valid for the duration of my claim. (Form 6, Worker's Report of Injury, p. 3)

The consent section of this form is referenced later in the thesis in relation to recommendations to ensure the consent provided by claimants is informed consent. Form 7 is the Employer's Report of Injury and Form 8 is the Health Care Provider form. The recognised health care providers authorised to complete Form 8 include a physician, a physiotherapist, or a chiropractor. The three forms are then reviewed by one of the Commission's eight Claims Adjudicators who make one of three decisions. Section 60 of the WHSC Act states "[a]n issue related to a worker's entitlement to compensation shall be decided on a balance of probabilities and, where the evidence on each side of an issue is equally balanced, the issue shall be decided in favour of the worker" (p. 56). The decisions the adjudicator can make are: (1) to accept the claim for Temporary Earnings Loss (TEL) or Extended Earnings Loss (EEL); (2) to deny the claim; or (3) to request more information to adjudicate the claim. When a TEL claim has been accepted, it is referred to a Case Manager who manages the claim until the worker returns to employment. The Case Manager ensures the claimant receives the wage-loss and health care benefits to which they are entitled. The TEL benefits are terminated when a Case Manager

determines the claimant has functionally recovered, and he/she can return to their pre-injury employment.

Claimants on EEL are also managed by Case Managers. For EEL claimants, a decision is made that the claimant is disabled and cannot return to pre-injury employment. These EEL claimants can receive wage-loss benefits until they reach age sixty-five; however, their entitlement to benefits is reviewed periodically. The Case Managers work very closely with the Legal and Investigations Department on both TEL and EEL claims, particularly with the investigators during a claimant fraud investigation. The Case Managers are also authorised to make direct referrals to the CFIP for an investigation.

The fourth line of business is Corporate Services. The services are provided by three departments: Policy and Planning, Internal Review, and the Legal and Investigation Department. The CFIP operates out of the Legal and Investigation Department and the next sections provide an overview of claimant fraud and the legal and investigation functions at the Commission.

1.2.1 Claimant Fraud

A review of workers' compensation literature provides minimal quantification of the actual or estimated claimant fraud rate. Hoy (2000) reports that the Insurance Council of Australia also reports that it has few figures quantifying the level of fraud. It estimates that it is between five and twenty per cent of workers'

compensation claims but they have no method to validate this estimate (p. 3). Leigh (2000) reports that studies show that only one to two percent of workers' compensation claims are fraudulent (p. 196). The *Task Force Report* (2001) concluded that it is unaware of any reliable method for quantifying the level of fraud at the Commission (p. 11).

Claimant fraud for the CFIP is characterised as a claimant knowingly and wilfully making a false representation to the Commission by action or omission. It results in payments or services to which the claimant is not entitled. The CFIP is mandated by policy to deter two types of claimant fraud: *earnings-related* fraud and *disability-related* fraud. *Earnings-related* fraud is failing to report or concealing income from employment earned during the same period as wage-loss benefits are paid. *Disability-related* fraud is claiming to be disabled when, in fact, he or she is capable of earning. The worker may not have suffered an injury at all or may have already recovered from an injury but misleads health care providers and the Commission by reporting ongoing problems from the compensable injury (Procedure 56, p. 2). There is an important analytical distinction between *disability-related* fraud and *earnings-related* fraud. The data collected in this study indicates that only *earnings-related* fraud cases are referred to the Courts for prosecution, while *disability-related* fraud is addressed by administrative sanctions. A term frequently used in the workers' compensation system for *disability-related* fraud is *malingering*. The *DSM-IV-R,* (2000) describes malingering as "an intentional production of false and grossly exaggerated physical or psychological symptoms motivated by external incentives" (p. 739). Mendelson and Mendelson (1993) contend that this definition also implies the legal concepts of perjury and fraud with a demonstrated intent for

financial gain. Molzen (1999) asserts that fraud occurs in fewer than 2% of all workers' compensation cases and *disability-related* fraud is very difficult to prove (p. 11).

When a claimant's behaviour is related to earnings or disability fraud, he/she provides several justifications, rationalizations, and outright denials to his/her Case Manager in an attempt to explain the behaviour. Examples include: "I did not know I was not allowed to earn money"; "I could not afford to live on compensation so I had to earn a few extra dollars just to survive"; "I did not know I had to report my recovery as soon as I felt better"; "I am not better, I was just having a good day. You saw me on that day but the next day my injury was aggravated."; "I thought I was allowed" or "I thought I was entitled". The Case Managers report that attitudes of entitlement and statements minimising their behaviours on the part of claimants are actually quite common.

Since fewer than 2% of CFIP investigations ended in a sanction, this suggests it is not a great problem for the Commission placing the Injury Fund at risk and threatening its financial sustainability.

1.2.2 Compliance

Compliance requirements and the possible sanctions for a claimant's non-compliance are set out in the WHSC Act, particularly in accordance with Section

19(1) where "[t]he Commission has exclusive jurisdiction to examine, hear and determine matters and questions arising under this Act" (p. 26). Claimants are advised they must comply with two main legislated requirements set out in the WHSC Act as stated in Section 54 (1). The first requirement is to report changes in functional abilities to his/her Case Manager with the goal of returning to work as early and as safely as possible. The second requirement is for the claimant to report earnings from other sources while in receipt of benefits from the Commission. As long as a claimant complies with these two requirements, wage-loss and health care benefits continue. Disincentives for non-compliance can include a Provincial response in the form of an administrative sanction under the WHSC Act, Section 54 (2). Administrative sanctions provided for in the legislation include a reduction, a suspension, or a termination of benefits. The additional disincentive for non-compliance is a Federal response, where the matter can also be referred to the police for a criminal fraud investigation and the Crown Prosecutor's Office for criminal fraud charges under the Criminal Code of Canada. This study examines the CFIP's use of administrative sanctions under the authority of their own legislation compared with criminal justice system responses to address claimant non-compliance. In Chapter Two, the criminological and socio-legal literature informing the use of legislative/administrative and criminal justice sanctions is further explored and discussed.

Bottoms' (2002) model of compliance with the law posits four key mechanisms: *instrumental compliance*; *normative compliance*; *constraint-based compliance*; and *compliance based on habit or routine*. Bottoms (2002) presents a characterization of

these four principal mechanisms that underpin legally compliant behaviour, three of which are explored in this study. *Instrumental compliance* includes incentives and disincentives. Deterrence is the instrumental mechanism the CFIP chose to achieve compliance. This form of compliance is seen to be working when the claimant decides to accept the benefits to which he/she is entitled under the WHSC Act, because he/she does not want to suffer the consequences of a breach of the legislation. *Normative* compliance occurs when the claimant believes the Commission's requirements are legitimate or represent a commonly held social norm. Compliance can also occur if a claimant believes that compliance with the law constitutes morally appropriate behaviour. When the same norms reflected in the law are held by the claimant, compliance is achieved. Normative compliance can also be achieved by enhancing normative commitment and/or enhancing the legitimacy of the Commission's legislation. *Constraint-based* compliance (for example, the exercise of physical restraints on liberty) is not applicable as workers' compensation is available to anyone who claims compensation for an injury that arose out of and in the course of their employment and the CFIP cannot impose restrictions on any claimant, even those who have been previously sanctioned under the WHSC Act or the Criminal Code of Canada. The fourth type of compliance is based on the claimants' habit or routine (Bottoms, 2002, p. 30). This form of compliance may be seen to be the relatively stable 'end product' of repeated compliance with particular norms in particular contexts. In essence, this means that compliance can become ingrained in behaviour to such an extent that it becomes 'automatic' and relatively un-amenable to conscious deliberation. At an individual level, long-term compliance with the two main legislated reporting requirements set out in the WHSC Act may be substantially of this nature. In subsequent chapters,

the literature on normative and instrumental compliance is reviewed in detail. The next sections provide an overview of the Commission and a review of its investigative function to provide a context and justification for the line of inquiry chosen. Further, it introduces the origins of the practise of deterrence in the CFIP as intended by Commission's policy makers.

1.2.3 Investigation

The investigation function of the Commission has changed considerably with many of the changes taking place over decades, influenced through mechanisms such as Statutory Review Committee recommendations approved by Government and through consultation with employer and labour organizations.

The Commission's corporate records for investigations date back to 1993 and the Corporate Policy Book contains documents dating back to 1984. These documents provide the history of the investigative function at the Commission. This chapter will briefly review its history while Chapter 2 provides a detailed chronology of the organization's investigation function. Reviewing the history also includes a review of the investigations' policy, procedures, and its intended function and mandate. These documents provide a description of the CFIP, its organizational structure, its mission, and its political origins.

1.3 Context Giving Rise to the Implementation of the CFIP

The report compiled following the 2000 Statutory Review, *The Task Force Report* (2001), is very important in tracing the origins of the CFIP and the concept of deterrence that eventually became part of Commission policy. The *Task Force Report* (2001) reflected the employers' belief in deterrence as an instrumental mechanism for achieving compliance and therefore protecting the Injury Fund from claimant fraud. The deterrence concept was then developed autonomously within the agency, under continuing pressure from employers' representatives.

For the fifteen year period prior to the *Task Force Report* (2001), the Commission was in a financial crisis with employers paying the highest average assessment rate in Canada. The average assessment rate is the average premium that employers pay to the Commission for every $100.00 of payroll. Between 1986 and 1989, the average assessment rate increased from $1.79 to $2.31. In 1989, it was determined that the wage-loss system introduced in 1984 was more costly than anticipated and the assessment revenue collected did not cover the costs of new injuries. By 1990, two actuarial studies indicated that costs were escalating dramatically and that the system was in danger of bankruptcy. In 1990, the Commission's unfunded liability reached $113 million dollars. The unfunded liability is the portion of benefits owing to claimants from the Injury Fund that have not yet been funded. In 1990, the average assessment rate was raised again to $2.43. In 1991, employers were required to even pay higher assessments, and it was increased to $2.88. By 1994, the average assessment rate had become $3.18. The financial crisis was then reviewed

by the 1996 Statutory Review Committee. It examined the cost of injuries as the primary cause of the crisis and concluded:

> There does not appear to be one particular cause to which the increasing injury claims can be attributed. What is apparent is that soft tissue injuries constitute an increasing majority of claims. This broad class of injuries includes strains, sprains, pain, repetitive strain injuries, carpal tunnel syndrome, muscle soreness, etc. Very often, there is no obvious causative accident. This class of injury makes up 66% of claims and the strong trend of more soft tissue injuries occurs across all industries. (p. 14)

The 1996 Statutory Review was silent on the issue of claimant fraud; however, from a financial perspective, it attributed some of the cause of the financial crisis to a dramatic expansion of the system with more benefits being paid to claimants for longer periods of time. Various factors contributed to why injured workers were on a claim for longer periods and costs were increasing. For example, the 1996 Statutory Review Committee reported:

> In addition to external factors such as a lack of workplace programs or high unemployment, there was evidence that benefits were increasingly extended because of factors not necessarily related to the work injury (such as pre-existing conditions), or because of internal factors such as varying interpretations of important legislative provisions. (p. 11)

The 1996 Statutory Review Committee concluded that there had been a generous application of the "benefit of doubt clause", and there were also related inconsistencies between the Commission and its external appeal division including legislative and policy interpretations, resulting in broader coverage and the acceptance of more claims (p. 10). Nothing improved the agency's financial situation over the next five years and, in 2000, the average assessment rate peaked at $3.24 with the unfunded liability being $180 million. The next Statutory Review

was a Government appointed Task Force. They produced the *Task Force (2000) Discussion Paper on the Workers' Compensation System* specifically addressing the context and the nature of the problems to be addressed by the Commission. The Task Force heard from employers who were voicing concerns, specifically alleging there was substantial claimant fraud and abuse in the system contributing to the financial crisis.

During their representations to the Task Force, employers also questioned the Commission about what they were specifically doing to investigate, prosecute, and, ultimately, deter fraudulent claims. They insisted that the agency needed to establish a programme to catch fraudulent claimants and ensure sanctions are imposed. The belief amongst employers making representation to the Task Force appears to be that expedited and severe punishment would serve as a *deterrent* for claimant fraud as evidenced by the following statement contained in *The Task Force Report* (2001):

> Several groups question whether the Workplace Health, Safety and Compensation Act is being enforced as effectively as possible. The general consensus is that more can and should be done.
>
> The Task Force agrees. Of particular note is the fact that the fines and penalties in the WHSC Act provide for less authority and opportunity to apply penalties and are lower than many other Canadian jurisdictions. A thorough review of the penalty provisions of the WHSC Act is warranted and needs to be completed on a priority basis by the Commission, in consultation with the Department of Justice. Ensuring maximum ability to apply penalties and ensuring that the level of penalty is sufficient to serve as a deterrent is critical. (p. 37)

The Task Force Report (2001) provided seven recommendations that resulted in the CFIP's policy and procedures being developed and the programme being implemented in this punitive context. These recommendations are provided in

Chapter Two. This study evaluates the effectiveness of the CFIP resulting from the recommendation to *deter* claimant fraud as a mechanism for achieving compliance.

The next section provides the background for the legal and investigations functions at the Commission.

1.3.1 Legal and Investigations Department

The CFIP is managed by the Legal and Investigations Department since the investigators became part of the Legal Department in 1998. Previously, the investigators worked in the Compensation Department assisting with fact gathering for claim adjudication. In 1998, the Legal Department was determined to be the appropriate area for the investigators, given the nature of their work, and a jurisdictional analysis indicated that eight of the other Canadian jurisdictions were structured this way. This department is directed by the Commission's General Counsel, reporting directly to the Commission's Chief Executive Officer. The positions that report to the Director include three investigators, one administrative Legal Assistant, an Insurance Adjuster, and two lawyers. In addition to the CFIP, this department provides a variety of corporate services including: access to information requests, agreements and contracts, representing the Commission at the external review division (Workplace Health, Safety and Compensation Review Division), civil litigation, and employer and service provider fraud investigations. Third Party claims are also managed by this department for cases where a third party is responsible for a claimant's work injuries. It also works with other Government

departments such as the Office of the Privacy Commissioner when a privacy violation complaint is made and with Legislative Counsel dealing with draft legislation and amendments. In addition, this department deals with the Crown Attorney's office, Department of Justice, when fraud referrals are made. The Director of Legal and Investigations determines the cases that are referred to the police for a criminal fraud investigation; however, there is no formal documented process in place for how the Director exercises judgment in this regard. In particularly sensitive cases, the Director consults with the Commission's Chief Executive Officer (CEO) to obtain approval prior to laying the complaint with the police.

1.4 Information Collection and Protection

The CFIP is subject to the Access to Information and Privacy Protection Act (ATIPPA), the Provincial privacy legislation. The information collected during an investigation is collected by statutory authority. In the protection and management of this information, the Commission developed Policy GP-01: Information Protection, Access and Disclosure. This policy outlines the process for access to and the disclosure of information and recognises the sensitive nature of the information it collects and the importance of protecting the claimant's privacy.

The policy states "[t]he Commission collects, uses and discloses only information necessary to administer and interpret the Act and only when authorised by law,

including the [WHSC] Act and ATIPPA" (p. 1). The policy further states that "[i]nformation accessed or disclosed under this policy is only to be used for health, safety and/or compensation purposes within the workplace" (p. 4). Policy GP-01 also allows for information to be disclosed to a law enforcement agency. It states that the Provincial and/or Federal police forces "shall be provided with all necessary information when the Commission is satisfied that evidence in its file warrants referral for criminal prosecution" (p. 10).

1.5 Thesis Aims

This is a study of the Commission's decision to implement the recommendation from the Task Force (2001) to *deter* claimant fraud. This study interprets the focus on deterrence as a justice/formal social control consideration of the system (justice tension) and ATIPPA representing a countervailing concern with privacy and freedom from formal social control considerations (liberty tension). In this study of claimant fraud, punishment is conceived as the loss of liberty with punishment including both criminal and administrative sanctions.

A programme evaluation using mixed methods is used to determine whether the CFIP policy, Policy EN-11: Investigations, with its policy goal of *fraud deterrence*, could work in principle. The initial research phase examines the context for the CFIP at implementation and how this context may be influencing programme decisions relevant to its justice and liberty tensions. This is a study of the

Commission's decision to implement the recommendation from the Task Force (2001) to deter claimant fraud. This study interprets the focus on deterrence as a justice/formal social control consideration of the system (justice tension) and ATIPPA as representing a countervailing concern with privacy and freedom from formal social control considerations (liberty tension). In this study of claimant fraud, punishment is conceived as the loss of liberty with punishment including both criminal and administrative sanctions.

The justice tension arises from the Commission's right to pursue the truth about a claim using investigators and tactics such as covert video surveillance. In addition, a justice tension exists should the Commission wish make public a convicted and sentenced claimant's name and case to achieve a general deterrent effect. The opposing tension in the case of publication of a claimant's name is one of privacy and liberty. Claimants' rights are protected under Provincial privacy legislation as well as protected by the Canadian Charter of Rights and Freedoms.

Key aspects of the CFIP's legislation, policy, and procedures are analysed from both criminological and socio-legal standpoints. These key aspects are then situated in relation to the trade-off between *justice* and *liberty* and the criminological literature relating to deterrence, rational choice, and the other suggested compliance mechanisms underpinning legally compliant behaviour. The evaluation also explores the perceptions of a sample of key informants, relevant to the programme's historic and absolute effectiveness. These perceptions are then related to the ethical, compliance, and deterrence debates in the literature. The significance of the research is to provide data on the experiences of those using the policy and procedures that

guide the CFIP as well as providing different perceptions of what its choice of policies have achieved, if anything.

1.6 Key Themes

There are three key themes explored in this study. The first theme is *deterrence*, examined in relation to the CFIP's policy goal to deter fraud. The CFIP Policy EN-11: Investigations includes statements such as "The Commission has adopted a zero tolerance policy for fraud" and "The Commission's goal of deterring fraud". The CFIP is examined for evidence supporting these policy statements. In addition to deterrence, Policy EN-11 identifies two other formal aims, namely fraud detection and safeguarding the Injury Fund. Policy statements reflecting these additional aims are: "Investigative expertise is required to detect and, where necessary, enable appropriate action against any party who abuses, defrauds, or attempts to defraud the system" and "The Commission is responsible for safeguarding the integrity and viability of the workers' compensation system on behalf of injured workers and employers". It must ensure that money from the Injury Fund is available to be issued to legitimately entitled individuals.

The criminological literature on deterrence routes to compliance are used to evaluate the programme's effectiveness. In addition, interviews with key informants are included providing their perceptions on the possibilities for deterrence in, and the perceived effectiveness of, the current claimant fraud framework.

An overview and description of how the concept of deterrence is applied by the CFIP is discerned from a review of reports, policy documents, and internal sources. A request to review the Commission's corporate records resulted in the researcher being provided with restricted access to original documents dating back to 1984. These were used to document the history of the investigative function and to identify the origins of the concept of deterrence in the CFIP. This review also provides a contextualization of deterrence as it is intended to be applied to claimant fraud and to show the influence of deterrence theory on the Commission, therefore, providing the rationale for adopting this particular line of inquiry.

In the workers' compensation context, deterrence theory proposes that the best way to deter fraud is through punishments that are swift, certain, and appropriately severe. Accordingly, Paternoster and Bachman (2001) propose that deterrence would occur when a claimant refrains from committing fraud fearing the certainty, swiftness, and/or severity of formal legal punishment. Beyleveld (1979) defines this as avoiding action through fear of the perceived consequences. For the Commission's policy makers, fraud deterrence was intended to reduce the risk of fraud and abuse of workers' compensation benefits through increasing the likelihood of fraud detection, apprehension, and the provision of severe administrative and/or criminal sanctions. Punishment is intended to not only act on the specific claimant, but also, in a general sense, on others who might otherwise be tempted to commit claimant fraud. For the Commission's policy makers, the deterrence concept requested by employers was intended to reduce the risk of fraud and abuse through

increasing the likelihood of apprehension and the use of administrative and criminal sanctions.

Deterrence in the workers' compensation system has the potential to tip into bullying and harassment. 'Naming and shaming' claimants by an agency of government can be viewed as abuse of institutional power. The use of covet video surveillance to follow and record personal information can be viewed by claimants as harassing and not congruent with the Commission's mandate to promote increased levels of activity during the recovery period from a work related injury. In Chapter Two, the potential for bullying and harassment is further explored.

The second theme is the tension between *justice and liberty*. The justice tension is established by the Commission's authority to investigate, sanction, and deter fraud. The liberty tension is established by each Canadian citizen's right to freedom from social control entrenched in the Canadian Charter of Rights and Freedoms and their right to privacy. The study explores whether or not a primary and overriding concern with deterrence has a detrimental effect on liberty and privacy rights. Justice tensions are identified through a review of the CFIP's legislative, policy, and procedure framework. Liberty tensions arising from the CFIP's investigations are established through a review of ATIPPA, The Canadian Charter of Rights and Freedoms, and a review of the literature focusing on the claimant's perspective of fraud investigations.

In particular, the justice and liberty tensions will be examined through the CFIP's use of investigators, the Fraud Tip Line, covert video surveillance, and sanctions. The socio-legal literature is used to provide a framework to understand how the trade-off between justice and liberty (freedom) could be resolved.

The third theme is that of the *light blue-collar* crime of fraud. This is a term that I developed during the study to describe the *white-collar* crime of fraud committed by blue-collar workers. The term *light blue-collar* crime will be used throughout this study demonstrating that it is both a criminologically interesting and analytically useful concept. According to Sutherland (1949), *white-collar* crimes are generally committed by citizens of higher social class who are more likely to have the opportunity to commit crimes such as fraud. *Blue-collar* crimes are referred to as crimes committed by a person from a lower social class who typically performs manual labour and earns an hourly wage. Their work typically involves manufacturing, extractive, service, and construction trades and some examples of *blue-collar* crimes include assault and armed robbery. Sutherland (1949) described the crimes of the blue-collar worker as not typically linked to their employment. He also noted that very few *white-collar* criminals were incarcerated for their crimes with the justice system illustrating a more lenient approach in the treatment of *white-collar* criminals.

The significance of the literature on *white-collar crime*, introduced by Sutherland (1949), was the introduction of a discussion on the frequent and serious crimes of the business professionals and the financially successful. This work was intended to

correct criminology's historically predominant focus on crimes against property and persons, committed by working-class offenders. Sutherland's work focused on the upper-class crimes associated with tax fraud; however, his work does not have a lot to say about *light blue-collar* crime of fraud, which is a focus of this study.

This is a unique study of the *light blue-collar* crime of fraud, or the *white-collar* crime of fraud committed by blue-collar workers. This research revisits Sutherland's *white-collar* crime ideas and modern views and versions of them. It considers to what extent these *white-collar* crime ideas apply to the qualitative and quantitative data collected in this study.

1.7 Framing the Problem

Ericson (2007) argues that the justice tension created by the right to pursue the truth through anonymous tips and surveillance has the potential to pull the workers' compensation system in a direction that treats claimants as if they are criminals. This criminal association is then used to send a deterrent message, informing claimants they will be scrutinised, investigated, and punished when non-compliant (p. 84). Ericson (2007) argues that this criminal association legitimises treating all claimants as a potential source of fraud, and this has created the foundation for a workers' compensation system based on criminal and administrative laws and surveillance. This study examines the literature and implications for the CFIP in order to explore alternative approaches other than criminal deterrence to achieve

compliance, minimising impacts on liberty by looking at claimant fraud primarily through its own legislation.

To examine these themes, the literature on the politics of welfare fraud is provided. For example, Chunn and Gavigan (2004) report that, in the Canadian province of Ontario, being on social assistance has also become stigmatised as 'criminal'. They observed "society has shifted public discourse and social images from welfare fraud to welfare as fraud, thereby linking welfare, poverty and crime" (Chunn & Gavigan, 2004, p. 219). They reported that an investigative focus on welfare cheating has led to welfare criminalization. Their conclusions were supported by Mosher and Hermer's (2005) report to the Law Commission of Canada, *Welfare Fraud: The Constitution of Social Assistance as Crime.* Welfare fraud in Ontario is policed as a crime against the public, a crime that receives condemnation, intensive investigation, and punishment. The public perception of some welfare recipients as criminal is quite different from the facts as not all welfare recipients are criminals. Similarly, this tendency to perceive all workers' compensation claimants as potential fraudsters, justifies the extent of, and the means dedicated to, catching them in the act. Therefore, there is a parallel between the perceptions identified by Chunn and Gavin (2004) and Mosher and Hermer (2005) and the perceptions of citizens, employers, and even some Commission employees about workers' compensation claimants.

Another key issue in this new category of criminological research (*light blue-collar* crime) is based in the Commission's choice of whether to proceed to the criminal

justice system and/or to rely on the WHSC Act for sanctions. A violation of the rules under the WHSC Act can also lead to the claimant's conduct being viewed and treated as an act of criminal fraud. Claimants are required to report any changes in their functional abilities and to report when they are in receipt of income from other sources. When a claimant fails to report these as required, the behaviours can be characterised as *disability-related* fraud or *earnings-related* fraud. The claimant's conduct is evaluated to determine if it warrants an administrative sanction under the WHSC Act and/or satisfies the Criminal Code of Canada test for criminal fraud. Ericson (2007) alleges that "the actual number of criminal convictions for fraud is infinitesimal when viewed against the regulatory investigations of fraud that prove to be unfounded or result in administrative reduction or termination of benefits" (p. 102).

To gather evidence of fraud, the CFIP engages in surveillance of the claimant's activities. The CFIP conducts surveillance using its own investigators and under the authority of the WHSC Act. It also uses contract law mechanisms to contract with private investigation firms to conduct covert video surveillance on its behalf. In addition, it uses administrative law mechanisms contained in the WHSC Act to have substantive and procedural limitations placed on a claimant's benefits. It is alleged that this use of administrative law can also entail a looser application of rights and freedoms compared to criminal law (McClusky 1998, 2002; Lippel 1999, 2003).

Lippel (2003) argues that this surveillance is conducted within a legal system that is less inclined to invoke high standards of rights and freedoms. For example, in a case involving a worker charged under the provisions of workers' compensation

legislation, a judge in the Canadian Province of Quebec rejected the Supreme Court of Canada's standard for limiting the use of electronic surveillance devices. Lippel (2003) summarised this decision stating that:

> [t]he court trivialized violations of privacy by the state in the context of regulatory offences, and concluded that the policing of injured workers does not require a vigilant respect of Charter [Canadian Charter of Rights and Freedoms] rights, given the importance of the Workers' Compensation Board's mandate to manage public funds. The judgment regarding a regulatory offence under workers' compensation legislation may be subsequently invoked to deny benefits that the worker relies on for subsistence. It seems surprising that the context of workers' compensation would somehow reduce the state obligation to respect human rights provisions; given the importance of the consequence for the worker . . . Rights have been whittled away in the name of administrative needs of regulatory agencies. (p. 109)

In this study, the justice tension associated with the CFIP policing claimants are examined to determine if this tension is perceived to "whittle away" a claimant's rights to privacy and liberty in the name of administrative need.

When CFIP investigators conduct surveillance, they have the authority to monitor a claimant's activities that are "reasonably apparent to members of the public" (Policy EN-11, Investigations, p. 2). This monitoring can include the use of covert video surveillance, and, according to Provincial privacy legislation, its use constitutes the collection of a claimant's personal information. The privacy legislation, the Access to Information and Privacy Protection Act (ATIPPA), normally requires the consent from any individual whose personal information is being collected. However, Section 33 of this legislation provides an exemption for investigations, providing the CFIP with the authority to conduct investigations, and the CFIP relies on this

exception when it authorises surveillance to collect personal information on video without consent. Claimants allege the use of covert video surveillance tactics infringes upon their liberties, rights, and freedoms. This theme of covert video surveillance infringing upon a claimant's liberties is explored further in Chapter Two.

The CFIP also uses a Fraud Tip Line and promotes its use to members of the public encouraging them to report suspected fraudulent activity. In this context, surveillance is not only carried out by agents of the state, but also by sources such as neighbours, landlords, and disgruntled family members. The claimants fear that when one of these sources views their activities of daily living, it may lead to an allegation and a CFIP investigation for fraud. This fear is consistent with the idea of the criminalization of compensation previously discussed by Erikson (2007), Chunn and Gavin (2004), and Mosher and Hermer (2005).

In a similar programme designed to deter welfare fraud, Herd and Mitchell (2002) report that this type of climate is permeated with suspicion and hostility and "the new system is more concerned with surveillance and deterrence, than it is with assisting people to find employment" (p. 33). A problem with fraud tip lines that are used to initiate an investigation was also identified in this welfare programme. Mosher, Evans, and Little (2004) documented instances of abusive men making false reports on fraud tip lines to further their power and control over women, landlords

making false reports to facilitate the eviction of a tenant, and vindictive neighbours or other acquaintances making false or misleading reports simply out of spite.

This tension between the CFIP's authority to collect information without consent and a claimant's rights to privacy and liberty demonstrates one of the justice and liberty struggles faced by the CFIP. Doyle, Lippert and Lyon (2012) recognise this struggle and state "[i]n Canada and around the world, governments have struggled to balance security and law enforcement concerns with civil liberties and privacy rights" (pp. 333-334).

1.8 Nature of the Study

This study evaluates the CFIP's claims investigations for the period 2005 to 2010. This period was chosen as it provides CFIP data for the two year period prior to the enactment of ATIPPA in 2008 and two years after. This provides an opportunity to examine any change in CFIP practise post 2008 due to privacy. In addition, 2005 is chosen as the start date as it is the first full year of data entered into the CFIP data bases since the data bases were implemented in 2004.

A programme evaluation was chosen as it could help the CFIP understand what it had been doing to deter claimant fraud and how it was doing it (Weiss, 1998, p. 181). This evaluation research seeks to first establish the chain of assumptions and the steps taken by the CFIP to achieve its policy goal to deter claimant fraud. Weiss

(1998, p. 266) states that programme theory, the chain of assumptions that explain how programme activities are going to lead step-by-step to desired outcomes, is essential to this type of research. This theory assists with determining what expectations are being acted upon for connecting CFIP processes to the achievement of programme goals. This evaluation provides six years of data (2005-2010) on what the programme was doing to deter claimant fraud and why it was following the course it had established for itself in 2002.

The programme evaluation employs both qualitative and quantitative approaches. Weiss (1998) supports evaluations that combine qualitative and quantitative approaches to improve the quality of the interpretability of a programme (See also, Cook & Reichardt, 1979; Fetterman & Pitman, 1986; Greene & Caracelli, 1997; Jick, 1983; Kidder & Fine, 1987). Mixed methods research views both qualitative and quantitative approaches as complementary. The quantitative method establishes basic relationships in the data between system inputs and outputs and the qualitative method sheds light on process and mechanisms; that is, how those relationships arise. The qualitative data in this study consists of the participants' perceptions of the CFIP's effectiveness. The participants involved were knowledgeable about the justice and liberty tensions faced by the CFIP, coming from the legal, investigation, financial, and information privacy professions. The research employs a thematic analysis framework to study their perceptions of the CFIP's practises, policies, and procedures.

The majority of the quantitative data in this study is extracted from the CFIP data base to initially determine the number of claimant fraud referrals made to the CFIP and the methods used to make these referrals. A particular focus is placed on the number of referrals received through the Fraud Tip Line, the number of investigations that used covert video surveillance, as well as the number of cases resulting in a criminal and/or administrative sanction. The focus on the data for the Fraud Tip Line allows for an analysis of how it is used and the data on the use of covert video surveillance is examined as this is a potentially intrusive method of surveillance. The data analysis seeks to determine the controls in place to limit (liberty tension) or facilitate their use (justice tension) in investigations. This is considered to be an essential component of understanding the justice and liberty tensions in the CFIP. These tensions are further examined through an analysis of the number of investigations resulting in a criminal and/or an administrative sanction. This data is important in that it provides a concrete, real world application of the programme and indicates the extent to which claimant fraud is addressed by the judicial system. The deterrence concepts of swiftness, certainty, and severity will be applied to this data and analysed.

The costs to administer the CFIP and the amounts ordered by the courts to be repaid to the Commission to restore its Injury Fund through court-ordered restitution are identified. This data is necessary for conducting a cost/benefit analysis, an important component for determining the effectiveness of the CFIP. In addition, data were requested regarding the total number of wage-loss claims filed and accepted by the Commission. This data represents the volume of claims processed and administered

by the Commission and allows for the number of claims investigated by the CFIP to be reported as a percentage of that total.

1.8.1 Justification for the Study

The primary line of inquiry chosen in this study is deterrence. In this section, the justification for this line of inquiry is provided along with an overview of how the concept of deterrence is applied by CFIP. How the concept of deterrence is applied by CFIP is discerned through a review of its mission statement, policy and procedure documents, and internal sources. The Commission's investigative policy, EN-11: Investigations states that it has the "goal of deterring fraud and abuse." Is there research based evidence that the CFIP's choices resulted in fraud deterrence, and, if so, how were they doing it?

The rationale for examining the underpinnings of the CFIP is to assess the programme's policy goal to *deter* fraud and the resulting trade-off between issues of justice and liberty in the programme's use of private investigators, a Fraud Tip-Line, covert video surveillance, and sanctions.

A review of the *Task Force Report* (2001) and the history of Policy EN-11: Investigations is provided in order to show the influence of deterrence theory on the CFIP and therefore the reason for adopting this particular line of inquiry. The economic context of these deterrence strategies is also provided to contextualise the discussion.

The background discussion demonstrates how and where the concept of deterrence is used in the CFIP, and this study considers the value deterrence provides to the CFIP in terms of outcomes. In addition, what is the value to the agency in terms of providing a rationale for its strategies? This evaluation also considers whether or not the CFIP has other goals in addition to deterrence and whether these been given priority or attention. The perceptions of a sample of key informants relative to punishment and deterrence are also considered. This thesis examines what the CFIP is trying to achieve by punishment. A further justification for this study is that it examines the costs and benefits of the Commission's use of its legislative/administrative punishment choices versus criminal punishment through the courts.

What do the study participants perceive the primary purpose of deterrence and punishment to be? Is it paying back the claimant for the fraud committed and the financial deprivation caused to the Injury Fund or is it that its function is to detect and prevent fraud, reducing the instances of it? Do the claimants deserve to be punished, and, if so, should it be in proportion to the harm they have caused? Is punishment the end in itself, therefore needing no further justification? This is also an opportunity to revisit Sutherland's ideas of *white-collar* crime and consider to what extent these *white-collar* crime concepts apply to cases of *light blue-collar* crime of fraud, if at all.

This research is both practical and timely. It fills an urgent gap in knowledge by speaking to topical policy and practise debates about deterrence and compliance and the trade-off between justice and liberty in the CFIP. To this end, the researcher is

provided with privileged access to a system largely unknown to researchers. This privileged access is described in detail in Chapter Three.

The study also provides an opportunity to evaluate legislative (Provincial) and criminal justice system (Federal) responses to claimant fraud. It provides a practical topic to apply innovations in policy and research. In addition, this research was supported by the Commission's CEO as having the potential to benefit the Commission as well as other actors such as employers, claimants, and institutions such as workplaces.

1.8.2 Research Questions

In this study, the theoretical concepts introduced in this chapter are examined through the prism of the CFIP. In particular, the thesis examines the experience of the CFIP in deterring the *light blue-collar* crime of fraud.

To focus this examination, three research questions (RQ 1, RQ 2, and RQ 3) were developed by the researcher based upon three components of a programme evaluation. Firstly, the evaluation seeks to determine if the programme can work in principle. Secondly, it seeks to evaluate the extent to which it is working as intended, and, thirdly, what, if any, recommendations can be made to improve it? Chapter Three provides detail and clarification for how the research questions were formulated and why they are important. However, for introductory purposes, RQ 1 is anchored in the literature and its ideas about deterrence and compliance. RQ 2

includes the qualitative data from the participants' interviews and the relevant quantitative data derived from the CFIP data base. RQ 3 demonstrates the concrete outcome from applying theory to the CFIP in a formative way. The three research questions are:

RQ 1. Can the current claimant fraud investigation programme work in principle? To answer this question, key aspects of legislation, policy, and procedure are analysed from a criminological and socio-legal standpoint. These key aspects are then situated in relation to (a) the trade-off between justice and liberty, and (b) the empirical literature relating to deterrence and rational choice. Conclusions are drawn as to whether the programme is ethical and/or effective. The study further asks the question – if deterrence is of limited value in terms of outcomes, what is the value to the agency in terms of providing a rationale/ justification for its strategies?

RQ 2. To what extent does the programme actually work? This question is addressed by answering what does 'working' mean and for whom? Quantitative and qualitative data are used to assess this. The participants' perceptions of its historic and absolute effectiveness are considered to evaluate its perceived impact. Their perceptions are also related to the ethical, compliance, and deterrence debates. The perceived failures and shortcomings of the programme are examined for connections to other findings. In addition, problems of implementation in the political context are addressed through an analysis of the qualitative and quantitative data relevant to this question.

RQ 3. How, if at all, can the programme be improved? This question is answered by analysing what the literature says should and should not work, and the explicit suggestions from the participants' interviews as to how the CFIP should operate ideally. Recommendations are made for improvement, allowing the CFIP to be theoretically and empirically informed. Finally, recommendations are provided as to how other actors and institutions (e.g. workplaces) may need to take complementary, but non-deterrence based, approaches to produce compliance.

1.9 Chapter Summary

In this Chapter, the concepts of both workers' compensation and claimant fraud were introduced. The context giving rise to the implementation of the CFIP was provided and related to the major themes of *deterrence*, *light blue-collar* crime, and *justice and liberty*. This chapter reviewed the role of the Commission in providing workers' compensation and its institutional arrangements for enforcement of its legislation. The aims and nature of the study provide the reader with the background required to understand what the CFIP is and how it undertakes its work.

1.10 Structure of the Thesis

The next chapter provides the policy and practise context that states the fundamental assumptions of the CFIP. It also focuses on key relevant aspects of the CFIP's legislative, policy, and procedural framework. It establishes the justice issues framing the Commission's right to pursue the truth about a claim and the issues of liberty for the claimants arising from that pursuit. The socio-legal literature

regarding the trade-off between justice and liberty is presented. In addition, the administrative and criminal processes and routes to achieve compliance are also examined.

Chapter Three provides the research methods. This chapter will justify and defend the approach and the sample. The research time-line, including a description of the research activities for each of the three research phases, is also presented. The methods demonstrate that this study was designed to understand key actors' perceptions of the CFIP's effectiveness and purpose. In addition, this chapter provides a section on reflexivity.

Chapter Four provides the literature review that addresses RQ#1: can a system based in deterrence work (a) *per se* and (b) when offset against democratic commitments to privacy? Criminological perspectives on the ethics and effectiveness of the CFIP, the key debates, and the theories are presented and applied. The study concluded that the CFIP's policy choice to use deterrence for claimant fraud is fundamentally flawed, and there is no significant evidence in the criminological literature that deterrence will be effective for the *blue-collar* population it is targeting with this strategy. Chapter Five is devoted to presenting the key findings relevant to identifying the extent to which the CFIP is working in practise. The participants perceived the CFIP as ineffective in achieving its policy goal to investigate and deter claimant fraud and the data base demonstrated it is ineffective in how it conducts investigations and achieves its outcomes. Chapter Six presents the participants' perceptions and explicit suggestions of how to improve the CFIP. The participants

perceived the CFIP as ineffective in achieving its policy goal to investigate and deter claimant fraud and the data base demonstrated it is ineffective in how it conducts investigations and achieves its outcomes. In addition, the socio-legal and criminological research literature is used to make recommendations. It is recommended that other actors and institutions need to take non-deterrence based approaches to produce compliance. The final chapter, Chapter Seven, provides an overall discussion of the research findings and reaches conclusions about the research aims. Since fewer than 2% of CFIP investigations ended in a sanction, this suggests it is not a great problem for the Commission placing the Injury Fund at risk and threatening its financial sustainability.

2 LIGHT BLUE-COLLAR FRAUD: THE JUSTICE AND LIBERTY FRAMEWORK

2.1 Introduction

In the first part of this chapter, the Commission's history of the investigative function is provided. Subsequent sections explore the justice and liberty considerations associated with use of the WHSC Act and the Criminal Code of Canada along with the policy and procedural framework. This framework is presented along with a selection of the socio-legal literature on justice and liberty in order to situate the findings and to provide a substantive theoretical analysis concerning the trade-off between these conflicting priorities. The historical context of the CFIP, including the context of its implementation, are examined to determine how context may be influencing programme decisions relevant to deterrence, justice, and liberty.

The *Task Force Report* (2001), introduced in Chapter One, is reviewed in detail in this chapter as it influenced the CFIP's design, construction, implementation, and, ultimately, its work. How decisions are made around issues such as surveillance and prosecution and how the CFIP and Case Managers are organised are further described.

2.1.1 History of Investigations

The Commission's records indicate its investigative function commenced in 1982 with the first policy to guide investigations becoming effective in 1984. This policy was entitled "Roles and Duties of the Claims Investigators" and the legislation in effect at that time was the Workers' Compensation Act (hereafter the WC Act). Section 59 of the WC Act required the Commission to "investigate and process a claim at the earliest convenient date" (p. 64). The sole purpose of an investigation during this period was to expediently gather information to assist the claims adjudication functions by establishing the facts where information gaps existed in the claim. The investigators were part of the Claims Department and operated from the Claims Investigations Branch, managed by the Assistant Director of Claims. During this time, only Commission employees could initiate an investigation and such investigations were only conducted to gather information where the information required to adjudicate a claim could not be obtained through conventional means such as by telephone call, interview, or in writing. The investigators also had access to a complete copy of the claimant's file as they were considered part of the Claims Department. This role and function of the investigators continued at the Commission for the next decade.

Prior to 1992, the Commission employed two investigators, both operating from its head office. In 1992, three additional investigators were added: one more for its head office and one in each of its two regional offices, Grand Falls and Corner Brook. The approval to add additional investigators included a requirement to conduct an evaluation after one year and provide a report identifying the benefits.

Evaluation Report (1993) was completed covering an eight month period from January 1 to August 31, 1993. The report provided a calculation of the annual savings resulting from all investigative activity to be $462,000. The appendix to this report provided the formula use to make this calculation and is used later when conducting the cost-benefit analysis for the CFIP.

The following year, a second evaluation was conducted. Evaluation Report (1994) covered the full twelve months of 1993, indicating an annual savings of $620,000 using the same formula provided in Evaluation Report (1993). The report stated:

> It should be noted that that the evaluation did not attempt to include any dollar amount relating to the "deterrent factor" associated with the presence of investigators. As well, no measure was made of the investigators [sic] contribution to the system from other duties the investigators performed such as gathering information on third party claims and clarification of facts to ensure timely entitlement decisions could be made. (p. 6)

The report concluded "[w]hile it's difficult, if not impossible, to measure the true value of investigations, it can be concluded without any doubt, this function provides a payback to the Injury Fund" (p. 21).

Evaluation Report (1994) also indicated that the addition of the three investigators was initiated due to pressure from employers and their belief that there was significant fraud in and abuse of the system at that time. However, the report concluded that:

> Contrary to popular belief, the cost savings we realize have more to do with fact finding which leads to denial or termination of benefits more so than outright abuse and fraud cases. Workers' Compensation is complex legislation and many times workers and employers misunderstand the rules which determine entitlement and the right to continue receiving benefits. (p. 13)

The report clarified that the investigators did not conduct covert video surveillance and there were problems associated with using unionised investigators. It stated:

> We are very careful not to employ tactics which may infringe upon people's rights. In fact, our investigators are not equipped with the necessary surveillance tools, e.g., video cameras, alternating unmarked vehicles, etc., that's [sic] necessary to thoroughly bring some complaints to a sound resolution. Furthermore, they are union staff who work a standard 9 to 5 work day. Workers do not always carry out activities during timeframes that are convenient for us, e.g., most sporting activities are played during the evening and weekends. (p. 9)

During the early 1990s, when a case of fraud was suspected by an investigator, these fraud cases were referred to the Commission's legal counsel for direction. This approach required the investigator to take a passive role in investigations while in other Workers' Compensation settings in Canada, investigations were being pursued much more aggressively. For example, this was particularly true in the province of Ontario as their compensation system had developed a Fraud Strategy in 1992 designed to "[e]ffectively and consistently pursue all instances of fraud" (p. 3).

With respect to investigations by the Commission, the agency had not formulated a focused investigation strategy. One internal memo from 1994 indicated "[i]nvestigations operate in a passive-reactive mode rather than an aggressive-proactive mode when it comes to compensation abuse and fraud" (p. 1). The

document also indicated that the Commission did not have a formal policy or detailed procedures to guide fraud investigations.

Documents reviewed by the researcher indicated that considerable debate was taking place among the Compensation Department managers and with the investigators regarding the future direction investigations should take. Ignorance of the investigative function was recognised as a problem with Commission employees and management. Attempts were made to rectify that problem through training sessions; however, in the absence of policy direction and detailed procedures to complement policy, there exists an element of confusion as to what the role of investigators should actually be. This problem was also addressed in *The Evaluation Report* (1994) concluding "[u]ntil better policy direction is developed, there is nothing further we can do to alleviate confusion from a departmental perspective" (p. 8). There was also recognition of the need to develop reporting procedures and strengthen the communication between investigators and the referral sources from both inside and outside the agency.

The Evaluation Report (1994) also concluded that "[u]pon receipt of an external stakeholder's survey, the Commission should formulate a policy on investigations based on what the stakeholders want and expect" (p. 4). The policy direction would then assist with the development of detailed procedures and the implementation of an investigation strategy consistent with that direction. This is the first indication of the agency's willingness to implement a policy based on what stakeholders expect.

In 1994, a memo provided a summary of the stakeholder's feedback on investigations and the Commission's efforts to clarify the role, expectation, and the limitations of Commission investigators. During this time, employers were asking for investigators to be trained to detect fraud committed by those on a claim for compensation and that the investigators should be provided with access to video and still-camera equipment. The employers also wanted the Commission to hire more investigators and argued that more proactive investigations should be conducted using contract private investigators in addition to the Commission's own investigators. The employers wanted to have direct and ongoing communication with the investigators when they asked for an investigation to be conducted on a claimant, and they wanted access to reports on the investigators' findings. They wanted the Commission to have more power in dealing with cases of fraud. The employers wanted the agency to get tougher on fraud and become more visible by letting the general public know action had been taken in fraud cases. Finally, the employers requested the Commission develop an investigation policy reflecting these initiatives.

In 1994, the first of the version of the Commission's investigation policy to address fraud was developed by the Commission's policy makers: Policy EN-11: Investigations. The policy appears to be based on the input of the employer stakeholder group and silent on the perspectives of the labour stakeholder representatives. The policy statement was "[t]he Commission will not tolerate system abuse from any party, including employers, workers, service providers and its own staff" (p. 1). One year later, in 1995, the policy was revised and the first

reference in policy to *fraud* was included and states that "[t]he Commission has adopted a zero-tolerance policy for substantiated system fraud or abuse" (p. 1).

In 1995, a memo was sent to Commission employees commencing the communication process internally and externally regarding its investigation activities and the agency's intention to provide the sentence from claimants convicted. The memo identifies that any convictions for fraud would be "[p]ublished in the Occupational Health and Safety Newsletter, dedicated to Workers' Compensation issues" (p. 1). The memo further states that the newsletter will "outline any convictions for people who have tried to defraud or have defrauded the Workers' Compensation Commission" (p. 1). This memo refers to two cases referred to the police and the courts that resulted in convictions. It stated "[t]hese convictions are a matter of public record and reporting them in this format is not a breach of confidentiality" (p. 2). The document includes the names and addresses of the two claimants convicted of fraud as well as the disposition they received. One claimant received a six month jail sentence and was ordered to repay $50,600.00 for receiving Canada Pension Plan Disability benefits while receiving wage-loss benefits from the Commission. The other claimant was convicted of attempted fraud for pretending to have a work related injury. This claimant was given a conditional discharge and placed on probation for six months. The document concluded that "[t]he investigators [sic] job is to ensure the Injury Fund is protected and providing this information to the public will 'illustrate our diligence in doing just that'" (p. 2). This memo provides evidence that the Commission had publicised cases of fraud in an attempt to specifically and generally deter claimant fraud, therefore, protecting the Injury Fund.

Protecting the Injury Fund from claimant fraud was also a primary consideration reflected in the Task Force recommendations in 2001. The next section provides these recommendations as they directly influenced the CFIP's design and its function.

2.1.2 Task Force Recommendations

By the year 2000, the workers' compensation system was still not financially sustainable as assessment revenue was insufficient to meet its costs. Prompted by this situation, Government appointed a Task Force to conduct another Statutory Review to examine the financial dilemma as well as the governing legislation and overall objectives and effectiveness of the system. The Task Force produced a *Discussion Paper* (2000) outlining the extent and nature of the problems facing the Commission that was intended to facilitate a discussion and input from stakeholders. The goal was to establish groundwork for achieving a sustainable system for the future.

The *Discussion Paper* (2000) outlined the following important issues:

> [t]he viability of the workers' compensation system in Newfoundland and Labrador was uncertain; assessment revenue was insufficient to meet rapidly increasing costs; and if benefits were not curtailed, assessment rates not significantly increased, or the number, duration and cost of injuries were not substantially reduced, then the Commission's Injury Fund would be eliminated by 2015. (p. 11)

The *Discussion Paper* (2000) noted that strategies must be developed in partnership with stakeholders responding to the current financial situation. Stakeholders held strong and varying views about the workers' compensation system but agreed that reform to the current system was needed, albeit there were differing views on how this could be achieved. Stakeholders agreed that the overriding objective of the system was "an insurance system that is fair, affordable and sustainable" (p. 7).

The resulting *Task Force Report* (2001) provided dozens of recommendations to improve the workers' compensation system generally; however, there were seven specific recommendations to address claimant fraud. An analysis of this report resulted in the conclusion that the recommendations provided in this document primarily reflected the employers' belief in the mechanism of deterrence to protect the Injury Fund. The report recommended the Commission:

> aggressively enforce the 'zero-tolerance' policy for system abuse and fraud; immediately take measures to increase the quality and frequency of investigations to catch and prosecute all abusers of the system; immediately take steps to improve and promote a fraud reporting hotline; initiate a substantial increase in investigation capabilities; realign its resources to ensure effective investigations were conducted; use private investigators when necessary; and, increase the fine and penalty provisions of the Workplace Health, Safety and Compensation Act (WHSC ACT) to ensure they were sufficient to act as a deterrent. (pp. 36-37)

This is evidence that the CFIP has a clear deterrent mandate indicating a punitive turn as a response to the financial crisis.

These recommendations were accepted by the Commission resulting in the implementation of the CFIP and its framework in 2002. As a result of the Task Force recommendations, Policy EN-11: Investigations was revised and Procedures 52-57 were developed. These policy revisions and procedural developments were subsequently implemented within one year of the *Task Force Report* (2001) being issued.

In 2001, the Director of the Legal Department sent a memo to the CEO outlining the issues to be addressed following the *Task Force Report* (2001) regarding investigations: zero-tolerance, heightening awareness and enforcement, increasing capacity through more resources (travel, training, and equipment), and contracting surveillance services. The memo concludes that the Task Force requires immediate steps to be taken to ensure that a closely monitored approach to investigations be implemented and an increase in the quality and quantity of investigations commence. The memo also asks for the CEO to "support obtaining the dedicated services of a Crown Prosecutor for violations under the act and the criminal code" (p. 3). This memo further adds that it anticipates Government may amend the legislation to ensure that penalties are enforced. This would then necessitate a relationship be developed with the claims department to ensure the enforcement of penalties and the laying of criminal charges. The memo added "[w]e may decide to begin laying charges under our legislation for breaches of the WHSC Act. Our current legislation allows us to do this; however, I do not think it has been enforced in the past" (p. 4). This is a reference acknowledging a period of hesitation to enforce the WHSC Act and punish claimants when fraud had been detected in the past as there was no will

to pursue it further. The memo adds "[a] large task which needs to be undertaken is amendments to the Investigation Policy and development of clear Investigation Procedures" (p. 2). This memo also predicts an annual cost of external investigative services as $75,000.00 with an average cost of approximately $3,000.00 per investigation when external investigators are used.

The Newfoundland and Labrador Federation of Labour (NLFL) supported the spirit and intent of the *Task Force Report* (2001) except for the recommendations regarding fraud and abuse. Specifically, it disagreed with the Commission's intent to enter into contracts with private surveillance companies and promote a toll-free Fraud Tip Line to report suspected cases of fraud. This caused the NLFL serious concern who then wrote the Commission's CEO in 2002 arguing:

> [t]here is little, if any, substantiated evidence to support allegations of Workers' Compensation fraud and abuse by injured workers. In fact the 1996-97 Statutory Review Committee reported that information from WHSCC indicated actual abuse was less than one per cent of all claims, and this included abuse by employers. It is also worthy to note that a similar initiative in Ontario found that seventy per cent of all abuse of the Workers' Compensation system was committed by employers. (p. 2)

The NLFL viewed the use of private surveillance companies and the use of a Fraud Tip Line as reinforcing the adversarial approach that traditionally dominated the relationship between the Commission and its stakeholders. They believed these initiatives would foster divisiveness between the workplace parties. Further, they argued the Fraud Tip Line would "[m]ake injured workers extremely vulnerable to malicious and unfounded allegations by members of the community who have no

appreciation of the dramatic impact a workplace injury has on workers and their families" (p. 2).

They perceived the initiatives to be draconian. They wanted injured workers and their families to have a right to maintain their dignity and liberty while coping with the stress of a workplace injury. They argued that these rights must be respected and supported by co-workers, employers, and the community and called on the agency to reverse its decision to implement a Fraud Tip Line and contract with private investigators and, instead, foster an environment that promotes workers' rights to dignity and liberty.

In 2002, Policy EN-11: Investigations was amended to specifically reflect the Commission's initiatives adopted following the *Task Force Report* (2001). The Commission had designed and implemented the CFIP and its new initiatives to address claimant fraud including the toll-free Fraud Tip Line and contracts with private surveillance companies for the use of covert video surveillance. The amendments included a strengthened policy statement to support zero-tolerance and enhanced investigative expertise. It provided clearer direction on situations that would be referred for criminal prosecution. Guidelines were also recommended to indicate the process leading to a claimant fraud investigation and issues regarding file documentation and release of information were made explicit. The policy allowed the CFIP discretion over releasing investigative outcomes to outside sources to ensure the agency was not required to release investigation results to any party, such as a neighbour, that did not have a direct interest in the claim. The policy submission included a request for approval to include the statement "[t]he

Commission will publicly release the outcome of fraud convictions resulting from criminal prosecution" (p. 2). Approval to include this statement in policy was not provided by the agency's Board of Directors.

The Director of the Legal and Investigations Department determines when a matter is referred for a criminal fraud investigation by the police. There is no process in place for how the Director exercises judgment in this regard. However, a 2004 memo from the Director indicated that "[i]n cases where the claimant has fully repaid an overpayment and the Commission is no longer in a position of deprivation against this worker, the pursuit of criminal fraud charges is not supported" (p. 2). The memo states:

> [i]t is my view that the Commission's own legislation contains considerable authority with respect to issues such as termination of benefits (Section 54.1) and collection of overpayments (Section 83.1). When the Commission exercises its statutory authority to prevent a fraud from occurring as it can under Section 54.1, or in fully restoring the Commission where a fraud may have occurred by establishing and collecting an overpayment, then it is my view that it is not appropriate to refer these matters to the police (RCMP [Royal Canadian Mounted Police] or RNC [Royal Newfoundland Constabulary]). In my experience, the Commission loses credibility with the police when it refers these sorts of matters when there is no deprivation and the Commission has already exercised considerable authority to protect the Commission's interest. I would prefer to reserve for referral to these offices, cases where there is a wrong against the Commission which should be corrected, not through the Commission's own legislation, but through the criminal process. (p. 3)

This statement indicates the Director recognises he/she has considerable authority under the agency's legislation to prevent fraud and, when it does occur, it can establish an overpayment and take steps to recover it. It also indicates referrals for

criminal prosecution should be limited to the most severe cases of fraud. Further, this memo provides evidence that there is more going on in the CFIP than deterrence; the Commission is obviously trying to improve the certainty of detection using the CFIP, and, perhaps, to advertise that certainty, but once claimant fraud is detected and the claimant is actually caught, the focus is on restitution rather than prosecution for deterrence purposes.

In addition to deterrence, Policy EN-11 identifies two other formal aims, namely fraud detection and safeguarding the Injury Fund. Policy statements reflecting these additional aims are: "Investigative expertise is required to detect and, where necessary, enable appropriate action against any party who abuses, defrauds, or attempts to defraud the system" and "The Commission is responsible for safeguarding the integrity and viability of the workers' compensation system on behalf of injured workers and employers. It must ensure that money from the Injury Fund is promptly issued to legitimately entitled individuals or businesses" (p. 1).

In the next section, an explanation of the relationship between the Case Managers, the investigators, and the CFIP is provided to contextualise their roles and responsibilities in case management and claimant fraud investigations.

2.2 Roles and Responsibilities

All of the evidence provided to the Commission in a claimant's application for compensation is initially considered and weighed by a Claims Adjudicator. The

weighing of evidence is based on a balance of probabilities determining whether or not the injury arose out of, and in the course of, their employment. If the evidence is equally weighted, then the Section 60 of the WHSC Act requires that the balance be tipped in favour of the worker and compensation is provided.

Temporary Earnings Loss (TEL) claims accepted by the Commission are managed by one of the Commission's thirty (30) Case Managers who direct the appropriate medical treatment for the injury and assist the claimant with the ultimate goal of a safe return-to-work. Claimants are required to actively participate in their recovery, and the Case Manager is responsible to ensure they understand the early and safe return-to-work programme and the processes involved. Extended Earnings Loss (EEL) claims are managed by another six (6) Case Managers without a focus on an early and safe return-to-work. This is because a decision has been made that the claimant cannot return to that type of work due to a permanent functional impairment, and the claimant is therefore entitled to long term wage-loss benefits.

When a TEL or EEL Case Manager has evidence leading to suspicion of fraud, he/she can make a direct referral to the CFIP for an investigation. The evidence gathered during the investigation is then returned to the Case Manager to weigh the evidence for and against a determination of fraud and a decision is made to continue or discontinue benefits. If a decision to discontinue wage-loss benefits is made, then the benefits could be reduced, suspended, or terminated completely and an overpayment established. All decisions of the Case Manager are subject to an appeal.

The TEL benefits are paid while the claimant is not working due to the compensable injury, receiving medical treatment and/or participating in their return-to-work. If the claimant refuses treatment recommended by their physician, delays treatment, or fails to participate in a return-to-work plan without a valid reason, the Case Manager may also terminate, suspend, or reduce this benefit.

Section 89 of the WHSC Act establishes minimum requirements for claimants regarding compliance with the early and safe return-to-work process. Claimants are required to:

1. Contact the employer as soon as possible after the injury occurs and maintain effective communication throughout the period of recovery or impairment;
2. Assist the employer, as may be required, to identify suitable and available employment;
3. Accept suitable employment when identified; and,
4. Give the Commission any information requested concerning the return- to-work, including information about any disputes or disagreements which arise during the early and safe return-to-work process. (WHSC Act, p. 55)

Temporary Earnings Loss (TEL) claimants continue to receive their benefits while they participate in the early and safe return-to-work process. If the Case Manager determines a claimant is not complying, the claimant is first notified of the obligation to comply and told of the finding and the consequences. If the claimant fails to demonstrate compliance within one week, the benefits may be reduced, suspended, or terminated, as determined by the Commission.

The Case Manager has the authority to make a direct referral for an investigation when there is evidence on the claim indicating the claimant may be committing *disability-related* fraud; however, there must be evidence leading to the suspicion as the Case Manager is not authorised to send the investigator on a 'fishing expedition' to look for evidence of fraud.

Earnings-related fraud can also result from the claimant receiving the Canada Pension Plan Disability (CPPD) benefit and not reporting this income to their Case Manager. The Canada Pension Plan Disability (CPPD) is a disability benefit administered by the Federal Government. Claimants receiving wage-loss benefits from the Commission may also be eligible to also receive CPPD benefits; however, the Commission considers seventy-five percent of the CPPD benefit as an offset when calculating weekly compensation benefits. Claimants are required by Section 81 of the WHSC Act to disclose they are in receipt of this benefit and failure to do so is considered fraud.

Claimants dissatisfied with a Case Manager's decision to reduce, suspend, or terminate benefits under the WHSC Act can request an Internal Review. This decision from Internal Review then becomes the final decision of the Commission. This decision can be reviewed by the Workplace Health, Safety & Compensation Review Division (WHSCRD), an external, independent agency from the Commission. A WHSCRD decision represents the workers' compensation system's final decision on the matter unless a claimant wishes to bring the matter to the Supreme Court of the Province for a Judicial Review.

2.2.1 Legislative Framework

Four pieces of legislation provided the legislative framework for the CFIP. Two pieces of legislation express and create what I will term the 'justice tension': The Workplace Health, Safety and Compensation Act (WHSC Act) and the Criminal Code of Canada. These tensions occur between the Commission's right to investigate and make decisions about a claimant's on-going entitlement to benefits and the Criminal Code's reference to the acts that constitute fraud. The Access to Information Privacy Protection Act (ATIPPA) and the Canadian Charter of Rights and Freedoms (the Charter) create what I will term the 'liberty tension'. Liberty tensions are created when the actions of an outside party, like the CFIP, interfere with a claimant's rights as defined by the Charter. The Charter provides for a claimant's right to privacy and protection from unlawful search and seizure.

The Personal Information Protection Electronic Document Act (PIPEDA) is Federal legislation and only applies to external investigators who are employed by private enterprises collecting personal information. This legislation is not applicable to the CFIP and was not reviewed for this study. However, the privacy guidelines established by Federal and Provincial Privacy Commissioners regarding the use of covert and overt video surveillance used in claimant fraud investigations were reviewed to assist in the evaluation of the CFIP.

2.2.2 Policy and Procedure Framework

In this study, the policy and procedures guiding the practise of the CFIP (Policy EN-11: Investigations and Procedures 52-57) are reviewed in detail.

The current version Policy EN-11 reflects many of the Task Force recommendations precipitating the establishment of the CFIP. It identifies that the Commission adopted a zero-tolerance policy for substantiated claimant fraud. It states that "[i]nvestigative expertise is used to detect and enable the appropriate action against a claimant who defrauds, or attempts to defraud the system" (p. 1). It establishes that the Commission is responsible for safeguarding the integrity and viability of the workers' compensation system by ensuring that money from the Injury Fund is available to provide benefits to legitimately injured claimants. The presence and services of professional investigators is viewed by the Commission as contributing to its goal of fraud deterrence. The policy directs that when there is evidence of fraud, the CFIP will refer the matter to the police for criminal prosecution and will share the information it has in its possession with the police.

When evidence is received, or a fraud referral call is registered with the CFIP, the matter is first reviewed by the decision maker on a claim (either the Case Manager or the Intake Adjudicator) to assess whether or not the reported activity warrants an investigation. For example, the Case Manager will review the matter to determine if the activity reported to the CFIP is consistent or inconsistent with the claimant's recovery plan and medical treatment. The allegation and/or the source of the

complaint is not noted on a claimant's file or placed in any similar permanent Commission record, unless a complete investigation substantiates the complaint.

All documentation and evidence collected relating to substantiated accusations from anonymous or identifiable sources is placed on the claimant's file. The CFIP uses its sole discretion to decide if it will notify the source of a fraud referral of the outcome of an investigation or not. When evidence of fraud is collected by the CFIP, the claimant is first presented with the evidence to ensure that he/she has an understanding of the facts relating to the allegation of fraud. In these cases, the investigation report will become part of the claimant's file.

A CFIP investigation includes a wide variety of field work and, when there is evidence of questionable or fraudulent activity, the Director provides approval for an investigator to monitor the claimant's activities that are "reasonably apparent to members of the public" (p. 2).

There are also six procedures used by the CFIP to guide claimant fraud investigations. Procedure 52, Worker Services Referrals, allows Case Managers and Intake Adjudicators to make a direct referral for a claimant fraud investigation. They can make a referral when there is evidence in the claimant's file leading to suspicion of fraudulent activity. The procedure outlines the steps these decision makers (Case Managers and Intake Adjudicators) take when they make an internal referral for fraud investigation. The investigation is initiated by completing of a Request for Investigation Form sent directly to the Legal and Investigations Department where it is recorded in the data base by the Legal Assistant. The Legal Assistant then assigns

it to an Investigator within twenty-four hours. Within seven more days, the Investigator will contact the decision maker to provide the approximate timeline for the investigation to be completed. When the allegations of fraud are considered to be significant in relation to the file information, a request for surveillance and/or covert video surveillance may also be initiated. The requester is not to disclose or discuss the investigation with any party, including the claimant, until the investigation has been completed. If external surveillance is required, the investigator, in consultation with the Director of Investigations, arranges for an external investigator to conduct the surveillance in accordance with Procedure 55. The Investigator provides periodic updates to the Case Manager or Intake Adjudicator regarding the status of the investigation and an outcome report is provided upon completion.

Procedure 53 is significant as it authorises for the first time the use of external referrals and directs how the tips from parties external to the agency are managed by the CFIP. Referrals for an investigation may come in the form of written correspondence or as tips received on the CFIP's Fraud Tip Line. When the CFIP receives an external referral, an investigation is supposed to be initiated based on the information received during the phone call or from written correspondence. The Legal Assistant is to assign the investigation within twenty-four hours. The Investigator then contacts the appropriate decision-maker to advise them about the existence of the referral and to obtain additional information, if necessary, specific to the matter under review. Where the alleged activity appears to deviate significantly from the information on the claimant's file, surveillance is initiated. In cases where there is not enough information or background material provided to investigate, the

investigation may be suspended unless new information is provided. If external surveillance is required, the Director of Legal and Investigations Department authorises the external investigators in accordance with Procedure 55. When the evidence warrants, an Investigation Report is sent to the decision-maker but, generally, the external source of the investigation referral is not notified of the outcome of the investigation.

The Legal Assistant updates the CFIP data base regarding the number of referrals received, the nature and sources of the referrals, whether the referral resulted in an internal or external investigation, and the outcome.

The Investigator's decision-making authority is limited to matters concerning the conduct of their investigation. Information or evidence obtained by the Investigator is then provided to the decision maker who makes the decision regarding the merits of the matter at issue in light of all the evidence.

Procedure 53 sets out the methods by which Investigators gather evidence and report on their findings. Normally, the method of obtaining information is a written statement obtained voluntarily. In some cases, investigators will audio or video-record the interview. In order to ensure the surveillance is directed toward the appropriate claimant, pre-surveillance is often carried out to verify certain facts and information. Pre-surveillance information is provided to external surveillance companies prior to their engaging in the surveillance. All requests for surveillance activity receive prior approval by the Director of Investigations. Surveillance is usually undertaken in cases where fraud or serious misrepresentation is alleged or

there is a significant conflict in the evidence which can only be resolved through observation of the claimant's activity. The investigator is responsible for exercising judgment as to what is fair and reasonable within the limits of the law and Commission policy and procedures.

Videotape evidence can be used to objectively demonstrate physical activity which can be used for comparison between the claimant's reported activities and their actual activities. Where the findings are unsubstantiated or the investigation is not undertaken or not completed, it is documented in the data base.

Procedure 54 provides direction for use of the Fraud Tip Line. This toll-free phone line is provided to allow identified and anonymous sources to call in to the CFIP to report cases of suspected abuse and fraud. Calls placed on the Fraud Tip Line are normally received by the Legal Assistant. When a call is received by any other person within the Commission, the person is required to transfer the call to the Fraud Tip Line.

Voice-mail is offered to callers who place phone calls outside regular working hours. There is no caller ID option available on the referral line, so callers are assured complete anonymity when calling or leaving a message. When calls are received, the Legal Assistant will obtain all available details from the caller and complete an Investigation Referral Form. The matter is assigned to one of the Investigators within twenty-four hours of the time the call is received.

Procedure 55 provides direction for how private investigators are utilised by the CFIP to supplement its own investigators' roles in detecting and obtaining evidence of potentially fraudulent actions by claimants.

The Director of Legal and Investigations Department reviews all of the requests for investigations to determine if the request should be handled by CFIP investigators or referred to an external surveillance company. The types of investigations typically referred to external surveillance companies include the following six considerations:

> 1. Remote investigation site;
> 2. Time sensitivity;
> 3. Anonymity in the investigation process is an issue;
> 4. Ongoing observation over prolonged periods is required;
> 5. Specialised equipment/investigative techniques required to obtain the necessary evidence; and,
> 6. Conflict of interest with internal investigators exists. (Procedure 55, p. 2)

Procedure 56 provides an explanation of types of claimant fraud which may occur within the workers' compensation context and provides assistance in the identification of fraud. Fraud requires the following:

> i) intentional misrepresentation, and
> ii) financial deprivation. (Procedure 55, p. 1)

This procedure describes the two types of claimant fraud: *earnings-related* fraud and *disability-related* fraud described in Chapter One.

Procedure 57 outlines the three (3) sources of videotape photographic evidence provided to the CFIP. They are:

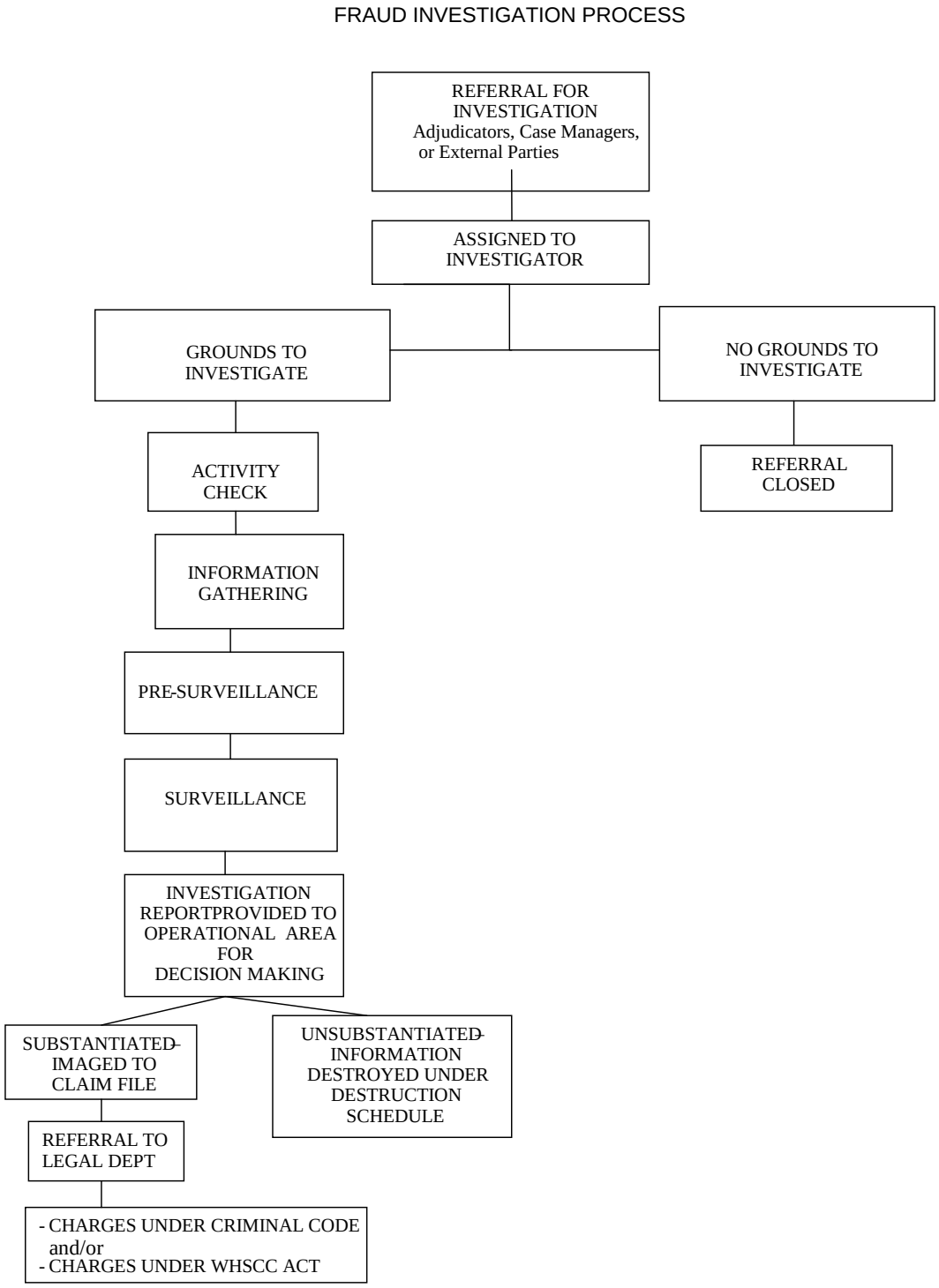
> (1) evidence produced by Investigators;
> (2) evidence provided by someone with an interest in the claim (e.g. employer); or,
> (3) evidence provided anonymously or by a member of the general public. (Procedure 55, p. 1)

When video recorded evidence is being considered in the decision making process and it is determined that the evidence is to be presented to the claimant, the Investigator provides a report and the videotape to the decision maker. The decision maker then requires the claimant to attend a face-to face meeting, usually accompanied by the investigator and one of the Commission's medical consultants. The facts and issues are outlined during the meeting, and the claimant is provided with an opportunity to respond and explain the activity documented on videotape. The decision maker then weighs all of the evidence and renders a decision in writing. The decision includes a summary of all the evidence relied upon in making the decision. If video-taped evidence was considered in a finding of *disability-related* fraud, the decision reflects that it was reviewed by one of the Commission's medical consultants because there was an apparent inconsistency regarding the claimant's fitness for work and level of functional ability. Evidence from visual recordings is only considered in conjunction with all other evidence with the relative weight determined by the other evidence which either conflicts with or supports a finding. Benefits are usually not reduced, suspended, or terminated until the claimant is aware of the investigation results and the decision resulting from it.

2.2.3 Investigation Summary

Once a referral had been received by the CFIP, there are several possible courses of investigative action which include no further investigation, conduct claimant activity checks, information gathering, and pre-surveillance and/or surveillance over a period of time. If the investigation results in no significant findings about the claimant, the file is closed and the reason documented. In these cases, there is no permanent record of the investigation and no reports are placed on the claimant's file. In cases where there are significant findings resulting from the investigation, such as physical activity recorded that is not in keeping with the claimant's functional abilities, or documents retrieved constituting evidence of fraud, then an Investigation Report is completed by the investigator and forwarded, along with any evidence, to the Case Manager. When the evidence is provided, the Case Manager decides if benefits will be reduced, suspended, or terminated. When the evidence collected is considered to meet the evidentiary requirement for a criminal charge of fraud, the matter is referred to the Commission's Legal Department for a fraud review. The Director is responsible for making a decision and has four available options: refer the matter to the police for a fraud investigation; not refer the matter to the police; recommend administrative sanctions, such as reducing, suspending, or terminating benefits; or, recommend that no further action be taken. If a referral is made to the police, a letter is written to the police requesting an investigation and all relevant information in the CFIP's possession at that time is also provided. Figure 1 summarises this process:

Figure 1: Process for Fraud Investigation



2.3 Justice and Liberty

In this section, a review of the socio-legal literature on legislative and criminal justice routes to address claimant fraud is presented. In part, this literature provides a lens on legislative and restorative approaches for preventing future loss from the Injury Fund from claimant fraud. A restorative approach provides a more constructive way to deal with claimant fraud and does not require intervention by the criminal justice system. It can be an effective and generally more cost effective approach. In cases where there is evidence of fraud, and when this evidence is weighed by a Case Manager indicating that fraud is more probable than not, the claimant's benefits can be suspended, reduced, or terminated and an overpayment amount is established. The restorative approach is for the claimant to pay back to the Commission the monies received to which he/she was not entitled, therefore restoring the Injury Fund. The shift is from a focus on punishment to a focus on restoring the Injury Fund such that the funds are available to pay legitimate claims. This approach is consistent with the Commission's goal of financial sustainability and its use is supported by the Correctional Service Canada (2014). The Correctional Service Canada (2014) supports the advancement of approaches that "provide an opportunity for those who have been harmed and those who have caused harm to be active participants in their journey for justice, accountability, and reparation" (p. 13).

In addition, it provides a context for the justice and liberty analysis included in the programme evaluation and assists with the identification of the justice and liberty

considerations arising from the CFIP's legislative framework. The potential sanctions for claimant fraud can be applied through either the WHSC Act and/or the Criminal Code of Canada and, in this study, the costs and benefits of the agency using its own legislative responses (administrative law) or criminal law responses are explored. The literature is primarily drawn from a selection of papers in Quirk, Seddon and Smith (2010) *Regulation and Criminal Justice*. The literature provides an inquiry into the legislative and possibly restorative solutions that could be applied to claimant fraud. This literature indicates that socio-legal research and analysis has already played a role in the development of legislation/regulation (Morgan & Yeung, 2007) and criminal justice (Sanders, Young & Burton, 2010) approaches.

Scholars such as Pearce and Tombs (1990) promoted increased prosecution and punishment of *white-collar* criminals, but an unaddressed question pertinent to this thesis is whether *blue-collar* criminals committing the *white-collar* crime of fraud (what I refer to as '*light blue-collar* criminals') deserve the same. One argument is that the criminal law response to crime through deterrence, rehabilitation, and incapacitation can be effective when applied appropriately. The following section introduces the scholars and the literature used to consider the costs and benefits to the CFIP of looking at the *light blue-collar* crime of fraud through a regulatory/legislative lens providing non-criminal responses under its own legislation for a type of fraud defined in the WHSC Act.

In Canada, a regulatory statute can include a criminal offence. For example, the Canadian Income Tax Act is a regulatory statute which contains the criminal offence

of tax evasion. The offense provisions in the WHSC Act are considered regulatory, and there is no reference to the Criminal Code. The Commission's authority under the WHSC Act when it is dealing with evidence of a claimant's wrongdoing described as *disability-related* or *earnings-related* fraud is limited to "reduce, suspend or terminate benefits." In order to proceed with a criminal charge of fraud, the police must become involved and charge the claimant under the Criminal Code of Canada with the offence of Fraud.

Braithwaite in Quirk, Seddon and Smith (2010) contends that one of the problems of focussing primarily on criminal law solutions is that it "promotes a myopic tendency to see a right outcome to criminal wrong doing as proportionate criminal punishment" (p. xvi). This programme evaluation of the CFIP provides an opportunity to examine an alternative to the criminal law by exploring the costs and benefits of a legislative/regulatory choice to address claimant fraud.

Quirk, Seddon and Smith (2010) state:

> The development of regulation as a governing force is sharpening its relief with substantive and procedural criminal law and focusing the minds of criminal justice scholars to think more about what criminal justice is (Zedner, 2004), what it is not, and how it is different to regulation. (p. 3)

Ashworth and Zedner (2008) present a model of criminal justice emphasising both the "[p]urpose of the criminal law in providing for censure and punishment and the need to respect the autonomy and dignity of individuals in the criminal process" (p.

22). As previously stated, there is no clear set of rules guiding the CFIP in its choice of whether administrative sanctions and/or criminal justice sanctions will be applied in cases of claimant fraud. This absence of specific direction provides an opportunity for the CFIP to consider its framework for future policy and decision making to address claimant fraud. Quirk, Seddon and Smith (2010) recognise the problem of blurred boundaries between the Commission's choices of a response to fraud stating:

> [t]he relationship between regulation and criminal justice is characterized by blurred and uncertain boundaries. The distinction, for example, between conduct that is controlled by regulatory measures and that which is subject to the criminal law, often appears unclear or even arbitrary. Yet it is a distinction which is frequently accepted as the basis for much scholarship and policy-making. (p. 4)

Becker's (1968) analysis focuses on what he describes as a continuum between 'mainstream criminal law offences' and 'regulatory offences'. He proposes that criminal offences, such as those against the person, property, and the public, are appropriately addressed by the criminal justice system while primarily regulatory offences are more appropriately addressed by compliance strategies and administrative interventions. He further argues that criminal justice deterrence can be viewed as ineffective compared with legislative/regulatory enforcement that is also less costly in terms of the impact on claimants and in strictly financial terms. Graborsky (1995) adds that the criminal justice process is slow, costly, unpredictable, ineffective, and should only be used as a last resort. This evaluation considers the costs and benefits to the Commission of shifting its focus so that it

does not unduly concentrate on relatively minor acts simply because they can be described or defined by the Criminal Code label of fraud.

The economic perspective in the literature provided by Ogus (2010) addressing the normative question of when the use of criminal processes may be justified in relation to regulatory contraventions is used to guide the cost-benefit analysis conducted in this study.

Sanders (2010) introduces the notion of freedom that is used to determine whether freedom is enhanced or eroded by interventions that pre-empt or remedy wrongdoing with its main goal being the pursuit of freedom and liberty. An unintended consequence from the criminal justice approach rooted in Policy EN-11 is what sociologists term ‘othering' (Bauman, 1989; Jamieson & McEvoy, 2005), referring to the process by which the state and citizens ostracise others perceived to be a threat to dominant societal interests.

The literature by Ogus (2010) describing the enforcement of legislation/regulation as potentially involving both administrative and criminal justice processes is also used in the analysis of CFIP data. To address the normative question of when, if ever, the CFIP’s use of the criminal justice process is justified in relation to legislative/regulatory contraventions, an economic perspective is applied. The Commission has been criticised by the NLFL for using the criminal justice system as a response to claimant fraud because it is considered heavy-handed and infringing

unnecessarily on a claimant's liberty when other administrative law solutions are available to it.

Ogus (2010) provides an interesting and useful comparison of the systems of legislative/regulatory enforcement with and without the use of the criminal justice system. This is useful for identifying the situations and circumstances in which the use of the criminal justice system might be regarded as justifiable. This approach is utilised in the programme evaluation. To address this normative issue, Ogus (2010) is concerned with the deterrence function of the law and proposes the use of the economic theory of deterrence as the basis of the analytical approach that is also used in this study. This economic theory of deterrence is presented in the literature reviewed for this study in Chapter Four.

In the next section, the legislative framework of the CFIP is presented as illustrating the justice and liberty tensions to be considered in the choice of administrative and/or criminal sanctions. Some of the justice tensions in the system are created by the WHSC Act allowing the CFIP to investigate a claim, collect a claimant's personal information without consent, and pursue administrative and/or criminal sanctions for claimant fraud. The liberty tensions in the CFIP will be examined through two specific articles of the Canadian Charter of Rights and Freedoms.

2.3.1 Legislative Framework

Section 19 provides the Commission with exclusive jurisdiction to examine, hear, and determine matters and questions arising under its own legislation. Section 59 provides the authority for the Commission to conduct an investigation into a claimant's initial and future entitlement to benefits. Section 60 provides that an action or decision of the Commission is final and conclusive and is not open to question or review in a court of law. Section 64 gives the Commission the authority to review a claimant's entitlement to compensation and impose an administrative sanction for non-compliance. Accordingly, the Commission may reduce, suspend, or terminate any compensation payable to a claimant for not taking all responsible steps to notify his/her Case Manager immediately of a change in circumstances that may affect his/her initial or continuing entitlement to compensation. When a claimant fails to comply with this requirement, an administrative sanction can be imposed and/or the agency can also make a referral to the police for a fraud charge to be laid under the Criminal Code of Canada. The offence of fraud is covered by Section 380 of the Criminal Code. This section provides that:

> anyone who by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, who defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service:
>
> (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding ten years, where the subject- matter of the offence is a testamentary instrument or the value of the subject-matter exceeds five thousand dollars; or
>
> (b) is guilty (i) of an indictable offence and liable to imprisonment for a term not exceeding two years, or (ii) or an offence punishable by

> summary conviction, where the value of the subject-matter of the offence does not exceed five thousand dollars. (Watt & Fuerst, 2000, p. 528)

In fraud cases, in the context of investigations that use surveillance tactics, this focus on justice and the pursuit of the truth needs to consider the equally important rights, liberties, and freedoms afforded all Canadians under the Canadian Charter of Rights and Freedoms. This is assessed by examining the liberty tensions faced by the CFIP as it investigates claimant fraud. The rights of a claimant to privacy and liberty also create a tension for the CFIP in its attempts to specifically and generally deter fraud. In the Canadian Charter of Rights and Freedoms (Part I of the Constitutional Law of 1982), these rights to privacy and liberty are fundamental and recognised. For this research, Article 7 and Article 8 of the Charter were identified as relevant as they provide the claimants with their legal rights.

Article 7 states "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (Canadian Charter of Rights and Freedom, 1982, p. 2). Article 8 states "[e]veryone has the right to be secure against unreasonable search or seizure" (Canadian Charter of Rights and Freedoms, 1982, p. 2). The issue of whether or not covert video surveillance of a claimant's activities that are reasonably apparent to members of the public is analogous to an unreasonable search is also considered.

The Provincial privacy legislation, ATIPPA, was intended to make public bodies such as the Commission more accountable to the public and to protect the claimant's privacy. Section 32 identifies the criteria whereby the CFIP has the authority to collect a claimant's personal information without the person's consent. The criteria are that:

> the collection of this information has to be expressly authorized by or under an Act; the information is collected for the purposes of law enforcement; or the information has to relate directly to and is necessary for operating a programme or activity of the public body. (p. 27)

The Director of the CFIP relies on this section prior to authorising an investigator to conduct surveillance and collect a claimant's personal information on video. In reference to ATIPPA, collection of personal information is not restricted to any particular method, media, or technology. The CFIP is bound by the requirements of the ATIPPA whether it collects the personal information itself or authorises private investigators to collect it on its behalf.

Section 33 stipulates how personal information is to be collected. Public bodies such as the Commission are normally required to collect personal information directly from the claimant unless "another method of collection is authorized by an act or regulation for the purpose of an existing or an anticipated proceeding before a court or a judicial or quasi-judicial tribunal, or for law enforcement purposes" (p. 26). The CFIP is a programme of a public body and is not required to obtain consent from a claimant from whom it collects personal information through surveillance. It is also not required to tell the claimant the purpose for collecting their personal information

by surveillance because the information is being collected for enforcement of a law. Complying with the consent provision would defeat the investigative purpose for which the information was collected. The only requirement in ATIPPA is that "in the opinion of the head of the public body, complying with it would defeat the purpose or prejudice the use for which the information was collected" (p. 28). Indirect collection of personal information is permitted for law enforcement purposes. Section 2 of ATIPPA defines law enforcement as "policing, including criminal intelligence operations, or investigations, inspections or proceedings that lead or could lead to a penalty or sanction being imposed" (p. 6).

The knowledge and consent of the claimant is normally required for the Commission to collect, use, and disclose personal information, except for investigations. The worker provides consent on Form 6 Workers' Report of Injury for the normal collection and sharing of personal information required to manage his/her claim; however, claimants are not specifically made aware of the investigation exemption on this form.

2.3.2 Privacy Guidelines

Federal and Provincial Privacy Commissioners have provided guidelines for the use of covert and overt video surveillance. The Privacy Commissioner for Canada promotes adherence to these guidelines to ensure that video surveillance is only used in the most limited cases. They provide the criteria for the collection, use, and disclosure of personal information recorded on video which include having a stated purpose to support its use, obtaining consent, limiting the collection, and keeping

proper documentation. The Director of the Legal and Investigations Department is also required to consider how the loss of privacy is proportional to the benefit gained by using covert video surveillance during an investigation. The advantages of deploying covert video surveillance must be weighed against the resulting intrusion on a claimant's rights to privacy and liberty. The standard is that a reasonable person making the decision would consider the use of covert video surveillance to be appropriate in the circumstances. The guidelines for overt video surveillance (closed circuit television recordings) are relevant for the CFIP in cases when evidence of fraud is provided to the CFIP by parties external to the Commission.

2.4 Socio-legal Concerns That Motivate the Study

In the workers' compensation system, when claimants refer to their rights to privacy and liberty, they are normally referring to their perceived right to be left alone and to not have their freedom impacted by their employer or the CFIP. The Canadian Charter of Rights and Freedoms (1982) offers claimants the strongest legal protections because they are rooted in the Constitution. With respect to surveillance, privacy interests fall under Article 8 of the Charter, protection from unreasonable search and seizure. Liberty falls under the broader protections of Article 7 of the Charter, "the right to life, liberty and security of the person" (p. 2).

The reasonableness of CFIP video surveillance is measured by balancing the CFIP's interest in law enforcement against the claimant's interest in privacy and liberty. However, the Charter does not protect claimants from any and all intrusions by the

CFIP. Rather, Article 8 is only considered if the individual who was claiming a Charter breach can show that he or she had a reasonable expectation of privacy in a particular place. Article 8 protects people, not the places.

As indicated by Lippel (1999, 2003), claimants want to be free from video surveillance and the CFIP wants to use evidence collected by surveillance in proceedings against them, in order to specifically deter fraud. The potential also exists in this deterrence framework for the CFIP to use this surveillance evidence and the resulting sanctions in an attempt to achieve general deterrence. Claimants view this as a violation of their rights to privacy and liberty.

The CFIP claims it only uses surveillance to view activities that are reasonably apparent to members of the public. This approach is supported by Stoddart (2011) who reports that Canadian courts have frequently found that individuals have little or no expectation of privacy with respect to activities carried out in public space. In the case (*Schreiber* v. *Canada (Attorney General),* [1998], it states those who have "voluntarily exposed themselves to public gaze" (p. 18) are said to have little basis for making a complaint if their behaviour is observed by others. To put it another way, "a person can have no reasonable expectation of privacy in what he or she knowingly exposes to the public, or to a section of the public, or abandons in a public place" (*Carter* v. *Connors*, 2009, p. 38).

The guarantee of security from an unreasonable search by CFIP surveillance only protects a reasonable expectation of privacy. This depends on what a reasonable person would expect in the circumstances. This requires investigators to conduct an

assessment of whether, in a particular situation, the claimant's interest in being left alone gives way to the CFIP's interest in intruding on the claimant's privacy in order to advance its law enforcement goal (*Schuster* v. *Royal & Sun Alliance Insurance Company of Canada*, 2009, p. 53). This means that the reasonable expectation of privacy does not depend upon what the claimant expects in relation to privacy in that place, but also on what a reasonable person would expect in the circumstances.

Canadian legal protections of privacy have historically tended to focus on traditional understandings of what is private, such as the home, property, and secret or confidential information (Austin, 2003; *Hunter v. Southam Inc*., 1984; Solove, 2002; Solove, 2001). The current focus of legal protections is now in the context of personal information privacy and data protection legislation, such as ATIPPA.

In the Supreme Court of Canada's decision on Article 8 of the Charter (*Hunter v. Southam Inc*., 1984), the Supreme Court clearly articulates what privacy protections are afforded to claimants. Privacy extends to "people, not places" and is not restricted to notions of property and trespass (p. 23). Privacy, however, does not cover everything that claimants believe the term was intended to cover. The case of *Hunter v. Southam* explains that the Charter protects "a reasonable expectation of privacy" (p. 24). A search, therefore, will be deemed unreasonable if it affects a claimant's reasonable expectation of privacy and is the main issue for the external investigators hired to conduct surveillance. Allowing investigators to make the determination of whether a reasonable expectation of privacy exists or not can be problematic. It tends to be a subjective process, depending on the investigator's perception of what constitutes a reasonable expectation of privacy. In addition, as

Paton-Simpson (2000) argues, the concept of a reasonable expectation of privacy fails to adequately address situations where privacy invasions occur in what are typically considered public settings.

This means the CFIP investigators have to subjectively determine whether a claimant under surveillance has a reasonable expectation of privacy in the situation where he/she is under surveillance. Paton-Simpson (2000) stated that "the concept of a 'reasonable' expectation of privacy is an amalgam of descriptive and normative notions and the makeup of this amalgam changes from person to person" (pp. 320-321). The problem for investigators is that claimants believe that in certain places, they have come to expect that their activity, and the place in which this activity occurs, is private. The CFIP asserts that a claimant's privacy interests are not supported legally in public places. However, Allen (1998), as cited in Marx, (2001), stated "[s]imply by venturing into a public area we hardly give up all expectation of privacy" (p. 163). In ordinary life, "reasonable people assess roughly just how 'public' a situation is and adjust their behaviour accordingly" (Paton-Simpson, 2000, p. 322).

Concerns have also been raised when a claimant is filmed in his/her backyard or on his/her steps in front of the house; sometimes this surveillance is considered public and legal, but sometimes it is not (*Cournoyer & Bolduc vs. SSQ, Life Insurance Society Inc.*). The legal issue for investigators is if the person and/or activity can be seen from a public place or view. If it can be viewed from a public street by an investigator passing the claimant's home in a car, then it is arguably legal. However,

if the person and/or the activity is viewed from an adjoining private property, such as a neighbour's yard, then it is not in public view and arguably not legal.

It is also important for the CFIP to consider privacy as new technologies are used in workplaces and employers are at higher risk of having to address these considerations during the time their employee is on a claim. Employers may be tempted to use the workplace surveillance and security technologies already installed in their workplace to contest a claim, and these can have an impact on privacy. Employee privacy issues include concerns about personal privacy versus the employer's need for workplace surveillance and security. In controlling access to buildings and computer systems, employers use various kinds of technologies to identify workers and their activities in the workplace. Employers may be tempted to use this information when it provides a reason to object to a worker's claim for compensation. If the employer submits information to the CFIP that was collected for another purpose, such as parking lot security, the employers believe it should be used as evidence to contest a claim regardless of the purpose for which it was collected. Claimants contend this is an invasion of privacy. The case law regarding the use of information collected for one purpose and used for another is deemed to be a privacy violation and is also inadmissible in a court of law.

Theisson and Bullock (2005) contend covert surveillance has the greatest potential to infringe upon privacy rights and, as a result, requires strict justification. The Supreme Court of Canada confirmed that the violation of privacy rights must be sanctioned by the granting of damages and, if there was malicious intention,

exemplary damages (*Editions Vice-Versa vs. Aubry*). The Human Rights Commission (1999) considered government agencies, such as the Commission, "to have an even greater obligation to respect privacy rights than that of the employers and private insurers" (p. 10).

The Supreme Court of Canada acknowledged the necessity of imposing on the state limits to their discretionary powers to conduct surveillance. In *R.C v. Wong,* the judge maintained the following:

> I firmly consider that if a free society cannot tolerate the possibility that in the absence of legal authorization, the agents of the state have the right to record the business of whoever they want, it is equally inconceivable that the state has the unlimited discretionary power to subject whoever they want to a magnetoscopic surveillance carried out surreptitiously. In his classic futuristic novel *1984*, George Orwell raises the sinister portrait of a society in which the citizens all have reason to believe that each of their movements is subjugated to magnetoscopic electronic surveillance. A more striking contrast to our expectations in the matter of private life in a free society such as ours could not be found. The notion according to which the agents of the state should be free to turn secretive cameras on members of society, whenever and wherever, as they wish, is fundamentally irreconcilable with our perception of acceptable behaviour on the part of governments. As in the case of the hidden listening of conversation, permitting the unlimited magnetoscopic surveillance by agents of the state, would diminish in an important way the degree of private life to which one can reasonable except in a free society. (p. 47)

There appears to be a consistent theme in the Supreme Court's Article 8 decisions; surveillance should not be conducted by the CFIP unless it is satisfied that it is truly necessary to combat fraud. The covert video surveillance data supplied by the CFIP is evaluated for its compliance or deviation from the Supreme Court's decisions.

These Article 8 decisions also mean that CFIP investigators are required to demonstrate investigative necessity to justify the use of covert video surveillance tactics, and this requirement means that there must be no other reasonable, alternative method of investigation. The CFIP video surveillance data is also evaluated for compliance with this requirement.

In addition to workers' compensation, many of the social programmes that distribute financial resources to citizens such as welfare and unemployment insurance also use covert video surveillance tactics. Examples of these social assistance programmes where fraud is investigated are reviewed in the next section.

2.4.1 Benefits Fraud: Social Assistance as Crime

In Mosher and Hermer (2005) *Welfare Fraud: The Constitution of Social Assistance as Crime*, the analysis of social assistance benefit fraud revealed that the policy and practises regulating welfare fraud in Canada are similar to other features of its social assistance system that are aimed at benefit reductions. Their analysis of the social assistance system in the province of Ontario led them to conclude "the intent of this is to re-constitute the receipt of social assistance benefits as a morally suspect activity" (p. 3). Similar to workers' compensation claimants, recipients of social assistance benefits report feeling like they are treated as criminals. The recipients are also aware they are being constantly monitored and reported upon by a variety of both public and private actors. They experience fear and shame accompanied by a sense that they are outsiders and do not feel like full Canadian citizens.

Mosher and Hermer (2005) conclude that benefits are administered within an environment of intense scrutiny. Extensive reporting and disclosure requirements, exceptionally broad consents to the disclosure of personal information, home visits, toll-free fraud-tip lines, invasive interrogations, and demeaning interactions are reported to be quite commonplace. Abuse, misuse, and fraud of the social assistance system are assumed to be flagrant, and therefore those in receipt of benefits are constantly assumed to be 'up to something'.

Mosher and Hermer (2005) report that those in receipt of benefits are expected to know and comply with an enormous number of complex rules. Their analysis of the data indicated that much of what is frequently called welfare fraud, and policed as such, is very different from the fraudulent activity that is the targeted through criminal law. Their 2001-02 data indicated that criminal convictions for social assistance fraud are exceedingly rare, representing 0.1 percent of the social assistance caseload (p. 29). Their analysis suggests that welfare fraud involves all breaches of any of the complex and confusing rules that govern social assistance. They add that many of these rules and regulations make receiving social assistance an ungovernable activity that inherently involves rule breaking and thus the committing of welfare fraud. One example is the regulation that revolves around 'undeclared income' and 'man in the house'. Under the 'man-in-the-house' regulation, a single mother with children is denied welfare payments if there is evidence that a man resides under the same roof with them. The children who otherwise qualify for welfare benefits are also denied benefits because the child's mother is living with, or having relations with, a single or married able-bodied male and his living in the residence was not reported to the appropriate authorities. The

man is then considered to be a financial supporter, even if the man is not supporting, or is not able to support, the children. The 'man-in-the-house' regulation was classified as vague with no reasonable person being able to conduct him/herself in a way that would not put him/her at risk of being accused of fraud.

They argue the impact is compounded by the extensive and often arbitrary powers of Eligibility Review Officers, the ambiguity of how rules and regulations are applied, and the use of the welfare fraud hotline which translates what can often be malicious gossip into official action. Mosher and Hermer (2005) argue that "it is the highly informal policing of this network, fueled by prejudicial stereotypes of those on social assistance, which results in termination of benefits, assessments of over-payments, accusations of fraud, and formal fraud charges" (p. 67). Entitlement to social assistance appears to be viewed as taking from the public.

Mosher and Hermer (2005) argue:

> The normative character of the 'crime' of welfare fraud is generated not just by the complexity and vagueness of the rules and regulations that govern social assistance but also by the disparities that exist between welfare fraud regulation and other forms of economic misconduct. As we have noted, in almost every respect 'tax evasion' and 'employee standards violations' are viewed in a much less punitive and severe light in terms of the moral culpability attached to the conduct, the range of detection and enforcement tools utilized and the penalties that follow upon conviction. This disparity suggests a clear normative distinction at work, one that is aligned with neo-liberal values that views poor people as not deserving of support, but rather of intense scrutiny and inequitable treatment. (p. 85)

Despite being the subject of significant changes in law and legal processes, this mode of regulation appears not to provide the usual safeguards and principles of

criminal justice administration. For example, the established legal distinctions between 'error' and 'fraud' that are present in income tax evasion jurisprudence are often not made where recipients have their benefits terminated for committing welfare fraud. They conclude that the receiving social assistance itself has become criminalised through the category of welfare fraud.

A survey conducted in Britain (Ipsos MORI, 2011) provides data about attitudes and behaviour in relation to benefit fraud that will be used in the discussion provided in Chapter Seven. The respondents included 479 claimants in receipt of social assistance benefits as well as 593 members of the general public. Of the respondents, over half of the general public sample perceived benefit fraud as being 'easy to get away with' similar to how workers' compensation fraud is viewed. In addition, claimants thought the consequences of fraud are serious while the general public respondents were less likely to think that the consequences of getting caught committing fraud are serious. Almost half of the general public sample agreed that the penalties of getting caught committing benefit fraud are 'not that bad'. There was, however, a general view that benefit fraud is wrong and three quarters of the sample believed that benefit fraud is wrong all of the time, regardless of the circumstances. The benefit recipients are required to report a change in their circumstances and sixty-five percent said that they 'definitely would' report a change in their life circumstances immediately. Approximately one quarter were viewed as 'on the cusp' of committing fraud while very few said that they 'definitely would not' report a change in circumstances immediately.

As for reporting fraud, forty percent of the general public sample said that they 'definitely' or 'probably' would report a neighbour who they knew was claiming more money than that to which they were entitled. Almost half of the sample thought it was easy for people to get away with claiming more money from benefits than those to which they are entitled.

Perceptions of the risk of detection were higher amongst claimants, indicating that claimants may be more aware of others who have committed fraud. Respondents were also asked whether they felt that benefit fraud is more difficult to get away with than it used to be. Almost forty percent of the general public sample thought that it was more difficult to get away with, while one quarter disagreed with this statement.

Beliefs about the punishments for committing benefit fraud were similar amongst both the claimants and the general public sample. Both groups were most likely to believe that people would either receive a fine or be made to pay back overpaid benefits, and approximately one quarter of both groups thought that a prison sentence was possible.

Another piece of research conducted by Ipsos MORI ("Benefit Fraud in Britain", 2011) indicates that British public opinion about benefit fraud and crime is inaccurate as the public over-estimate the amount of benefit money that is fraudulently claimed. British citizens believe that twenty-five percent of the benefits paid out are fraudulent while official estimates indicate that it is less than one percent. Similar to the literature on workers' compensation fraud, this type of

conflict between facts and public perception poses a significant challenge for policymakers and may have played a role in the development of Policy EN-11. It is a problem to develop good policy when the perceptions driving its development are inconsistent with the evidence.

Another study of sixteen individuals conducted by Groves (2002) indicated that benefit fraud is one way for recipients to manage their daily lives in their roles as parents, partners, daughters or sons, and/or independent adults, at particular points in time and place. In this way, benefit fraud is viewed as one of many tactics people with a low-income use to 'get by' (see Dean & Shah, 2002). Research by (Cook, 1989; Evason & Woods, 1995; MacDonald, 1994) has explained benefit fraud as being caused by inadequate benefit levels distributed by an unfair and rigid social security system. Recipients live their lives in poverty and this circumstance has had a shaping influence upon their decisions and actions. Groves (2002) argues that the respondents in this study did not derive only financial benefit from their fraud, but rather the fraud was narratively constructed as a financial and social resource to be accessed as well as a means to access other resources which significantly enhanced their lives. Groves (2002) also reported that while benefit fraud improved the recipient's immediate cash-flow problem, rarely did it significantly make their lives better.

Descriptions of those in receipt of financial assistance as being somehow morally or culturally set apart from the majority has a long history in welfare discourse (see Golding & Middleton, 1982). The research reported here has provided a further

challenge to the perception that people who engage in benefit fraud are immoral criminals, motivated by greed, living on the fringe of society. Groves (2002) indicated that the respondents in his study talked about their fraud in ways which demonstrated their adherence and acceptance of mainstream values around work and family. In addition, they actually recognised how their own fraudulent action was normatively problematic for society and for themselves.

Gilens (1999) used evidence from United States public opinion polls, an analysis of American public policy and welfare reforms, and a content analysis of media reports to examine the reasons Americans are opposed to welfare. Based on the analysis, Gilens (1999) concludes that negative feelings about welfare are primarily related to the perception of welfare as a programme for particular races and, due to the misrepresentation in the media, evoke seeing welfare recipients as the 'undeserving poor'.

Using data from public opinion polls conducted during 1986 - 1995, Gilens (1999) examined the opinions of Americans in relation to increasing or decreasing spending on social welfare programmes. In almost every social programme area, the majority believe that spending should be increased. The data indicates that there is general support for social welfare for targeted populations, such as the poor, with seventy-one per cent (71%) of those polled believing that spending should be increased to fight poverty. This appears to indicate that Americans support social welfare programmes, but when they are asked about whether welfare spending for those currently on welfare should be increased, Americans indicated they were strongly opposed. Seventy percent actually indicated spending for people on welfare should

be decreased. These two results are essentially contradictory - Americans support helping the poor, but do not support welfare, the primary programme designed to help them. To explain this contradiction, Gilens (1999) rejects that individualism and self-interest explanation for the opposition to welfare, but finds evidence of "racial attitudes (Blacks as lazy) and welfare recipients as undeserving as central elements in generating public opposition to welfare" (p. 92).

Social assistance and welfare reforms in the United States and Canada over the past decade emphasise work and returning those in receipt of financial assistance to work as soon as possible. This emphasis lends support to Gilens' argument that opposition to welfare is driven by images of the undeserving poor and welfare recipients as lazy. In reference to workers' compensation, many Canadians also appear to support workers' compensation for the injured worker but do not want to see the undeserving and lazy claimants benefiting from it.

2.4.2 The Claimant's Perspective versus The Employer's Perspective

In compensation cases, the claimant's perspective and the employer's perspective are primarily informed by economic factors. The claimant benefits from maintaining economic stability in the face of a work-impairing injury, and the employer scrutinises such claims to limit economic liabilities. As such, these perspectives can illustrate two essentially conflicting views of claims investigations and surveillance.

The research design for this study did not include interviewing claimants and employers asking for their perceptions and experiences with investigations and covert surveillance. During the preliminary discussions with the Commission's CEO proposing research at the site, she explicitly stated the Commission was not in favour of research that included contacting employers and/or claimants to obtain their perspectives about the CFIP. The reason provided was the Commission did not want this research to raise again the controversial issue of investigation and surveillance with either employers or injured workers. The concern was that employers or claimants may make this a public issue in the media or through government officials. The Commission would not allow the study to proceed if it proposed accessing claimant or employer information for the purposes of contacting them. The access to the Commission's data did not extend to individual-level named confidential data from databases or case files. The access was to a de-identified data base and de-identified sample case files, the participants who voluntarily consented, as well as the Commission's policy and procedures, statutes, documents and reports.

To compensate for this, the claimant perspective evident in Lippel (1999; 2003) is used to provide the claimants' perspective on workers' compensation investigations and surveillance. Dr. Katherine Lippel is the Canadian Research Chair in Occupational Health and Safety Law, and her research focus is on the content and application of occupational health and safety regulatory frameworks and in providing compensation for work related health problems. In addition, the claimant's perspective on these investigations is evident in the perspective provided by the NLFL in the letter written to the Commission. In addition, the employer's

perspective is evident in the representations to the Statutory Review committees as well as the *Task Force Report* (2002).

Lippel (2003) reports that claimants often feel they are treated like criminals for being on a workers' compensation claim. They associate this feeling with workers' compensation using investigators to conduct surveillance on them without their knowledge. They also report feeling stigmatised by the negative comments about them made in the media. They believe that there is a stereotypical and discriminatory perception of them as abusers of the system, contributing to their feeling of being treated like criminals.

Lippel (1999) examined surveillance tactics used by workers' compensation investigators in several Canadian provinces and came to the following six conclusions: (i) it stigmatises injured workers; (ii) it could have as a consequence a less rigorous application of the legislation in matters of liberties and fundamental rights; (iii) it is often accompanied by the fear of being followed by an overzealous and aggressive investigator; (iv) it can result in public organizations using video surveillance of persons without their knowledge raising specific legal questions; (v) it can mean that the stigmatization is reinforced by the fact that rights acknowledged by the Canadian Charter of Rights and Freedoms can be less rigorously respected; and, (vi) it can mean that the use of video-surveillance in the management of workers' claims constitutes, in many cases, a breach of an individual's right to dignity. In this study, the CFIP's use of surveillance is examined to determine how it is deployed, in what cases, and what, if any, controls are in place to ensure a

rigorous application of the legislation in relation to a claimant's rights to liberty and privacy.

Lippel (2003) contends that Canadian jurisdictions permit video-surveillance of claimants in situations where it would be illegal to use it in a criminal investigation. She argues "when the state resorts to video-surveillance, rather than the employer, the legal stakes are different because of the principles contained in the Canadian Charter of Rights and Freedoms and it should be assured that the workers are granted all the recognition that is imperative" (p. 25). Just because a jurisdiction permits this type of surveillance it should not be assumed that most or all instances of surveillance are conducted illegally. In addition, in Canadian society it is not uncommon for any citizen to find surveillance by the State as intrusive. For Doyle, Lippert, and Lyon (2012), the underlying issue is the extent to which camera surveillance is analogous to a physical search. Canadian citizens enjoy "considerable protection from physical searches by the state, absent reasonable cause" (p. 333).

Lippel (2003) also reported the circumstances claimants believe led to surveillance in their case. They believe that surveillance constitutes an act of retribution in connection with a conflict they were having with their Case Manager. In several cases, the surveillance began after the claimant made a complaint about the attitude of the Case Manager. Others mentioned cases where surveillance was used because their claim was particularly costly due to the severity of the injury, believing the use of video surveillance was a means to decrease the cost of the claim. Two cases she

studied confirmed this argument. Two injured workers that were the object of surveillance were indisputably, severely disabled following a workplace accident, yet were still subjected to surveillance. It should be noted that Lippel's work primarily focused on discovering cases where surveillance went too far and does not indicate that this is necessarily the case for claimants under surveillance by the CFIP.

The claimants studied in Lippel (2003) reported they were hesitant to begin activities, even if they were encouraged to do so by their doctor. They were afraid they would be recorded on video, and it would be used to reduce, suspend or terminate their wage-loss benefits. Claimants are often encouraged by their doctor or therapist, and even by their Case Manager, to try to regain as much mobility as possible by trying to increase their functional abilities and become more involved in their pre-injury activities of daily living (Neveu, 2001). If they are not attempting activities they have been medically advised to attempt because of a fear of reprisals, it is less likely they will reach full medical recovery. In this way, surveillance can be counter-productive to the rehabilitative mandate of the Commission.

Lawyers specialising in insurance law have also identified the potential harmful effects of covert surveillance practises on injured workers. They contend that the workers must fight to overcome their disability while fearing that they are being watched for the purpose of showing that they are less affected by their injury than they have indicated (Gilbert, 2006, p. 206-207). As Lippel (2003) cogently argues, video surveillance on claimants can have both medical (psychological and physical) and economic consequences. Yet, there are, from the employer's perspective,

consequences for not using surveillance to catch those who may be attempting to defraud the system. As such, employers, and those who work for them, such as private investigators, argue that there are benefits in using covert video surveillance.

One such argument, brought forth by the Canadian Association of Private Investigators (CAPI), asserts that overt investigation tools such as medical examinations and interviews with a claimant's neighbours are more invasive of privacy rights than covert surveillance. Private investigators argue they should be permitted to exercise their own discretion in selecting investigative options, including covert surveillance, with the standard being that of reasonableness under the circumstances. The CPAI asserts:

> [t]he degree of impairment to privacy rights that may result from covert surveillance should be balanced against the nature of the matter being investigated, and the reasonable expectation of privacy in the place of investigation. In the more serious case of fraud, there should be less expectation of privacy in public places. Further, fraud investigations are necessarily focused and time-limited and, accordingly, the opportunity to gather information does not permit for resorting to other forms of investigation first. (p. 4)

However, this idea is contested by Lippel (2003). She examined the surveillance of the claimants by workers' compensation investigators and concluded that "stigmatizing injured workers could have as a consequence a less rigorous application of the legislation in matters of liberties and fundamental rights when they are the object of covert surveillance" (p. 26). She further asserts that the impact of the video evidence on the validity of the claims can be great and even

disproportionate, even when the recording contains nothing really compromising. This issue will be considered in the discussion of liberty in Chapter Seven.

Lippel (2003) noted that the employers do not want claimants feeling too comfortable when they are receiving compensation. They believe that making the experience unpleasant can contribute to a decrease in future claims. In this study, data is analysed to determine the frequency for which employers report claimant fraud and provide video evidence of claimant fraud to the CFIP.

Lippel (2003) argues that investigators trying to catch a claimant in a trap is not an unusual tactic. Again, caution should be exercised with this statement to ensure "not unusual" is not construed to mean "typical". One participant in her study shared a specific case in which an investigator let the air out of the car tire to see if the claimant would bend down to change the flat. The practise was found to be reported in other sources (Laurin, 1998, p. 4). Another trap identified was leaving money next to the door of the claimant's car so the investigator could record on video the target of surveillance bending down to pick up the money (Laurin, 1998, p. 4). Another case reported by Lippel (2003) took place in the parking lot of a shopping centre when a female investigator asked a male claimant to help her carry a heavy parcel. The claimant apologised by saying that he could not help her because he had a bad back. She asked him again pleading that they could lift it together in a safe manner. He was on video but, in this case, the arbitrator did not penalise the claimant, recognising that he had put in an exceptional effort in a special situation (Parent & Saint-Arnaud, 2003, p. 6).

However frequent or infrequent these examples of zealous investigations are, they have serious consequences for the principles of liberty and justice. In the cases mentioned above, where an investigator manipulates a claimant to get results for an employer, there is an infringement of the claimant's right to due process. In legal terms, these cases appear to be instances of entrapment. The issue from a legal standpoint is that while there are rules and regulations in place to ensure that officials in the justice system, like police officers, do not use such methods to obtain evidence, there does not appear to be compliance by investigators with these same rules. This means that suspects of other crimes appear to have more rights than those on a claim for compensation. This can deprive a claimant of due process under the law. There are also negative consequences for the compensation boards and employers. In the examples given, the legal consequence was that the evidence was dismissed by the courts meaning that the case for criminal fraud was severely weakened. In such cases, if the claimant is actually committing fraud, it is possible that his/her case may be dismissed by the courts. This may also cause financial issues on several levels including the loss of a fraud case, the loss of time and money in the payment of the investigator, and the possibility of continuing to pay wage-loss benefits on a fraudulent claim.

Another important issue that Lippel (2003) identifies with reference to liberty and justice and covert video surveillance is the intrusion upon not only the claimant, but members of a claimant's family. She reports a number of cases where several members of the claimant's family, including children, were seen on the video, sometimes even when the claimant was not present. The children and the spouses

can actually suffer great stress because of such activities. There are examples where the whole family is under surveillance without their knowledge. Here, the claimant feels a sense of violation as well as guilt for being on compensation and exposing his/her family to this violation.

Lippel (2003) concluded that the stigmatization of claimants in the workers' compensation system is reinforced by the idea that the rights acknowledged by the Charter and the privacy rights covered in Federal and Provincial legislation can, in some ways, be less rigorously respected.

In the Province of Quebec, the compensation board admits that, in 35% of the cases, video-surveillance carried out at its request does not succeed in justifying the cessation of compensation (Laurin, 1998, p. 4). Lippel (2003) questions why Canadian jurisdictions permit the video-surveillance of claimants in situations where it would be illegal to do so to apprehend criminals. As she argues,

> [w]hen the state itself resorted to video-surveillance, rather than the employer, the legal stakes are different enough because of the principles contained in the Charter and it should be assured that the workers are granted all the recognition that is imperative. (Lippel, 2003, p. 26)

The consequences for a claimant from decisions made on video-surveillance evidence can include the loss of financial support, stigmatisation, and humiliation. Lippel (2003) concluded that "the generalized usage of video-surveillance in the

management of the claims of victims of workplace injuries constitutes, in many cases, a breach of an individual's right to dignity" (p. 31).

The perspectives of surveillance provided in this section inform some of the discussion to follow about the justice and liberty tensions associated with its use. The next section provides the literature on an integrated approach to addressing the problem of claimant fraud.

2.5 An Integrated Approach

Binsfeld (2010) proposes an integrated strategy to address claimant fraud in the workers' compensation system. The integrated approach includes the integration of investigative resources, systematic procedures, timely reporting of injuries, advanced fraud detection technology, and the involvement of Case Managers who document and manage injury information from the onset of a claim and continue to tightly manage that claim, minimising the opportunity for claimant fraud (p. 3).

Binsfeld (2010) contends that despite technological advances, case management remains a key component to detect and prevent fraud and that fraud detection must begin with the first report of an injury. When injuries are reported late, lag times create an opportunity for inconsistent accounts of the nature and severity of an injury

to occur. Without a systematic and reliable process to ensure timely reporting, gaps in injury management actually create opportunities for fraud (Binsfeld, 2010, p. 2).

In this integrated approach, Case Managers and Intake Adjudicators serve as the first line of defence for claimant fraud, having to spot red flags and alert investigators to questionable activities. The red flags are indicators of suspicious activity indicative of fraud. Red flags for workers' compensation claimant fraud are indicators or warning signs that may signal fraudulent activity. They serve to alert Case Managers and investigators to the possibility of fraud, suggesting further investigation may be warranted. The greater the number of red flags identified on a claim, the greater the probability that the claim is fraudulent. Fulmer (2010) reports the top forty most common red flags associated with workers' compensation fraud. The Case Managers and Intake Adjudicators can consider these and refer a suspicious claim to investigators for further review. However, these are just indicators or markers and not actual evidence of fraud. The red flags are:

1. There are no witnesses to the injury or the only witnesses are the claimant's 'close' co-workers.
2. The claimant and witness statements offer conflicting information.
3. The injury was not reported on time.
4. The accident report, statements and other documents contain numerous cross-outs, white out, erasures or are incomplete.
5. The claimant cannot recall specific details about the accident.
6. The claimant is a new employee. Statistically the newer the employee is, the more likely the claim is fraudulent, especially if other red flags appear.
7. The claimant has a poor attendance record at work.
8. The claimant has a history of discipline issues. A disgruntled employee has a motive to fabricate the claim.
9. The accident occurs immediately before or after a vacation.
10. The accident occurs immediately prior to an employee's retirement.

11. The employee is injured prior to a strike, company layoff, termination or the employer closing or relocating the business.
12. The employee is injured after giving notice.
13. The employee is injured after receiving a disciplinary action, demotion, being passed over for promotion or being placed on probation. The common denominator is that the claimant is disgruntled and disgruntled employees are more likely to file fraudulent claims.
14. The claimant has problems with workplace relationships.
15. The claimant leaves the country for unapproved medical treatment.
16. The claimant has a history of reporting subjective claims or has more than one claim at a time.
17. The claimant's job history reflects a series of jobs held for relatively short periods of time.
18. The claimant's alleged injury relates to a pre-existing health problem.
19. The claimant is involved in high-risk hobbies or sports. Claimants injured playing sports over the weekend often attempt to blame it on a work related injury early Monday morning. When adjusters have claimants that are active in sports this information should be passed on to the investigator.
20. The claimant is involved in home improvement or auto repair activities.
21. The claimant has a part-time job that is labour intensive. For example, building outdoor decks or erecting fences.
22. The injury occurs on a Friday but is not reported until the following Monday, or the injury happens early Monday morning or at the beginning of a weekly shift. Probably one of the most common red flags and could indicate the claimant was injured over the weekend.
23. The incident report and the medical evaluation offer conflicting information.
24. The claimant refuses or delays treatment to diagnose the injury.
25. The claimant won't [sic] come to the telephone, is sleeping and can't [sic] be disturbed or is never home. Again, this is one of the most common red flags.
26. The claimant misses physical therapy, occupational therapy or other medical appointments.
27. The claimant provides a telephone number but doesn't [sic] live at the address associated with it.
28. The claimant provides his friends, parents or other family members address or a hotel or post office box.
29. The claimant's family doesn't [sic] know anything about the claim or they are extremely helpful to the point of the information sounding rehearsed.
30. The claimant is going through a divorce.
31. The claimant is going through a child custody battle.
32. The claimant is having financial difficulties.
33. Tips or anonymous information from co-workers, relatives or neighbours [sic] suggest that the claimant's injuries are exaggerated or not legitimate.
34. The claimant's lifestyle is incompatible with his known income.
35. The claimant's family members are on workers' compensation or have a history of claims or lawsuits.
36. The claimant's injuries are subjective. This involves soft-tissue injuries, phantom pain, emotional injuries, etc. This is very common and difficult to prove otherwise.

37. The claimant changes physicians frequently. This occurs when the physician releases the claimant to return-to-work or when the diagnosis is at odds with the claimant's assertions.
38. The claimant is healthy, tanned or sunburned and is obviously involved in outside activities.
39. The claimant and other workers from the same employer use the same attorney, doctor, chiropractor or clinic.
40. The claimant is familiar with claims-handling procedures or workers' compensation rules. At the very least this could indicate that the claimant has filed a previous claim. It also means the claimant may be expecting surveillance. (Fulmer, 2010, p. 2)

In addition to the red flags, Binsfeld (2010) contends workers' compensation can leverage technology to capture, access, and analyse claims data. Also, "advanced fraud detection tools, such as predictive analytics are used to identify potentially fraudulent patterns in the data" (Binsfeld, 2010, p. 4). In addition, with the prevalence of social media, many investigators can receive direct tips from claimants. For example, if an investigator accesses Facebook, postings from injured workers who boast about activities they participate in or talk about working and earning an income, while collecting disability payments for a work related injury may be uncovered.

Binsfeld (2010) suggests that managers and supervisors from the claimant's employer continue to play an active and critical role in communicating with injured employees. This personal communication tells the claimant they are missed at work and are expected to adhere to treatment, recovery, and their return-to-work plan. If the claimant has work restrictions, the employer should be communicating the ability for this to be accommodated and provide them with modified duty assignments. The claimants must understand that they are expected to return in this modified capacity,

and Binsfeld (2010) suggests that this should be reinforced with training and human resources policies.

The medical information on the claim file needs to be managed tightly because, when claimants go to their treating physician or other health care provider, they can exaggerate the nature of their jobs, so they may get a medical note and be granted time off from work. This is another form of fraud and Case Managers can communicate with the claimant and the health care provider to reconnect the claimant to the workplace when the functional abilities can be accommodated by the pre-injury employer.

Additionally, Binsfeld (2010) recommends a rigorous quality assurance process to monitor how claims are managed, how each Case Manager's performance is measured, and to identify improvement opportunities and viable solutions to assist in mitigating potential fraud. Ideally, Binsfeld (2010) recommends an established internal quality assurance process be implemented that utilises experienced claim technicians and references an established set of review criteria for injuries and recovery times.

Binsfeld (2010) also recommends supplementing internal efforts with the utilization of periodic external quality assurance reviews by independent firms to identify the strengths and weaknesses of claims' administration. He states that the key to combatting claimant fraud is "consistent due diligence on the part of each claim handler, combined with effective teamwork" (p. 3). Undertaking thorough

investigations and verification of fraud allegations along with effective communication with the Case Manager provides greater control of the process. Binsfeld (2010) argues that combining these measures with an ongoing and effective quality assurance process would enable the Commission to have in place a solid process for making decisions in response to fraudulent claims.

According to the National Council on Compensation Insurance (2012), *Workers' Compensation and Economic Cycles: A Longitudinal Approach*, evidence suggests that business failures provide direct and special motivation for employees to file workers' compensation claims. This is because the benefits generally are larger and paid over a longer period than unemployment benefits, and the workers' compensation wage-loss benefits are non-taxable. According to the study, one estimate indicated approximately 40% to 50% of laid-off workers will file workers' compensation claims against their employers within six months of termination. An increase in business failures is also expected to lead to an increase in claim severity because the employee's objective is to obtain a pay-out that exceeds the expected unemployment benefit. Severity may also be higher as a result of the types of injuries claimed.

The next section provides best practise literature for investigators to inform how they should investigate *earnings-related* or *disability-related* claimant fraud.

2.5.1 Investigative Techniques

Rainbolt (2003) provides an investigative model designed to fight claimant fraud. This model suggests methods to consistently identify the type of fraud, focus the suspicion, and then design a strategy to use the evidence obtained.

Rainbolt (2003) contends the general strategy for combating malingering should be to conduct three days of surveillance in an effort to catch the claimant physically active beyond their alleged functional abilities. The goal is to try to obtain quality video surveillance footage and provide it to an evaluating physician.

He recommends a five step process to combat claimant fraud. The first step is to determine whether the type of claimant fraud is disability or earnings fraud. The second step is to analyse the evidence and focus the suspicion. The third step is to establish and to implement an investigative strategy for the specific type of suspected claimant fraud. For *disability-related* fraud, Rainbolt (2003) suggests that before beginning surveillance, the Case Manager must ensure that the claimant has made specific statements about his/her functional abilities and inabilities. Then, once the statements and the video evidence have been gathered, the Case Manager can document the claimant's functional limitations. Then, after reviewing the claimant's written statement, the Case Manager can review the video footage and make a separate list of the activities the claimant performed. Once the list of objective discrepancies is created and the Case Manager is confident, then medical

professionals should be engaged to view the video footage. For *employment/earnings-related* fraud, Rainbolt (2003) recommends sending a questionnaire regarding employment to the claimant accompanied by their wage-loss benefit check. The questionnaire should ask about both employment and income since the date of the injury and require a date and signature from the claimant. The fourth step is to organise the evidence. This should include a summary of all costs incurred, a list of witnesses, and copies of all of the evidence in chronological order.

The fifth and final step is to preserve the evidence and follow up with an administrative sanction and/or refer the claim to the police for an investigation and possible criminal charges.

2.6 Summary

This chapter provides the history of the CFIP as well as a framework to consider the justice and liberty tensions considered by the CFIP in its pursuit of fraud deterrence. The socio-legal concerns motivating the study and the literature on an integrated approach to addressing claimant fraud were presented to inform the programme evaluation and discussion of the socio-legal issues raised in this study.

The next chapter describes the research design and methodology used in this programme evaluation.

3 RESEARCH DESIGN

In this chapter, the methodological literature for the programme evaluation using mixed methods is presented. In addition, the three phases of the research conducted on the CFIP are described in detail.

3.1 Programme Evaluation

The programme evaluation is conducted on the CFIP in the workers' compensation system, a programme and a system largely unknown to criminological and socio-legal researchers. This study examines the three main theoretical concepts of *deterrence*, *light blue-collar* crime as well as *justice and liberty*, through the prism of the CFIP, therefore providing its experience with the crime of fraud. My interest in the difference social policy can make in dealing with claimant fraud is explored, and the links between policy and criminology are examined to determine if there is a better strategy for the CFIP. According to Hood (2002), most of the developments in criminal justice policy have not emerged from criminological research but rather "[f]rom ideological and political considerations fuelled by populist concerns and impulses" (p. 1).

The study is made possible by the agency allowing my privileged, yet restricted, access to the programme, its de-identified data base, and its employees. The access to the CFIP is described as 'privileged' based on a jurisdictional review conducted

on the other workers' compensation investigation programmes in Canada. The review indicates that prior to this study, no criminological or evaluation research has been conducted on any of the fraud investigation programmes in Canada. The programme data is unknown and mostly unavailable to researchers. This access offers a 'window' onto the functioning of a programme operating within an institution previously inaccessible to criminological researchers. Specifically, the study evaluates the CFIP through an examination of its policy, procedures, and the practise choices that it makes regarding its goal to *deter* claimant fraud. The evaluation includes an analysis of how programme outcomes are actually produced. In addition, the perceptions of a sample of key informants with knowledge and experience relevant to the CFIP's historic and absolute effectiveness are explored. These perceptions are related to the ethical, compliance, and deterrence debates in the literature.

This study should only be considered as one piece of research on this programme and alone it is not a comprehensive programme evaluation. Consistent with the argument of Mark, Henry and Julnes (2000) "only a portfolio of studies can cope with the evaluation profession's multiple goals of evaluating merit, worth, improvement, and compliance in an initiative" (p. 72). Pawson and Tilley (1997) make a related point in criticising a 'one-off' approach to evaluation and believe in demonstrating the cumulative power of a series of studies.

A mixed methods approach is used and the next section provides the justification from the methodological literature as to why this approach is selected for providing the data to answer the three research questions.

3.1.1 Mixed Methods

This study uses a mixed methods research deign and data collection includes data base queries (quantitative) and interviews of key informants (qualitative) with a thematic analysis conducted on the interview transcripts. There were many methods considered for the design of this study; however, a mixed methods design was chosen primarily because the three research questions guided the selection of mixing quantitative and qualitative in one study. Jarvinen (2000) suggests this is an appropriate strategy as the site provides an opportunity to interview participants and retrieve documents providing the qualitative data while access to Commission data bases and financial records provides the quantitative data for the programme evaluation. The methods focus on collecting, analysing, and mixing both types of data for the purpose of providing a better understanding of the research problems investigated in this study. The quantitative data includes information in the CFIP data base and programme financial information. The qualitative data consists of the information gathered through interviews with the study participants, information retrieved from documents at the site as well the literature reviewed for this study. The quantitative and qualitative findings are used to complement each other, thus maximising the potential of the mixed methods approach.

Mixed methods research provides strengths that offset the weaknesses of both quantitative and qualitative research. Researchers such as Guba and Lincoln (1989) argue that quantitative research is weak in understanding the context or setting in which people are speaking and, hence, the meaning of their words is not directly heard. Qualitative research makes up for these weaknesses by bringing meaning. Conversely, qualitative research is viewed as deficient because of the personal interpretation made by the researcher, the ensuing bias created by this, and the difficulty in generalising findings. Quantitative data is readily analysed and the analysis is not subjective. Both these approaches offer different perspectives and insight on the same phenomenon; hence, they are complementary and not necessarily compensatory.

The mixed method approach is chosen as it allows me to use of all of the tools of data collection available rather than being restricted to the types of data collection typically associated with either qualitative or quantitative research. Using both methods takes considerable time and resources in collecting and analysing both types of data. It complicates the procedures, but a combination of both forms of data provides for the most complete analysis of the issues faced by the CFIP. Audiences of this research such as policy makers, legal practitioners, and others in applied areas of criminology require multiple forms of evidence to reach informed conclusions from this research.

Schwandt (2000, 2006) questions the need for the differentiation of qualitative and quantitative research. He points out that "it is highly questionable whether such a distinction [between qualitative inquiry and quantitative inquiry] is any longer

meaningful for helping us understand the purpose and means of human inquiry" (p. 210).

Johnson, Onwuegbuzie and Turner (2007) argue that mixed methods research is the third major research approach along with qualitative and quantitative research. They contend that mixed methods research offers a powerful third paradigm choice to qualitative or quantitative methods alone and that mixed methods provides the most useful, informative, and balanced research results.

Creswell (2013) argues that research methodology discussions are less quantitative versus qualitative and now more about how research practices lie somewhere on a continuum between the two (e.g., Newman & Benz, 1998). Creswell (2013) believes that the problem under study is most important and recommends the use both approaches to understand the problem (see Rossman & Wilson, 1985). As a philosophical underpinning for mixed methods studies, Tashakkori and Teddlie (1998) and Patton (1990) also discuss the importance for focusing attention on the research problem in research such as this and then using pluralistic approaches to derive knowledge about the problem.

This is a programme evaluation of the CFIP and the methodology is designed to answer the question: is the programme working as intended? The design also facilitates providing recommendations to address the problems identified with the CFIP. According to Cresswell (2013), pragmatism provides a basis for the contention that using mixed methods research is consistent with pragmatism,

drawing from both quantitative and qualitative assumptions. Creswell (2013) supports pragmatism as it provides the opportunity to use multiple methods, different worldviews, and different assumptions, as well as the use of different forms of data collection and analysis in the mixed methods study.

There are procedures for mixed methods strategies of inquiry and numerous terms found in the literature, such as multi-method, convergence, integrated, and combined (Creswell, 1994) that shape procedures for research (Tashakkori & Teddlie, 2003). In this study, concurrent procedures are used in converging quantitative and qualitative data in order to provide a comprehensive analysis. In using this design, I collected both forms of data and then integrated the information in the interpretation of the overall results. Also, in this design, I present one form of data within the other.

Johnson, Onwuegbuzie, Anthony and Turner (2007) define mixed methods research as:

> an intellectual and practical synthesis based on qualitative and quantitative research; it is the third methodological or research paradigm (along with qualitative and quantitative research). It recognizes the importance of traditional quantitative and qualitative research but also offers a powerful third paradigm choice that often will provide the most informative, complete, balanced, and useful research results. Mixed methods research is the research paradigm that (a) partners with the philosophy of pragmatism in one of its forms (left, right, middle); (b) follows the logic of mixed methods research (including the logic of the fundamental principle and any other useful logics imported from qualitative or quantitative research that are helpful for producing defensible and usable research findings); (c) relies on qualitative and quantitative viewpoints, data collection, analysis, and inference techniques combined according to the logic of mixed methods research to address one's research question(s); and (d) is cognizant, appreciative, and inclusive of local and broader socio-political realities, resources, and needs. Furthermore, the mixed

> methods research paradigm offers an important approach for *generating* important research questions *and* providing warranted answers to those questions. This type of research should be used when the nexus of contingencies in a situation, in relation to one's research question(s), suggests that mixed methods research is likely to provide superior research findings and outcomes. (p. 130)

Rossman and Wilson (1985) provide three justifications for combining quantitative and qualitative research. First, combinations are used to enable confirmation or corroboration of each other through triangulation. Secondly, combinations provide richer data. And thirdly, they are used to initiate new modes of thinking by attending to paradoxes that emerge from the two data sources.

Reichardt and Cook (1979) argue for programme evaluators to use both quantitative and qualitative methodological paradigms. They pointed out that although specific research methods and techniques are sometimes linked to methodological paradigms, it is nonetheless "our view that the paradigmatic perspective which promotes this incompatibility between the method-types is in error" (p. 11). They also added "[t]here is no reason for researchers to be constrained to either one of the traditional, though largely arbitrary, paradigms when they can have the best from both" (p. 18).

Creswell, Klassen, Plano Clark, and Smith (2011) support the use of mixed methods as they are appropriate when "focusing on research questions that call for real-life contextual understandings and intentionally integrating or combining these methods to draw on the strengths of each" (p. 24). Quantitative methods are mainly deductive and are ideal for measuring pervasiveness of known phenomena and central patterns of association, including inferences of causality.

Weiss (1998) provides direction for how these two approaches are combined in this study with the qualitative study being primarily focused on the CFIP's processes and the quantitative data on the CFIP's activity and outcomes. The quantitative establishes relationships in the data while the qualitative sheds light on the processes and mechanisms; that is, how those relationships arise. Most writers on the subject of combining both approaches view them as complementary (See, Cook & Reichardt, 1979; Fetterman & Pitman, 1986; Greene & Caracelli, 1997; House, 1992; Kidder & Fine, 1987; and Smith, 1986).

Using both qualitative and quantitative methods, there is a focus on programme processes and how the CFIP's outcomes are actually produced. Accordingly, I document and describe how the CFIP actually operates. The research focus is on determining why certain choices are made by the CFIP, how these choices are intended to achieve a particular outcome, and how the participants in the study perceive them.

The most significant advantage of the qualitative method is that it allowed for an opportunity to find the 'unexpected'. This means the data trail is followed wherever it goes; it was a trail that was largely determined by the interviews conducted with the participants. The qualitative methods allowed me to observe, ask questions, and listen to the participants' perceptions of the CFIP. The qualitative methods are chosen for use in this evaluation as they are considered superior for understanding the meaning of programme processes to people in different positions and for finding unexpected patterns of association (Weiss, 1998, p. 86). Therefore, people in a

variety of professions and positions are asked to participate in this study. According to Padgett (1998), qualitative research is also appropriate in situations where little is known and an in-depth understanding is beneficial. This is the case with the CFIP, as it is a programme largely unknown to researchers.

Qualitative evaluation has its own strengths, and these strengths are complemented by the strengths of the quantitative approach. These two approaches are combined to improve the quality and the interpretability of this evaluation. In the qualitative work, the programme theory is discovered when it emerges from the data (Weiss, 1998, p. 266). In the quantitative work, the CFIP's outcomes and activities are documented numerically.

Weiss (1998) states that "qualitative evaluation is highly compatible with programme theory" (p. 265). Accordingly, I describe the CFIP's theory of deterrence and how the current chain of assumptions explain how CFIP's activities lead to desired outcomes. Further, this allowed for a determination to be made about which expectations and assumptions were being acted upon for connecting the CFIP's processes to the achievement of its goal to deter claimant fraud. The evaluation sought to explain why it chose the deterrence course, what the CFIP was actually doing, and how the participants perceived the CFIP's policies and procedures to be working.

There are deficiencies identified with the qualitative method. It involves the researcher using personal interpretation, including the ensuing bias created by this, and the difficulty in generalising findings to a large group because of the limited number of participants studied (Noaks & Wincup, 2004, p. 17). The mixed method design provides two rich data sets used to answer the three research questions. The research questions were designed to reflect three significant components of a programme evaluation: is it working, if so to what extent, and what recommendations can be made to improve it. Specifically, the first research question is designed to address the extent to which CFIP could achieve compliance through deterrence mechanisms. The second examines how the CFIP was working in reality while the third question focuses on providing recommendations on how the CFIP can be improved.

Clarke (2003) contends that "mixed methods, integrating the qualitative and the quantitative, are now an established feature of programme evaluation research" (p. 86). Weiss (1998) also supports evaluations that use both approaches to improve the quality and the interpretability of the study.

The majority of the qualitative data is derived from the interviews with the participants in response to the twenty-three questions posed by the researcher. There were nine closed-ended questions and fourteen open-ended questions asked during the interview with some of the participants qualifying or expanding on their answers to the closed-ended questions. In addition, qualitative data is collected by gathering internal documents relevant to the CFIP's implementation of its policies and the

ensuing investigations. The documents used in this study are identified in section 3.3.2.

The quantitative data is from the CFIP data base containing records for 1,851 investigations conducted between 2005 and 2010. A selective quantitative analysis was conducted to determine the extent the data supported or contradicted the qualitative data.

Using these methods also required that I used both inductive and deductive thinking.

3.1.2 Researcher Role

I chose to take an insider role in this study. The main factor considered in this decision was that I had access to a programme allowing me to conduct criminological socio-legal research on deterrence, a subject of particular interest to me. Gubruim and Holstein (1997) discuss the integral role of the researcher in the research process and locate the researcher in the centre with the research participants. In this insider role, I now had a dual position within the agency: employee of the Commission in the Worker Services Department and CFIP researcher; both of these roles were influenced by the organizational context and the research process.

Armsby and Costley (2000) see this as a benefit because insider researchers have practical experience and insider knowledge and benefit from a greater awareness of the range of variables that impact on the chosen research problem. Similarly, Bell (1999) indicates that an inside researcher has a privileged role in terms of knowledge of the agency and access to information. Smyth and Holian (1999) consider the insider role as helping to solve practical problems and also enabling the enquiry process to change and enhance the programme. One problem with this insider role, according to Rooney (2005), is that the nature of the enquiry places me in a subjective role that introduces bias which may compromise validity. I attempt to mitigate this bias by journaling and collecting reflective personal data during the study to assist me in recognising bias, values, beliefs, and personal interests. I needed to recognise and challenge these as suggested by van Heugten (2004) and the impact that journaling had is further described later in this chapter in the reflexivity section.

In the qualitative components of this research, my perspective is perhaps a paradoxical one: I need to be tuned-in to the experiences and perceptions of the participants while at the same time maintain an awareness of my own biases and preconceptions and how these may be influencing what I am trying to understand (Maykut & Morehouse, 1994, p. 123).

As an insider, I play a direct role in both data collection and analysis. As suggested by Asselin (2003), I set out to gather the data with my 'eyes open', but also assume that I know nothing about deterrence and how it should be operating at the Commission. In my decision to take the insider role, I also facilitate an expeditious

and more complete acceptance of my role by the participants. During the study, there was evidence the participants were more open during the interview, resulting in a greater depth to the data collected. Because I am central to the research and, hence, the research outcomes, I remained cognizant of my own assumptions and goals.

I commenced the pursuit of a PhD in criminology nine months before I became employed at the Commission as an Executive Director, employed in the Worker Services Department. This study is actually a continuation of applying my formal education to my career as I am interested in trying to evidence the possibilities and limits of deterrence versus rehabilitation or educational, vocational, and normative approaches. Therefore, the Commission was purposefully chosen as the site to conduct this research. In the next sections, I provide a description of the three phases of the research.

3.2 Phase One: Preliminary Tasks

The preliminary tasks completed in this phase were conducted during the period of June 2008 to June 2010 and are described in the order in which they were completed.

3.2.1 Justice and Liberty Framework

The first phase initially focused on documenting the framework for the CFIP. The justice issues informing the Commission's right to know the truth about a claim were identified through a review of the programme's legislation, policy, and procedures provided in Chapter Two. The Commission's legislation, The Workplace Health, Safety, and Compensation Commission Act (WHSC ACT), Policy EN-11: Investigations and Procedure 52 - Investigations Referral, Procedure 53- Role of Investigations, Procedure 54- Referral Phone Line, Procedure 55- External Investigation Referrals, Procedure 56- Fraud Investigations, Procedure 57- Utilization of Videotape/Photographic Evidence In Decision Making, were all reviewed in detail as part of the programme evaluation. Since the justice tension was defined as any social control consideration of the system, deductive reasoning was used to determine that Policy EN-11: Investigations and its six procedures were relevant because they provided the programme's goals along with the processes and mechanisms intended to achieve social control. The Criminal Code of Canada was then provided by the Legal and Investigations Department to the researcher and Section 380: Fraud was reviewed and documented.

The liberty tension is framed by ATIPPA and the Canadian Charter of Rights and Freedoms representing the countervailing concern with privacy and liberty. The protections to privacy and liberty were also documented through a review of Federal and Provincial legislation and guidelines. Provincial privacy legislation, the Access to Information and Privacy Protection Act (ATIPPA) and the Federal legislation,

Personal Information Protection and Electronic Documents Act (PIPEDA), were initially reviewed. It was determined that ATIPPA would be included in the research, but as PIPEDA is Federal legislation and does not apply to provincial public bodies such as the Commission, the focus was on the Provincial legislation. In addition, guidelines for the use of video surveillance were reviewed. In particular, the Privacy Commissioner of Newfoundland and Labrador has Guidelines for Video Surveillance while the Privacy Commissioner for Canada has Guidelines for Covert and Overt Video Surveillance. These guidelines provide a framework to determine if video surveillance is being conducted in accordance with privacy compliance recommendations. The Canadian Charter of Rights and Freedoms was also reviewed resulting in Article 7 and Article 8 of the Charter being identified as relevant as they speak to issues of liberty and in particular freedom from unlawful search and seizure.

Next, I began drafting several versions of the research questions to focus the programme evaluation. The final wording for these questions was based on three major components of any programme evaluation: Firstly, can the programme work in principle based on theory and research on the subject matter; in this case deterrence. Secondly, to what extent does the programme actually work and, thirdly, what, if any, recommendations can be made to improve it? These research questions then indicated the literature for review.

3.2.2 Literature Review

A systematic review was then conducted for the socio-legal and criminological literature using relevant keywords implicit to the mandate of the CFIP. The keywords used were: deterrence, fraud, compliance, investigation, surveillance, as well as justice and liberty. The search resulted in socio-legal literature on justice and liberty tensions with surveillance and the criminological literature on deterrence, rational choice, normative compliance, benefit fraud, and *white-collar* crime. Then I read, reviewed, and, organised the literature according to topic with the most recent literature and studies organised chronologically. This work commenced in Phase One and continued through to completion of Phase Three.

Next the research proposal was developed and submitted to the University of Manchester.

3.2.3 Research Proposal

The Research Proposal was prepared by the researcher and submitted to the University of Manchester. It was approved in March 2010 subject to two conditions. The first condition was approval from the Commission's CEO to proceed with the study and, secondly, as this study includes human participants, an ethics approval was required.

3.2.4 Ethics Approval

Potential participants needed to be assured there would be no negative consequences if they chose not to participate in this study. Volunteering was based on being completely informed about the study and each participant had the right to withdraw at any time. They also had the right to review all materials related to their involvement in the study and could require that portions of the information they provided could be erased.

Informed consent was a central component. Berg (2001) describes informed consent as "the knowing consent of individuals to participate as an exercise of their choice, free from any element of fraud, deceit, duress, or similar unfair inducement or manipulation" (p. 56). The principles of informed consent adhered to in this study included the participants knowing what they were required to do, were being asked to do, and for what purpose, and the name of a person they could contact should they have questions or concerns about the researcher or the research process.

Confidentiality ensured that all identifying information was removed from both the written and the audio research records. In qualitative research such as this, I knew the participants' identities and, hence, total anonymity was not possible.

The Ethics Application was approved in June, 2010. According to Padgett (1998), ethical issues in qualitative studies rarely entail significant risk to individuals.

Padgett (1998) put forth four core elements for ensuring ethical research practise that were followed in this study. These elements were voluntary participation, doing no harm, informed consent, and confidentiality.

A written request was then made to conduct the research at the site. Written authorisation to conduct the study was provided by the CEO. Support was also provided by the CEO in terms of privileged, restricted access to all relevant corporate documentation and records. The restriction was that any and all materials requested were to be made to Corporate Governance and all information supplied to the researcher was to be anonymised. Internal documents, records, and data from the CFIP data base were provided for this research, but did not include claimant names, addresses, employer information or claim file numbers. The Commission's archives, corporate records, resource library, and the legal library were also made available for this research. Time during the regular workday was provided for gathering information on claimant fraud investigations and for meeting with the CFIP personnel as required. Throughout the initial stages of the study, I met with the CFIP employees to develop an understanding of how the programme was conceived, constructed and implemented. The end of Phase One focused on data collection for clarifying the CFIP goals, the nature of its implementation, and identifying its investigative outcomes.

3.3 Phase Two: CFIP Data Collection

Phase Two activities were conducted during the seven months between July 2010 and February 2011. These activities primarily included collecting the quantitative and qualitative data about the CFIP.

3.3.1 Clarifying Issues

On multiple occasions I met informally with CFIP employees, asking questions in order to understand how the investigations were actually conducted and to clarify issues that were arising. I took notes during these meetings so I could refer to them as required. These notes were not analysed for the evaluation although they did provide valuable information on how claimant fraud investigations were managed.

Throughout Phase Two, eleven more structured meetings were held between the researcher and individual CFIP employees. These meetings were held to understand exactly the process followed from the time a claimant fraud referral was received by the CFIP through to the completion of all involvement in the file.

I also reviewed three investigation files that were randomly selected and de-identified by the Legal Assistant. The purpose was to familiarise myself with the contents of an investigation file and to review a sample of the notes taken during an

investigation by an investigator. The content of these three files was compared to the requirements directed by Policy EN-11 and Procedures 52-57. These file reviews also allowed for questions to be asked about the forms used, the filing system, investigation processes, video tape evidence, and who had viewed the video. I asked questions about how and when covert video surveillance was deployed and the exact process followed when video surveillance was provided to the Commission from outside sources.

3.3.2 Internal Documents

Next, internal documents were requested by the researcher to provide the context at the site giving rise to the CFIP's implementation, goals, framework, and mechanisms. Throughout this phase, the researcher made five separate requests for Statutory Review documents, policy submissions, stakeholder correspondence, documents providing the history of the Commission's investigative function, and financial documents. All of these requests were made to the Corporate Governance Department and the documents were retrieved by Commission employees with authorisation to provide them to the researcher. At no time was I provided with direct access to the Commission's archives and its corporate records. The documents provided were:

- Policy on Claims Investigators (1984);
- Evaluation Report (1993);
- Inter-Office Memorandum dated 1993 07 16 addressing evidentiary issues;

- Evaluation Report (1994);
- Inter-Office Memorandum dated 1994 06 23 addressing employer feedback on investigations;
- Policy EN-11: Investigations (1995);
- Inter-Office Memorandum dated 1995 06 07 documenting two fraud convictions;
- Statutory Review Report (1996);
- *Discussion Paper*: *Task Force Report* on Worker's Compensation, (2000);
- Worker's Compensation *Task Force Report*, (2001);
- Inter-Office Memorandum dated 2001 02 21 addressing resource implications for the CFIP arising from the Task Force recommendations;
- Policy Submission: Amendments to Policy EN-11 (2002);
- All correspondence from the Director of the Legal and Investigations Department referring to the establishment of the CFIP. This included twenty-two memos and nine submissions to the Commission's Board of Directors;
- Letter from the President of the Newfoundland and Labrador Federation of Labour March 7, 2002 to the Chief Executive Officer of the Commission. This letter was particularly relevant as the Federation of Labour took exception to the Commission contracting with private investigators to conduct surveillance and for establishing a fraud tip line;
- The Commission's Annual Reports 2005 -2010; and,
- The Injured Worker's Handbook. This handbook was reviewed for evidence that the CFIP promoted the Fraud Tip Line.

A detailed review of the Commission's website was also conducted to identify the information and documents made available to other actors and institutions about the process for filing a claim for benefits and communication regarding the existence and function of the CFIP.

3.3.3 Quantitative Data

To obtain quantitative data, a request was made of the CFIP on July 28, 2010 to provide de-identified data for all investigations conducted for the period January 1, 2005 – December 31, 2010. In response to my request, I was provided with eleven MS Access data bases. The data were provided in 2003 'mdb' format and the data bases were labelled to reflect the three locations (St. John's, Grand Falls, and Corner Brook) where CFIP investigators are located. The data bases were labelled as follows:

1. St. John's 2005.mdb;
2. Grand Falls and Corner Brook 2005.mdb;
3. 2006 St. John's.mdb;
4. 2006 Grand Falls.mdb;
5. 2006 Corner Brook.mdb;
6. St. John's 2007.mdb;
7. Grand Falls 2007.mdb;
8. Corner Brook 2007.mdb;
9. St. John's, GF, CB 2008.mdb;
10. St. John's, GF, CB Investigations 2009.mdb; and,
11. St. John's, GF, CB Investigations 2010.mdb.

The data for five fields was deleted from the data bases prior to being provided for this research. The data and fields deleted were:

1. Employer,
2. Employer Name,
3. Claimant Last Name,
4. Claimant First Name, and
5. Claim Number.

The data bases required some modification as the information was entered as text and not data. This required modification so queries could be run on all 1,851 claimant fraud investigations. To take advantage of advanced querying techniques, I converted the eleven MS Access data bases from their original 2003 ‘mdb’ format to a single MS Access data base in the 2007 ‘accdb’ format. The data were then imported into a single MS Access ‘accdb’ data base and the data in the following data base fields was converted from the text data type into a data type to allow for querying:

1. Investigation Year,
2. Investigation Number,
3. Region,
4. Date Investigation Opened,
5. Date/Time,
6. Referral Received Through Tip Line,
7. Referral Source,
8. Anonymous Referral Method,
9. Nature of Referral,
10. Date Assigned to Investigator,
11. Date Summary Was Prepared,
12. Date File Owner Contacted,
13. Investigation Status,
14. Date Investigation Completed,
15. Investigation Outcome, and
16. Investigator Assigned.

In 2007, Microsoft enhanced its MS Access data base engine. The ‘mdb’ and ‘accdb’ are the file extensions for the two different MS Access data base file formats. The letters ‘mdb’ and ‘accdb’ are not acronyms, but rather the way Microsoft distinguishes the two data bases.

Once the data were converted, I had to determine the most effective method for data analysis. Subject matter experts in data analysis employed by the Commission recommended MS Access Query functionality and it was used to develop nineteen MS Access Crosstab Queries. A Crosstab Query is a special query that summarises data by plotting one field against one or more other fields. When creating the MS Access Crosstab Query, one field is nominated as a Column Heading and the other as the Row Headings with one field nominated for the summarised values. When MS Access runs the query, it looks through the data in the Column Heading field. For each unique value that it finds, it creates a column and uses the value for the Column Heading. It also looks through the data in the Row Headings field and creates a row for each unique value that it finds, using that value as the Row Heading. When more than one field is nominated as a Row Heading, a row is created for each combination of unique values found. The Column Headings are arranged across the top of the resulting datasheet. The Row Headings are arranged down the left-hand side.

The nineteen MS Access Crosstab Queries were:

1. Investigation Outcomes by Type by Year,
2. Investigation Outcomes by Referral Source,
3. Investigation Outcomes by Anonymous Method,
4. Referral Source by nature of Referral,
5. Investigation Outcomes by Nature of Referral,
6. Nature of Referral by Year,
7. Nature of Referral by Anonymous Method,
8. Referral Sources by Year,
9. Anonymous Methods by Year,
10. Investigation Status by Year,
11. Investigators by Year,
12. Investigation Outcomes by Fraud Tip Line,
13. Nature of Referral by Fraud Tip Line,
14. Fraud Tip Line Referrals to Investigator,

15. Average Time - Open to Assigned,
16. Average Time - Assigned to Contact,
17. Average Time - Contact to Summary,
18. Average Time - Summary to Closed, and
19. Average Time - Open to Close.

These nineteen MS Access Crosstab Queries were then run individually and the results were copied as data result tables into separate tabs in an MS Excel spreadsheet file.

The resulting data tables were then formatted to provide column header shading and borders. Next column and row totals were created for all data tables. In addition, a percentage table was created for the data in eighteen of the nineteen query tables.

The number of CFIP investigations that resulted in an administrative and/or criminal sanctions is used determine the number of claimants sanctioned for the *light blue-collar* crime of workplace fraud. The data on the number claimants referred to the police for a criminal fraud investigation is of particular interest in this study, including the resulting criminal charge and disposition. The claimants' names were not provided, but rather were coded in the data bases using a letter and number code assigned to them by the CFIP. In addition, quantitative data were also requested for the period under study for the following:

1. Number of claims submitted to the Commission for compensation;
2. Injury types and industry sector from which the injuries and claims arose;
3. Data on video surveillance;
4. Number of cases approved for covert video surveillance by external investigators;

5. Data on the number of video tapes provided by sources external to the Commission;
6. Number and cost of investigations conducted by external investigators;
7. Financial records providing the annual operating costs of the CFIP;
8. Data referring to the percentage of the provincial workforce covered by the maximum wage-loss benefit, and the sectors of the workforce from which these claims arise; and,
9. Weekly maximum compensation wage-loss data.

All of the data requested was provided to the researcher without exception. Once the quantitative data had been collected, it was then analysed and placed in tables.

Once I had the data on the types of injuries and the industry sector from which these injuries arose, I conducted a search of the Statistics Canada (2011) data base to identify the gross average weekly wages for workers employed in these industries. This analysis was completed to determine if a claimant's wages would be fully or partially compensated by the Commission.

In January 2011 each of the other eleven Boards and Commissions in Canada were contacted and asked to provide the researcher with data on the number of cases and/or the rate of claimant fraud within their system. No jurisdiction confirmed that they calculated the fraud rate and six responded stating they did not know the exact rate. Three jurisdictions provided an estimated range of between 2-10% and one provided a range of between 5-10%. A statement contained in the Statutory Review Committee Report (1996), which predates the establishment of the CFIP, reports that "[i]nformation from the Commission appears to indicate that fraud occurs in less

than one percent of claims" (p. 30); however, the Statutory Review Committee responded stating "the level of fraud has not been reasonably established" (p. 31).

Once all of the quantitative data were analysed, the research turned to the qualitative component of the study.

3.3.4 Qualitative Data

To obtain additional qualitative data for the research, a total population of twenty-one key informants were identified by the researcher for this study. This research requires the subjects to have expertise in at least one of the following subject areas: law, claimant fraud, deterrence, detection, investigation, and privacy. Therefore, this list of twenty-one potential participants constituted a comprehensive list of key informants with subject matter expertise including specialised and technical knowledge of these topics and experience with the Commission.

The twenty-one potential participants were chosen through the use of purposive and convenience sampling procedures. Purposive sampling was used because this research required the subjects to possess particular expertise with the various issues facing the CFIP. A letter was then sent to each of the potential participants requesting their voluntary participation as well as to provide them with general information. It explained the research, the nature of the request, and included the Participant Information Sheet.

The population from which the sample of participants was drawn included participants with specific areas of expertise of interest to this study. Table 1: Population and Sample provides a summary of the initial population and the sample of those who consented to participate. Five employees from the Legal and Investigations Department were asked to participate. This request resulted in all five potential participants consenting, three lawyers and two investigators. Four other Commission employees with expertise in finance and privacy were also asked to participate. This resulted in three participants consenting with expertise in internal financial controls and privacy as one employee declined the request to participate. Two staff members from the Privacy Commissioner's office were contacted, and one consented to participate while the other responded stating they did not wish to participate. Two lawyers from private law firms specialising in labour law were also asked, resulting in one consenting to participate. The second lawyer did not respond after two attempts were made requesting voluntary participation. Two private privacy consultants operating their own consulting businesses were invited and one consented. Similar to the experience with the lawyers from private practise, two attempts were made with the second consultant but there was no response to the request. Two private investigation firms were also contacted through written request, resulting in two private investigators, one from each firm, consenting to participate.

The interests of workers are represented by two Worker Advisors while employers' interests in the system are represented by two Employer Advisors. These four advisors are not employees of the Commission, but are employees of the Commission's primary stakeholders namely, the Newfoundland and Labrador

Employers Council (NLEC) and the Newfoundland and Labrador Federation of Labour (NLFL). All four advisors were contacted with only one of the Employer Advisors consenting to participate. The Worker Advisors from the NLFL both declined; the reason cited for this is the NLFL is already on the record disagreeing with the Commission's use of private surveillance companies and the Fraud Tip Line. The second Employer Advisor declined the request stating that she was leaving the NLEC before the research commenced for employment with a new employer outside of the province. The result was fourteen participants voluntarily consenting from the initial list of the twenty-two potential key informants sought for this research.

The twenty-one key informants are people who are either employed by the Commission and/or have professional interactions with Commission staff, as well as having demonstrated expertise in their professions. The eight employees from the Commission who participated were known to me professionally for four years. They do not work directly with me nor do any of them work in the same department as I. However, in the course of our employment, we have had the opportunity to interact episodically on a variety of issues and subject matters. The one participant from the Privacy Commissioner's office was unknown to me prior to meeting to conduct the interview. The lawyer from the private law firm was known to me professionally for five years, one year prior to my employment at the Commission. The human resource/privacy consultant was only known to me professionally as we both participated in two-day training programme one year prior to the commencement of the study. The two private investigators were completely unknown to me

professionally and I met them for the first time when they arrived for the interview. The Employer Advisor was known to me professionally six months prior to the participant interview.

Table 1: Population and Sample

Employer/Professions	Participants Requested	Participants Consenting	Professions Represented
Legal and Investigations (Commission)	5	5	3 Lawyers, 2 Investigators
The Commission	4	3	2 Finance, 1 Privacy
Privacy Commissioners Office	2	1	1 Privacy Analyst
Private Law Firms	2	1	1 Labour Lawyer
Private Investigation Firms	2	2	2 Owner/Private Investigators
Worker Advisors	2	0	0
Employer Advisors	2	1	1 Employer Advisor
Human Resource and Privacy Consultants	2	1	1 Consultant
Total	**21**	**14**	**14**

Seidman (1998) provides two criteria for the sample size adhered to in this research. The first criterion was sufficiency. The sample size was deemed to be sufficient as the number of participants in this study reflected the range of participants and sites with one exception. The claimant's perspective was not represented because neither of the two worker advisors agreed to participate in the study. To compensate for

this, the research conducted by Lippel (1999; 2003) is used. The second criterion was saturation of information. This occurred during the interviews as the participants were providing similar facts, opinions, and perceptions about the CFIP either changing its policy direction or improving the conditions for deterrence.

Nine of the participants are also employed by the Commission; however, they are employed in three separate departments from the department in which I am employed. As I am employed in the Worker Services Department, I have no authority over the Legal and Investigations Department, Finance Department, or Corporate Governance where these participants are employed. These three departments operate independently from Worker Services, and they were free to decide if they would provide written consent to voluntarily participate in this research. In addition, the Executive Director of Corporate Governance was designated by the CEO to provide oversight for the research to ensure that all ethical issues are anticipated and adequately addressed. No ethical issues were identified or brought to the attention of the Executive Director of Corporate Governance or to the researcher during the course of this study.

3.3.5 Participant Interviews

The fourteen participants consented to voluntarily participate in a one-hour interview. The participants were not required or asked to be interviewed outside of their regular working hours. Each participant was first required to complete and sign

a Consent Form. All of the signed Consent Forms and the qualitative data provided by the participants were kept confidential in a locked filing cabinet in my office at the site. At no time, during or after the research, were the individual participants identified. The participants were guaranteed that the audiotapes, transcripts, and notes would be destroyed within five years of the date of their interview.

The interviews were conducted individually and took place in a location selected by the participant. The nature of the interview was relatively low risk with no material covered in the interview considered to be potentially threatening or harmful. None of the participants were remunerated for their participation.

A follow-up phone call with the fourteen consenting participants confirmed an interview date, time, and location. All of the interviews were conducted either in the participant's office and place of work or in the researcher's office. I began each interview session by reviewing with the participants the information contained in the Participant Information Sheet that had been provided to them previously. The purpose of the interview was to get an accurate view of how they perceived a variety of aspects of the CFIP.

When conducting the participants' interviews, the mode of inquiry was essentially informal. Weiss (1998) contends that in evaluations, the modes of enquiry are frequently informal and the designs tend to be more casual (p. 181). This study

involves the use of open-ended interviewing techniques to collect data emphasising the personal experiences and viewpoints of the participants.

I tape-recorded all of the interviews and these recordings were later transcribed for further analysis. In addition, notes were taken during the interview, writing down the main points of the discussion, using the participant's own words when possible.

Consistent with the approach proposed by Silverman (1993), I sought to understand how the programme works from the participants' perspectives. The experiences and perspectives of the participants were sometimes different from each other and the different occupational groups represented by the participants had their unique perceptions about the CFIP. Therefore, I was not aiming for a single version of the truth, but rather for an account of the CFIP as seen from multiple points of view.

The twenty-three questions posed to the participants were formulated by the researcher based on the literature review. These questions were specifically designed to get data on their perceptions of deterrence and any mechanisms the participants perceived as having or not having a deterrent effect. In particular, since the policy was based on the principle of deterrence, there were several questions about deterrence.

The questions are derived from the five substantive areas under study. The areas include: i) fraud deterrence, ii) covert video surveillance, iii) claimant fraud

detection and investigation, iv) justice versus liberty, and v) the programme's legislation, policy, and procedures. The participants' responses provide the qualitative data relevant to the three research questions.

To determine the scope of the claimant fraud problem, as perceived by the participants, question #1 was developed: What percentage of claims at the Commission do you think are fraudulent? Twenty-one other questions (questions #2-22) were developed based on the two major themes identified in the literature reviewed for this study namely deterrence/compliance and justice and liberty/privacy and the mechanisms the CFIP believes will achieve a deterrent effect, namely policy and procedures, investigators, the Fraud Tip Line, covert video surveillance, and sanctions. The twenty-one other questions developed were:

2. Do you think the Commission has the appropriate policies and procedures to deter fraud? This question was designed to elicit the participants' perceptions of the policies and procedures ability to assist the Commission to achieve a deterrent effect.

3. Do you think the Commission has the appropriate policies and procedures to investigate fraud? This question was designed to elicit the participants' perceptions of the policies and procedures ability to guide effective investigations into claimant fraud.

4. Do you think the Commission's anonymous telephone line works in deterring claimant fraud? This question was designed to elicit the participants' perception of

the Fraud Tip Line and its ability to increase a claimant's perception of the likelihood of detection contributing to a deterrent effect.

5. Do you think all tips should be investigated? This question was designed to elicit the participants' perceptions of justice versus privacy/liberty issues associated with investigating tips that may or may not be legitimate. I was interested in the participants' perceptions of what, if any, steps should be taken first to minimise or eliminate privacy/liberty intrusions or violations.

6. What tools should be open to investigators? This question was designed to elicit from the participants their suggestions of what devices and tactics investigators should be allowed to use during an investigation. In particular, I was interested in perceptions about the use of video and audio recording devises as well as the use of disguises and traps discussed in Lippel.

7. Under what circumstances should the Commission investigate claimants for suspected fraud? This question was also designed to elicit the participants' perceptions of justice versus privacy/liberty issues associated with investigating tips that may or may not be legitimate. I was interested in the participants' perceptions of what circumstances, if any, would immediately necessitate the commencement of an investigation. These would then be categorised as either in favour of a justice consideration or privacy/liberty.

8. What limits should be placed on investigation? This question was designed to

elicit the participants' perceptions of how far an investigation by a public body should go so as to consider the justice and versus privacy/liberty issues associated with investigating claimant fraud. I was interested in the participants' perceptions of what limits, if any, should be placed on investigators to minimise or eliminate privacy/liberty intrusions or violations or to achieve a sanction.

9. Should any limits be placed on the use of covert video surveillance? This question was designed to elicit the participants' perceptions of how far an investigator can go with the use of covert video surveillance as an agent of a public body.

10. What rights to privacy/liberty should trump the Commission's right to use covert video surveillance? This question was designed to elicit the participants' perceptions of privacy/liberty considerations and of how far an investigation by a public body should go so in its use of covert video surveillance. In particular, I was interested in the perception of disguises and covert cameras as being legal or appropriate or what places were considered to be private and not appropriate to conduct an investigation.

11. If a fraud tip is received by the Commission, should covert video surveillance be deployed? If so, should there be any restrictions or other steps taken first? This is another question designed to elicit the participants' perceptions of under what circumstances a public body deploy covert video.

12. Does covert video surveillance have a deterrence effect? If so, what is it? This

question was designed to elicit the participants' perceptions of what, if any, deterrent effect covert video surveillance was perceived to achieve.

13. Should only the Commission investigators use video surveillance or should external investigators use it as well? This question was designed to elicit the participants' perceptions of who should use covert video surveillance; investigators employed by the public body under ATIPPA or private investigators guided by PIPEDA, or both.

14. What information protection and access limitations should be provided to a claimant when a case is suspected of fraud? This question was designed to elicit the participants' perceptions of privacy and liberty considerations during an investigation.

15. Should the Commission publish the names of those charged of fraud? This question was designed to elicit the participants' perceptions of 'naming and shaming' tactics to achieve a general at the charge stage of the criminal process.

16. Should the Commission publish the names of those convicted of fraud? This question was designed to elicit the participants' perceptions of 'naming and shaming' tactics to achieve a general deterrent effect once a criminal conviction had been achieved through the justice system.

17. When covert video surveillance is used, should others shown in the video be

pixelated out for privacy reasons? This question was designed to elicit the participants' perceptions of privacy/liberty considerations for those captured on video who are not the target(s) of the surveillance. It further provided the opportunity to get data about perceptions of how this can be achieved and if there were any evidentiary considerations.

18. What criteria should be met before covert video surveillance is used? Given the potential for covert video surveillance to be privacy intrusive and impact citizens' liberty, this question was designed to elicit the participants' perceptions of what criteria, if any, should be implemented before covert video surveillance is used.

19. Should the Commission accept covert video surveillance of a claimant from their employer? If so, should there be any restrictions or considerations? This question was designed to elicit the participants' perceptions of how data collected by an employer for one purpose could be referred to the CFIP for use in an investigation, a purpose for which it was not intended upon collection.

20. Do Case Managers play a role in the detection, investigation and deterrence of claimant fraud? A Case Manager has a central role in workers' compensation, and I was interested in the participants' perceptions of whether or not Case Managers played a role in the detection, investigation, and deterrence of claimant fraud.

21. What, if any, changes to Commission policy and procedures would you

recommend? This question provided the opportunity for the participants to recommend changes to Commission policy and procedure.

22. Should the Commission accept covert video surveillance or closed circuit television video surveillance? If so, should there be any restrictions or considerations? This question was designed to elicit the participants' perceptions of how data collected by any party should or should not be used in an investigation by the CFIP.

The last question posed (question #23) was an open-ended question that provided the participants with the opportunity to add anything they wished to add or clarify about the topics raised in the previous twenty-two questions. Question #23 asked: Is there anything you would like to add about the issues of justice, privacy, liberty or deterrence in the investigation of claimant fraud? In response to this question, many of the participants identified problems with the CFIP and made recommendations to address them. The identified problems and the recommendations from the participants are provided in Chapter Six.

Questions 1-23 were initial probes used to explore broad topic areas. The interview focused on their particular knowledge and expertise in justice and liberty issues, fraud deterrence, covert video surveillance, investigations, and use of the Fraud Tip Line. The questions encourage each participant to share his/her knowledge and experience about these topics in his/her own words.

Two practise interviews were conducted with individuals outside the study sample and were not audio recorded. The purpose of these interviews was to help me become comfortable with the interview questions and the process of interviewing using these questions. One interview was completed with an employer in the province, and the other was with a retired electrician. These practise interviews did not result in any change to the interview questions but they did indicate that the participants appeared to focus on the tape recorder. The opportunity to practise doing the interview was quite valuable because it allowed me to develop a comfort and confidence level for subsequent interviews. I was also able to determine the best way to introduce the interview and maintain a good interview flow.

Seidman (1998) describes interviewing as a "basic mode of inquiry" (p. 3). The interviews provided a window on the participants' perceptions and a way for me to understand them. The process of interviewing allowed me to demonstrate an interest in each participant's knowledge and experience. The selection of the in-depth interview as the method of inquiry for this study is predicated on the need to obtain a solid understanding of the participants' knowledge of deterrence, justice, and liberty issues in claimant fraud investigation. In-depth interviews provided an opportunity for the participants to share their knowledge, opinions, and experiences that arise when investigating fraudulent claims for benefits. It was an opportunity to sit with them and hear their answers to the questions posed and, through extended discussion, they provided an informed understanding of the issues that would not be possible through observation of the investigation processes or through a documentation review alone.

Denzin (1970) describes this type of interview as a non-scheduled standardised interview. I elicited answers to the questions, but the order in which they were asked was tailored to meet the flow of topics covered in each interview. Three assumptions guide this type of interviewing. Since the meaning of the question is designed to be standardised, it is formatted in a familiar way for the participant. Second, no particular order of questions works equally well for all participants during the interview so their readiness and willingness to address a topic as it came up dictated the order in which the questions were asked. Third, I needed to carefully observe each participant so I could craft the questions and their sequence so that all participants equally understood what the questions meant.

To set the stage for each interview, Lofland and Lofland (1995, pp. 84-85) provide a sample guide of how to do this and the following is a description of how the guide was applied during the interviews. First, I explained the purpose and nature of the study, telling them they were selected because they were identified as a key informant. They were given assurance they would remain anonymous in all written reports and that their responses would be treated in the strictest confidence. They were informed that when a transcript of their recording was made the only identification on the tape would be a participant code assigned by the researcher. Secondly, I indicated that they may find some of the questions difficult to answer with the reason being that some of the questions may be appropriate for one participant but not always appropriate for another. Since there was no right or wrong answer, they were encouraged to answer with whatever, if anything, they thought was relevant to the question posed. They were reminded that I was only interested in

their perceptions and personal experiences and they were perfectly free to interrupt and ask for clarification of the question. In addition, they could also decline to answer any specific question. Thirdly, the participants were told at the beginning of the interview they were being interviewed for evaluative purposes as this was a programme evaluation of the CFIP and not just academic research for my Doctoral dissertation. Then, as suggested by Lofland and Lofland (1995), a basic demographic profile was completed. Before I started the interview, I also informed them that they would be provided with an interview summary, which would be mailed to them within one week of the interview. Fourthly, I asked permission to tape record the interview, explaining this request. All fourteen participants consented to audio tape-recordings of the interview.

I paid attention to three critical components of the interview process including making them feel comfortable being interviewed in their choice of environment and on a date and time that they had selected; actively listening to what the participant was saying and conveying my listening through non-verbal and verbal responses; and demonstrating appreciation for the opportunity to do the interview and treating them in a cordial and professional manner. Berg (2001); Lofland and Lofland (1995); Padgett (1998); and Seidman (1998) contend that adherence to these critical details ensures maximum benefit will be derived from the interview.

Taking notes during the interviews helped to keep me focused and ensured that all of the questions were covered without repetition. It also indicated to the participants that what they were saying was important as the note taking enabled me to go back

to topics and this facilitated the use of spontaneous questions during the interview. Tactics such as these, according to Berg (2001) and Seidman (1998), help to keep a natural flow to the interview because there is less need to interrupt the participant. The interviews were conducted in conversational style, with the questions used to ensure the five substantive areas under study were explored in-depth through an account of the participants' knowledge and experiences. The practise interviews indicated that the presence of the audio recorder had some impact on both me and the participants, so I decided to take notes during the interviews with the intent to remove the participants' focus from the audio recorder. The notes were mostly words and phrases. This approach led the participants to focus on my writing and not the tape recorder, and, as a result, I felt more engaged rather than just waiting for the response to end so I could ask the next question. My written notes captured things that would not be evident on the audio recordings such as the participants' reaction to my question, their body language, or the thoughts I had about a participant's response, a follow up question, or a probe. The notes assisted me during each interview and were not used in the data analysis phase. The note taking was intentionally minimal so as not to interfere with eye contact during the interview. A review of the notes indicated they were taken mostly early on in the interview and less so as the interview proceeded.

Writing up the interviews initially entailed listening to the tape-recorded interviews, writing notes about each one, and creating an interview summary. Most notes were done within twenty-four (24) hours of the interview, and all interview summaries were completed by the researcher within a week. Copies were then mailed to the

participants for their review and approval with respect to completeness and accuracy. Every measure was taken at this stage to ensure that participants had an opportunity to provide a thorough review of the summary and time to provide detailed feedback. They were advised that they could contact the researcher at the telephone number provided should they wish to discuss the interview summary.

The study process then required a second contact by phone with three of the fourteen participants who asked for an opportunity to discuss their own interview summary with me. The three participants contacted me by phone and arranged a time to discuss the summaries on the telephone at a later date. This discussion then assisted with determining the required changes. I ensured that all relevant discussion occurred with each of them and that clarification was provided where necessary. The result was that minor changes were required to two of the three participants' summaries. The changes made to the transcripts were minimal. The types of changes fell into two categories. The first were changes to provide clarity to a participant's summary while the second category is categorised as softening a particular comment. In total, there were only five sentences changed. These changes were made while each participant was on the phone. I later documented the date and time each participant provided approval for these summaries. The fourteen approved interview summaries were then securely stored. This marked the completion of Phase Two and the process of coding and data analysis began.

3.4 Phase Three: Coding and Thematic Analysis

Phase Three activities were conducted throughout 2011 and 2012. In this phase, the quantitative data were analysed and eighteen tables were constructed and descriptive statistics were calculated for the participants' responses to the first question posed in the interview. For the qualitative data, transcripts of the tapes were typed to facilitate thematic coding and analysis. The next section will describe the coding procedures.

3.4.1 Coding

A transcriber was hired to transcribe the audio tape recordings of the participants' interviews. She was required to sign a confidentiality agreement and care was taken to ensure the transcriber would not have access to any identifying information. The participants were never identified by their name or position in any of the documents, notes or on the audio tapes. The tapes were coded by the researcher and only I knew who each participant was. Access to audio tapes was provided to the transcriber for transcription purposes only. The interview data were transcribed using the Phillips 720 Transcription system. She listened to the audio tapes and transcribed the recordings in my presence for up to five hours each day over a six day period. The assistant transcribed the data in fourteen separate documents with each participant's data file titled using a letter and number code (for example, "Participant L1").

The data from the audio tapes was transcribed into written form in order to conduct the thematic analysis. Bird (2005) argues that this is "a key phase of data analysis within interpretative qualitative methodology" (p. 227) and is recognised as an interpretative act where meanings are created rather than simply a mechanical one of putting spoken sounds on paper (Lapadat & Lindsay, 1999).

Once transcripts of each interview were typed, the coding process commenced by listening to all of the audio recordings simultaneous with reading the transcripts six times over a ten day period. The task of coding was undertaken manually. The first three times I listened to the audio tapes and read the transcripts, I did it over a three day period just to re-familiarise myself with the interview data. Then, over the next seven days, I listened to the tapes and read the transcripts three more times to commence coding. I had previously identified two keywords (*deterrence/compliance* and *liberty*/*privacy*) from the literature review, and these were then deductively imposed by me on the data. During each of these three 'listening, reading and coding sessions', I used the transcripts to identify key statements made. I also documented on the transcript the beginning number and the end number on the digital counter of the transcription system for each participant quote relevant to the two keywords.

Next, I reviewed the transcribed data again over a four day period, and it was during this stage that additional themes emerged relevant to the two keywords. In practise, this research was an admixture of deduction and induction. I came to the data with particular expectations but then modified my ideas based on what was disclosed

during the participant interviews. This process allowed for new and often unexpected ideas and concepts to emerge; however, my findings were more nuanced than this would suggest. I did not expect to find at the start of data collection the five additional coded themes that emerged inductively. The primary purpose for using the inductive approach was to allow research findings to emerge from the themes inherent in the participant data.

For *deterrence/compliance,* there were three additional themes from the participant data: *policy and procedure,* the *Fraud Tip Line*, and c*overt video surveillance.* For *Liberty/Privacy*, two more themes emerged: *guidelines* and *rights*. Several criminological researchers suggested I start with general themes apparent in the literature review and then add themes as the data analysis progressed (Denzin & Lincoln, 2000; Miles & Huberman, 1994; Willms, Best, Taylor, Gilbert, Wilson, Lindsay, & Singer, 1990). The initial coded themes and the subsequent coded themes that arose from the participant data are presented in Table 2: Keywords and Coded Themes.

Table 2: Keywords and Coded Themes

Keywords	CFIP Eventual Coded Theme
1. Deterrence/Compliance	A. Policy and Procedure B. Fraud Tip Line C. Covert Video Surveillance
2. Liberty/Privacy	A. Guidelines B. Rights

Then, to provide data for the third research question, the audio tapes and transcripts were reviewed again to identify the participants' concerns with the CFIP and their

recommendations to improve it. A highlighter marker was used on the transcripts to identify recommendations provided by the participants. The participants' recommendations were then copied from the original transcripts and placed in a document titled Participant Recommendations. The data were then analysed and generally categorised as either providing a recommendation for investigations or for the management of claimants.

Now that the data had been collected, transcribed, and coded, the next task in the analytical procedure was to conduct a thematic analysis.

3.4.2 Thematic Analysis

The data were analysed according to generally accepted procedures for the analysis of in-depth interviews (Lofland & Lofland, 1995; Tutty, Rothery, Grinnell, & Austin, 1996). The initial keywords were identified from the literature in advance of analysis and was therefore a deductive, 'theory testing' approach. However, this was not value-free observation as I came to this research with particular objectives and was sensitised to particular themes that guided the questions I asked the participants during the interview and the way I thematically analysed and interpreted the data. It was a 'thematic analysis', identifying emerging themes.

The thematic analysis began by identifying emerging themes that I thought may relate to the three research questions. The analysis focused on identifiable themes and patterns in the participants' responses as I identified a limited number of themes

and became very familiar with these themes in order to ensure they were completely understood. This assisted with recognising patterns within the data and the themes then became the categories for analysis.

The data analysis was determined by both the research objectives (deductive) and multiple readings and interpretations of the data (inductive). Thus the findings were derived from both the research aims and objectives and the findings arising directly from the analysis of the data. However, the primary mode of analysis was through the development of codes. The analytic process required intense involvement with the data and, through interpretation of meaning, it moved the level of analysis beyond just counting words or phrases and focused on identifying and describing both implicit and explicit themes within the data. Rubin and Rubin (1995) claim that analysis is exciting because "you discover themes and concepts embedded throughout your interviews" (p. 226). However, describing themes as emerging or being discovered sounds like a passive description of what really happened during data analysis. The role I took in this process is best described as active.

Ely, Vinz, Downing, and Anzul (1997) contend:

> The language of themes emerging can be misinterpreted to mean that themes reside in the data, and if we just look hard enough they will emerge like Venus on the half shell. If themes reside anywhere, they reside in our heads from our thinking about our data and creating links as we understand them. (pp. 205-206)

In this process of understanding the data, it I was important to acknowledge my own theoretical positions and values in relation to this research as I do not necessarily

subscribe to a realist view of qualitative research where I can simply give voice to the participants in this study. As Fine (2002) argues, even a 'giving voice approach' "involves carving out unacknowledged pieces of narrative evidence that we select, edit, and deploy to border our arguments" (p. 218). I wanted to provide a rich thematic description of the entire data set so that the reader can get a sense of the predominant and important themes. Therefore, the themes I identified, coded, and then analysed were an accurate reflection of the content of the entire data set. In this type of an analysis, I believe some depth and complexity was lost, but a rich overall description was maintained.

By using an inductive approach, the themes identified are strongly linked to the data (Patton, 1990). Inductive analysis was the process of coding the data without trying to fit it into a pre-existing coding frame or into my analytic preconceptions and, therefore, the thematic analysis was data driven. As previously mentioned, it is important to note that I cannot be free from my own theoretical and epistemological commitments and this issue is further elaborated in the section on reflexivity.

The analytical process really started when I began to notice patterns of meaning and issues of potential interest in the data. The keywords (*deterrence/compliance* and *liberty*/*privacy*) identified from the literature review were readily apparent. However, the patterns and themes from the data were not immediately clear but were eventually identified. For *deterrence/compliance*, there were three additional themes related to mechanisms: *policy and procedure, Fraud Tip Line*, and c*overt video surveillance*. For *Liberty/Privacy*, two more themes emerged: *guidelines* and *rights.* The frustration with the themes not being immediately clear is confirmed by Ryan

and Bernard (2000) contending "themes are abstract (and often fuzzy) constructs the investigators identify [sic] before, during, and after analysis" (p. 780).

The analysis involved first reviewing the entire data set, then reading the coded statements that I was analysing, and, finally conducting, the analysis of the entire data set. In effect, the writing of the analysis became an integral part of the analysis. My writing and note taking throughout all three phases also assisted me with the coding and analysis process and my engagement with the literature enhanced my analysis by sensitising me to the subtle features of the data.

Since I collected the data myself through interactive means, I brought to the analysis some prior knowledge of the data and some initial analytic interests and thoughts. Listening to the tapes and reading of the transcribed text immersed me in the data so that I was familiar with the depth and breadth of the content and always searching for meanings and patterns.

3.5 Answering the Research Questions

To answer the first research question, (Can the current claimant fraud investigation programme work in principle?) key aspects of legislation, policy, and procedure are analysed using the criminological and socio-legal literature reviewed for this study.

To answer the second research question, (To what extent does the programme actually work?), the quantitative and qualitative data are used. The participants'

perceptions of the CFIP's historic and absolute effectiveness are considered to evaluate its perceived impact. Their perceptions are also related to the ethical, compliance, and deterrence debates. The perceived failures and shortcomings of the programme are examined for connections to other findings. In addition, problems of implementation in the political context are addressed. The third research question, (How, if at all, can the programme be improved?), is answered by triangulating what the literature says should and should not work, the explicit recommendations from the participant interviews and data from the CFIP about how it was operating compared to how it should operate ideally. Recommendations are made for improvement, allowing the CFIP to be theoretically and empirically informed. Finally, recommendations are provided as to how other actors and institutions (e.g. workplaces) can take complementary, but non-deterrence based, approaches to produce compliance.

Gliner (1994) states that methods of analysis such as triangulation offer promising criteria for fairness and rigour. McIvor (1992) deployed a mixed-method design and used triangulation in the study of the implementation and administration of community service orders in Scotland. Official documents, questionnaires and interviews, and policy and practise were used to obtain data and the data were then triangulated. Hine (1997) used similar methods in a different design to evaluate community service orders. Clarke (2003) stated that one of the main advantages from using triangulation as part of a mixed- method research design is that the researcher can have greater confidence in the findings. Bryman (1988) states that "it is in the spirit of the idea of triangulation that inconsistent results may emerge" (p. 144). Clarke (2003) asserts that "when this occurs the solution is not to choose one

set of results over another, as inconsistent results can cause the evaluator to refocus the original research question and explore new areas of inquiry" (p. 88).

The process of reflexivity was also used during the analysis. Reflexivity means:

> reflecting upon and understanding our own personal, political and intellectual autobiographies as researchers and making explicit where we are located in relation to our own research. Reflexivity also means acknowledging the critical role that we all play in creating, interpreting, and theorizing research data. (Mauthner & Doucet, 1998, p. 121)

Reflexivity is further discussed in the next section.

3.6 Reflexivity and Self Critique

In reference to my role in this study, I provide a brief biographical sketch beginning with my employment and education. While attending university for my undergraduate degree from 1980 until 1984, I also worked in the Occupational Therapy Department of the Provincial psychiatric hospital. I graduated in 1984 with a Bachelor of Arts Degree, with a major in Psychology and a minor in Sociology.

In 1984, I was hired to work with young offenders held in custody. One year later, I became the supervisor in that facility and continued in that role until 1988. It was in that year I also started my own business and, in 1989, I resigned from my position

with the Youth Corrections Branch to focus on my new business. I owned my own business until 1994 when I was approached by a senior official with the Department of Justice and asked to return-to-work with adult offenders. Accepting the position, I became employed with the Department of Justice, Adult Corrections Branch as a counsellor for adult offenders, released from prison on electronic monitoring. One component of that programme was court mandated counselling. The group therapy and individual counselling components of the programme were based on the research of Andrews and Bonta (1998) focusing the programme on cognitive behavioural interventions for anger management, anti-social attitudes, pro-criminal thinking, and addictions. The programme was designed to target the criminogenic needs of offenders and was based upon the five principals of effective correctional programmes: risk, need, responsively, professional discretion, and therapeutic integrity. In 1996, I became the Clinical Director of this programme. The programme was then evaluated fairly by Dr. Paul Gendreau (1996) using the Criminal Programme Assessment Inventory (CPAI) as being in the top ten percent of correctional programmes in North America for reducing the offenders risk to re-offend. This treatment programme was studied by Bonta, Wallace-Capretta and Rooney (2000). The findings indicated that the treatment was effective in reducing recidivism for higher risk offenders, confirming the risk principle of offender treatment.

The programmes were then realigned to focus on the offender groups that had been convicted of sexual offences, domestic violence offences, and assault causing bodily harm. I became certified by the Correctional Service of Canada in 2000 to deliver

the National Sex Offender Treatment Programme to moderate risk sex offenders. I was then trained to provide domestic violence treatment and risk assessments for these violent offender populations.

In 2001, I graduated from Memorial University with a Master's Degree in Education. I wrote my thesis on the "Learning Organization Model" (Senge, 1996) and "Mixed Gender Co-facilitation in Group Therapy". This research focused on the discipline of team learning amongst the co-facilitators working with domestic violence offenders. In 2003, I also worked under contract with the National Judicial Institute of Canada. My mandate was to provide education to Provincial and Supreme Court judges in all Canadian provinces and territories. I provided judicial education on risk and lethality assessments, the psychology of the abuser, and on the admissibility of evidence in domestic violence cases.

In November 2004, I was asked by the Minister of Justice to sit on the Minister's Committee on Violence against Women. At the end of 2004, I asked my employer for a year's leave of absence to commence studies at the University of Manchester for a PhD in Law. I moved to the UK in January of 2005 and returned in September 2005 and I then resigned from my position as Director of the treatment programme. I became employed by the Commission in October 2005 in the Worker Services Department, to embark on a much needed career change. This career change provided access to the CFIP and a unique opportunity for me to conduct research at this site.

Since I conducted the data analysis, I needed to be aware of my own perceptions and bias, wanting my background to be transparent to the reader. A significant part of raising my own awareness and sensitivity to my role as researcher, the process of reflexivity became essential to my understanding of both deterrence and the research process itself.

I knew conducting research with a significant qualitative component would be complex and, throughout all three phases, I felt a level of apprehension. The methods I was using did not come with a precise formula about how to proceed. Since I was the primary instrument of data collection and analysis, I commenced the study believing reflexivity would be essential. Therefore, I kept a journal which consisted of notes that I made in several notebooks. Although many of the benefits of journaling are known and documented in the literature, I did not anticipate the extent to which my writing and reflection would inform my discussion.

In many ways, the journal helped me discover some of my own thoughts, biases, and beliefs and attitudes about crime, offenders, and punishment. Reading the excerpts from the notes in the journal, I made connections between the literature on methodology, decisions I made during the study, the process of reflexivity, and my new understandings of the difficulties and benefits of conducting a mixed method piece of research.

Reviewing specific sections of the journal during every writing session helped me keep my personal opinions in-check and allowed me to stay focussed on what the

data were saying to me. In this way, it helped me become more aware of my biases, feelings, and thoughts that could potentially influence the research process and the findings. I believe engaging in the process of reflection contributed to my becoming a better researcher.

In the beginning, I knew the topic I wanted to study but nailing down the specific language that captured the major themes in the research was difficult. Returning to my journal revealed just how frustrated I was at the start. The frustration was based in the difficulties of writing down exactly what was on my mind in a clear, readable format. It was easier to think than it was to write.

There were many things about the CFIP that I was interested in and many things about the programme were intriguing. I discovered that working on a topic that was really interesting to me made the complexities and the frustrations of the journey even more worthwhile. Given my own experience with treatment programmes, I wanted to know why the CFIP had chosen deterrence as its method to achieve compliance and I wanted to know if it was working.

My journal notes were made at every stage of the research and reflected the challenges I faced. The first challenge was developing a conceptual framework for the study. The second was planning the research design. There were fewer notes made when I was reviewing the literature but the notes increased in length and were increasingly insightful as I proceeded through to developing my final three research questions. At this stage I needed to clarify and connect the three questions to the study of the CFIP.

The participants were from the previously described population because they represented the stakeholders in the workers' compensation system and I had access to them. I was genuinely interested in their perceptions about the CFIP. My notes reflect the amazement I had with how easy they responded to my questions, providing their valuable insights to inform this study.

Unfortunately, the absence of the worker's perspective necessitated a reliance on Lippel (1999; 2003). The main problem with relying on Lippel (1999, 2003) is that researchers should not fully rely on any one source for important information, in this case, the claimants' perspectives. In addition, I cannot confirm that her work represents the entire body of knowledge on the claimants' perspectives with surveillance. The perspective in Lippel arises from claimants in the province of Quebec, and there are differences in the legislation, policy, and procedures in how claims are managed and investigated and, therefore, the compensation systems as well as the policy and procedures are not the same.

Katherine Lippel is, however, an authoritative voice in support of the injured workers' perspective. She specialises in legal issues relating to occupational health and safety and workers' compensation and has authored numerous publications in the field. Her publications include two books on Workers' Compensation law, several articles on psychological harassment, therapeutic jurisprudence in the field of Workers' Compensation, precarious employment and occupational health, and safety regulation and gender-based analysis of compensation systems. She is the Canada research chair in occupational health and safety law and a Professor of Law at the University of Ottawa. She is also a member of the Québec bar. In this study, her

research and literature has shaped my argument about the claimants' perspective by suggesting a line of thinking about surveillance. Her qualifications are specified, and she has written extensively on the injured workers' perspective of surveillance. She is affiliated with a reputable university and her information from claimants reflects similar claimants' views of surveillance in this province as confirmed by several of the participants in this study. Her research is recent, and the information provided is factual as it contains a perspective provided by claimants. However, given her research interests, the author's language may not be free of emotion and bias. For example, in Lippel (1999, 2003) she refers to claimants as victims of workplace injuries.

Chapter Six will provide a critical discussion of this literature. The literature by Ericson (2007) and Lippel (1999; 2003) carried significant weight when considering the claimant's perspective of surveillance. It was through this literature that I realised the restrictions that the threat of surveillance can have on the rehabilitative environment in which a claimant is intended to heal. How much surveillance is acceptable? How much investigation is actually warranted? My journaling exercise, however, did not lead to a specific answer but rather a general conclusion. I concluded the answer should be the *least amount possible that will achieve the objective*.

In reference to my role in the interview and how that affected the answers provided to the questions, my notes indicated my perception was the flexible style of the interview facilitated the participants feeling comfortable with me, the questions, and

having the responses recorded on audio tape. All of the interviews were recorded and none of the participants appeared cautious or hesitant in providing answers to the questions I posed.

Developing logical frameworks for the layout of each chapter was also a struggle, but the final chosen framework presented the literature, the findings, and the recommendations in a logical order.

I challenged myself in a way I never thought I would. I made it difficult on myself because I spent so much time taking notes and analysing those notes hoping conclusions would emerge from the data. Dedication to learning and academia translated into sacrificing time with family and juggling a schedule at work, but the research took priority. Upon reflection, time is a major theme in doing a dissertation and in particular in mixed method research. It requires time management, time at the computer, time to arrange data collection, time to collect the data, time to analyse it, and a vast amount of time to accurately write up the entire study.

The qualitative component required that I push myself to do an inordinate amount of work in a short time. This, at times, conflicted with the demands of my job. I had to find a balance between my duty to my employer and my duty to the research. This was also the dual role I found myself in throughout the study. In my search for answers to the research questions, I actually learned a lot about myself. I am disciplined, analytical and structured, but I can be open to change. I believe both my education and experience with prisons and treatment programmes strengthened the

analysis of the data. I hope that the challenges that I faced and overcame in completing a dissertation at the age of fifty will motivate others to seek answers to the questions they have.

I enjoyed exchanging ideas with my supervisor. The process of supervision and discussion helped keep me focused. Everything that I saw in the data became exciting and I wanted to know more about it. Supervision was the key to completing the dissertation.

Narrowing the questions posed to the participants to twenty-three was also a challenge. However, upon reflection I probably could have asked more questions about the normative route to compliance. This is explained mostly by the fact that I became familiar with that literature after the questions were developed. Completing a dissertation is only possible with a lot of hard work and attention to detail.

Presenting the preliminary research findings to other PhD students also helped me focus early on in the data analysis process. The ideas emerging at that time were many, and the need for focus was great. Preparing for the presentation helped bring about that focus.

I had no pre-conceived notions that deterrence was or was not working for the CFIP. The process of knowing began with the research questions. The notes I kept for

reflection during the write-up stage really reflect the intimate contact I had with the qualitative data. I found it surprising that a system such as workers' compensation would rely on deterrence to protect its significant financial assets. I was initially surprised by the Commission's choice of deterrence for two reasons. The first was that for a specific deterrent effect to be achieved a claimant would have to be punished swiftly and severely. As the Commission does not control this with regards to the justice system, the definitiveness of the swiftness and severity of punishment was questionable. In addition, I was aware of the need to use a claimant's name, conviction and sentence to serve as an example to generally deter others who may be like-minded to achieve a general deterrent effect. The Commission, as a public body, is supposed to operate in a privacy compliant environment and to achieve a general deterrent effect a claimant's name would have to be communicated to the public to serve as an example to others. The use of 'naming and shaming' appears to contradict the Commission's privacy compliance instruction and its mandate to provide compensation and rehabilitation.

This surprise was heightened by my education and work experience in dealing with a programme based on criminological research and the characteristics of effective correctional programmes.

During the study, I felt like I was conducting innovative research and I realised the participant interviews had become a valuable empirical asset. The main thing I identified that did not work well included the absence of a worker perspective due to the worker advisors not consenting to participate in the study. Additionally, if I was

to do this study again I would use a computer programme to assist with the qualitative data coding and analysis. The amount of time I dedicated to this phase of the research was in excess of 940 hours.

In my preliminary discussions with Commission officials, they made it clear they were not supportive of research that included me contacting clients asking for their perceptions of claimant fraud investigations and surveillance. They feared such research would infuriate the NLFL and the labour movement. The NLFL had already expressed its extreme dissatisfaction with the direction the CFIP was taking with Fraud Tip Lines and external investigators. For these reasons it was not proposed. Ideally, the data analysis would be enriched if it included a survey of claimants asking for their perceptions of investigations, surveillance and the Fraud Tip Line.

I would also suggest a survey be conducted in the future with employers and claimants asking for their responses to issues identified in this study. In addition, I would suggest conducting a larger longitudinal study that includes claimants as participants, or an experimental exploration of instrumental and normative approaches to dealing with claims, with random allocation to each approach.

The conclusion I reached is that it is critical to allow research and theory to guide policy development. Without it the consequences can be significant and costly, in both financial and human terms.

4 LITERATURE REVIEW

4.1 Introduction

In this chapter, the criminological literature on deterrence, *blue-collar* crime, and *white-collar* crime is reviewed. This study, focused as it is on *light blue-collar* crime, is a new area of criminological research, and there is no existing literature on this specific topic. I coined the term *light blue-collar* crime while I was conducting the literature review of the criminological theories and the studies of the more traditional areas of *blue-collar* and *white-collar* crime and while analysing the data collected. In addition, the *blue-collar* and *white-collar* crime literature provides a framework to evaluate the effectiveness of the CFIP in deterring claimant fraud through its adoption of a zero-tolerance policy for fraud enforced through criminal and administrative sanctions.

4.2 Evidence of Deterrence Logic: Assumptions in CFIP Policy and Procedure

The authors of the *Task Force Report* (2001) recommended that "the Commission, in concert with the Department of Justice review the fine and penalty provisions for fraud on a priority basis to ensure they are sufficient to act as a deterrent" (p. 37). In proposing deterrence as an effective fraud control strategy, the Commission's policy makers have assumed in implementing this recommendation that before committing fraud claimants will calculate the costs and benefits of this behaviour. As such, the

CFIP intended to make the consequences of a claimant's choice to commit fraud painful enough through the threat of punishment that potential offenders would choose not to engage in fraud. Accordingly, the application of deterrence had punishment as its primary purpose rather than vengeance. But is there evidence that deterrence theory will work for the CFIP to actually deter claimant fraud? To answer this question a review of deterrence theory is necessary.

4.3 Deterrence in Criminological Theory

The basic ideological premise of deterrence theory for the CFIP suggests that claimants will be deterred from committing the crime of fraud through the use of punishment, specifically, certain, swift, and severe punishment. Indeed, the deterrent effect of punishment has usually been taken for granted by the majority of the population; that is, there is a generally held notion that, under certain conditions, sanctions have a deterrent effect on crime. This notion is prevalent amongst the study participants, members of the general public, and in other workers' compensation systems in Canada. According to Mathiesen, (1990) ''[t]he notion of the general preventive effect of punishment is so deeply ingrained in the common sense thinking of society, that questions about its actual existence are frequently not raised and remain unasked…In this sense, the notion of the general-preventive effect of punishment constitutes a prevailing paradigm in society'' (p. 13). However, due to this 'prevailing paradigm', there are, I would argue, substantive issues with the Commission's use of deterrence as the basis of CFIP's policies and procedures. One of these issues is the apparent lack of specific knowledge about how deterrence is

theorised to work and the lack of evidence of a concrete application of the theory with little to no distinction of the different perspectives assigned to the categories of *blue-collar* and *white-collar* crime by those in the field of criminology.

The CFIP's belief in and use of deterrence theory is made more problematic due to the fact that deterrence theory has both its proponents and its detractors within the academic field. Advocates of deterrence argue for the effectiveness of deterrence theory (see Daniel Nagin, Larry Siegel, Tombs and Whyte, and Charles Tittle). However, deterrence may not work in the context of workers' compensation (according to Per-Olof Wikström, Don Andrews, James Bonta, Francis T. Cullen, Cheryl Lero Jonson, Lawrence Sherman, Christina Dejong, and Philip J. Cook.)

4.3.1 The Proponent Perspective

On the surface, the idea of deterrence appears reasonable, and it is consistent with Siegel (1992) who stated "crime prevention or at least crime reduction, may be achieved through policies that convince criminals to desist from criminal activities, delay their actions, or avoid a particular target" (p. 133). The concept of deterrence has a particular appeal and, according to Tombs and Whyte (2013), "[t]he rise of neo-liberal crime control policies has been closely linked to a revival of deterrence theory in a wide range of contexts" (p. 1). Cullen, Wright and Blevins (2008) contend the belief in the effectiveness of deterrence theory is also driven by its political attractiveness and ready-made policy applications such as its application in

the CFIP's Policy EN-11: Investigations. Nagin (1998) states that the evidence in support of deterrence is growing and claims that:

> [e]vidence for a substantial deterrent effect is much firmer than it was. . . [two decades] ago. However, large gaps in knowledge on the links between policy actions and behavior make it difficult to assess the effectiveness of policy options for deterring crime. There are four major impediments. First, analyses must estimate not only short-term consequences but also calibrate long-term effects. Some policies that are effective in preventing crime in the short-term may be ineffective or even criminogenic in the long run because they may erode the foundation of the deterrent effect fear of stigmatization. Second, knowledge about the relationship of sanction risk perceptions to policy is virtually non-existent [sic]; such knowledge would be invaluable in designing effective crime-deterrent policies. Third, estimates of deterrent effects, based on data from multiple governmental units, measure a policy's average effectiveness across unit. It is important to understand better the sources of variation in response across place and time. Fourth, research on the links between intended and actual policy is fragmentary; a more complete understanding of the technology of sanction generation is necessary for identifying the boundaries of feasible policy. (p. 51)

Of importance here is Nagin's view that there is a lack of consistency between the principles of deterrence theory and its application in policy. He adds that there is too much variation within the studies to conclude how, or if, the theory works in practise. So while he argues for the viability of deterrence theory, he also recognises the problems inherent in the movement of the idea of deterrence from theory to practise.

4.3.2 The Detractor Perspective

The basic assumption of deterrence theory that claimants will refrain from committing fraud due to their fear of swift, severe, and certain punishment also has its detractors in the criminological literature. Within the literature, there are those who believe that deterrence through legally imposed punishment, either general or specific, does not work to achieve compliance. There is also a concern that using punitive measures to achieve deterrence may have a negative effect on recidivism. Sherman (1993) contends that being punitive can make some 'defiant' offenders more likely to offend and, therefore, the punitive strategy of increasing punishment to achieve a deterrent effect does not uniformly cause a decrease in crime. Cullen and Jonson (2012) assert that "[w]hen we look at various types of evidence, for the most part, deterrence theory proves to be either incorrect or only weakly supported" (p. 70). Wikström (2007) argues there is minimal evidence in support of the deterrence assumptions. He argues "this is predominantly due to research gaps and the fact that some deterrence research has been methodologically weak, rather than a conflict between the findings of existing research and the presented theoretical propositions" (Wikström, 2007, p. 23). Similarly, Cook (1980) observed, "deterrence research has enjoyed a revival during the 1970s, but so far has produced little more than a frame of reference, a variety of hypothesis and suppositions, and a scattering of empirical observations which are more anecdotal than systematic" (p. 212).

The lack of significant agreement about whether or not deterrence, as a criminological theory, works in practise is of particular importance. As the CFIP's policies and procedures are based on the premise that deterrence works, an idea not fully supported by criminologists or evidenced by numerous studies, the basis for the Commission's assumptions on how to prevent or deter fraud can be seen to be fundamentally flawed. This, of course, impacts whether or not the CFIP's policies and procedures can truly be effective.

4.3.3 Deterrence: General and Specific

There are two theoretical types of deterrence: specific and general. Specific deterrence refers to punishing the individual claimant so he/she does not recidivate, and the deterrent effect is specific to the individual being punished. If specific deterrence is effective, Cullen and Jonson (2012) contend that the following should be expected: "offenders sentenced to prison would be less likely to recidivate than offenders put on probation; offenders given longer prison terms would be less likely to recidivate than offenders given shorter prison terms; and, offenders placed in community programmes that emphasise close supervision and the threat of probation/parole revocation should be less likely to recidivate" (p. 71).

For a general deterrent effect to be achieved, a message must also be sent to the general public and communicated to other claimants after a specific claimant has been convicted and punished. The purpose of this is that any other claimants

considering fraud will then perceive the risk of detection and punishment as high, resulting in the decision to not commit the crime of fraud. In reference to the perspective that the primary purpose of sanctions is general deterrence, Andrews and Bonta (1998) claim that:

> [s]anctions based on general deterrence are intended to influence the criminal conduct of those non offenders (or offender "wannabees") who might be deterred by knowing that criminal activity has negative consequences. (p. 250)

In criminological ideology, the use of punitive measures appears to be a kind of 'common sense' approach; it plays upon the basic nature of humans to disengage from activities that induce pain or discomfort.

Cullen and Jonson (2012) summarise three predictions of deterrence theory. The first prediction is the more punishment there is, the less crime there should be. The second is the more offenders that are under supervision and threatened with punishment, the less crime there should be. The third prediction is the more people think punishment is likely, the less crime there should be (p. 69). If these predictions of deterrence theory are correct, then to reduce the likelihood of fraud the CFIP should be conducting surveillance in order to apprehend the fraudulent claimant as soon as possible after the act and then relying on the justice and correctional systems to maximise the punishment for claimant fraud (loss/pain) and minimising the benefits (pleasure/gain). However, an issue that must be considered is which claimants the CFIP targets for deterrence. There are two groups to consider: the first group is the claimants who have not yet committed fraud, but may be thinking about

it and need to be deterred. The second group is those who have committed fraud and are at risk to recidivate. Cullen and Jonson (2012) contend that for these two groups a different type of deterrence is involved.

4.4. Rational Choice Theory

Rational choice theory is the underlying theory that views claimants considering the choice to commit crime, including fraud, as calculating the costs and benefits of that choice prior to taking action. According to Cornish and Clarke (1986), these costs include both formal and informal sanctions and moral costs. The theory recognises that a range of factors influence a claimant's estimate of the costs and benefits of committing fraud. Cornish and Clarke (1986) state that:

> [o]ffenders seek to benefit themselves by their criminal behavior; that this involves the making of decisions and of choices, however rudimentary on occasion these processes might be; and that these processes exhibit a measure of rationality, albeit constrained by limits of time and ability and the availability of relevant information. (p. 1)

In other words, rational choice theory argues that deterrence, according to Clarke (1995), is an instrumental mechanism intended for achieving compliance and assumes the claimant's ability to consider the costs and benefits within certain parameters, influenced by their attitudes, beliefs and preferences. Siegel (1992) adds that:

> [a]ccording to this view, law-violating behavior should be viewed as an event that occurs when an offender decides to risk violating the law after considering his or her own personal situation (need for money, personal values, learning experiences) and situational factors (how well a target is protected, how affluent the neighbourhood is, how efficient the local police happen to be). Before choosing to commit a crime, the reasoning criminal evaluates the risk of apprehension, the seriousness of the expected punishment, the value of the criminal enterprise and his/her immediate need for criminal gain. (p. 131)

Shover and Hochstetler (2006) argue that this view of offenders as rational has become the justification for emphasising deterrence as a crime-control practise over the past twenty years. Consistent with this view, the CFIP was conceived and constructed based on a deterrence approach promoted by the Task Force that recommended it. Shover and Hochstetler (2006) also see the general acceptance and prevalence of deterrence as a preferred theory crime reduction in society stating that "[p]rograms grounded in theories of deterrence and incapacitation took centre stage, and the emphasis shifted to initiatives that would increase the odds and severity of punishment" (p. 1).

Deterrence then is the result of a claimant's evaluation concerning the possibility of punishment due to his/her choice to act in a particular circumstance. Added to the possibility of punishment, morality is also a factor in deterrence. Seemingly regardless of possible punitive measures, a claimant may not commit fraud because it is inconsistent with his/her moral rules and beliefs about complying with the law and not the result of his/her fear of consequences. As Wikström notes:

> the main reason why most individuals most of the time comply with most of the laws is not because they have made 'a standing decision' or

> ‘make repeated rational choices’ to comply with the law (or particular laws) based on fear of consequences, but rather that their morality prevents them from seeing crime as an action alternative (no choice is made), and their moral habits do not include the commission of acts of crime (habits are expressions of ‘automatic’ choices that do not involve any deliberation and therefore do not involve any rationality). (p. 17)

Further complicating the idea of rational choice and morality is the situational aspect of the choice of whether or not to commit a crime. Lilly, Cullen and Ball (2011) argue that in deciding to offend, the claimant must judge the potential formal, informal, and self-imposed costs and that variation in people’s morality further influences the choice to commit a crime. Additionally, they contend that:

> [i]f held strongly, moral beliefs can override perceived utility; some people will not do what they think is wrong. Other moral beliefs, however, are akin to situational ethics. They are “moral rules-in-use” that define “the acceptability of *particular* conduct within a *particular* context” (Paternoster and Simpson, 1993, p. 45, emphasis in original). These are definitions of the situation, or techniques of neutralization, that might justify illegal acts under some circumstances. Related to this point, the moral constraint of a regulation further depends on the “*perceived sense of the legitimacy of the rules and rule enforcers*” (p. 45, emphasis in original). Laws seen as unfair are less binding. (p. 289)

Beyond sanctions and controls, Lilly, Cullen and Ball (2011) argue two other factors are considered: the costs of complying with the law and benefits of not complying. The claimant’s life experiences play a role here and, as Paternoster and Simpson (1993) state, “the best predictor of future offending is past offending” (p. 47). The CFIP, however, does not have access to information or systems to determine if a claimant has a criminal history.

Lilly, Cullen and Ball (2011) provide a review of a person's circumstances that make *white-collar* crime more likely to occur including when the individual:

> (1) perceives that formal and informal sanctions will not be severe, (2) does not experience a loss of self-respect, (3) lacks a strong morality or have internalized situational rules-in-use that justify the act, (4) view rules as unfair, (5) judge both the benefits of noncompliance and the costs of compliance as high, and (6) have broken the law in the past. (pp. 289-290)

The issue for specific deterrence is the relative importance of the claimant's calculation of the costs and benefits versus other factors. Studies by Paternoster and Simpson (1996); Simpson, Piquero and Paternoster (2002); Smith, Simpson and Huang (2007) indicate that morality appears to be the strongest predictor of the willingness to offend. Piquero, Exum and Simpson (2005) found that other individual traits, such as the desire for control, might shape perceptions of sanction effects and independently influence corporate crime decision making. Simpson et al., (2002) concluded that "perceptions of utility matter, but they are likely to be contingent on a host of contextual factors" (p. 289).

When claimants are considering the costs and benefits of committing a crime such as fraud, their thinking is often hurried and based on inaccurate information and assumptions. Studies by Carmichael and Piquero (2004); Exum (2002) and by Piquero and Paternoster (1998) indicate the estimated costs and benefits of crime are influenced by individual factors such as self-control, moral beliefs, strains, emotional state, and a person's association with pro-criminal peers.

Wright (2010) argues that human beings are not rational actors who consider the consequences of their behaviour before deciding to commit a crime. Outside of the individual factors mentioned above, Wright (2010) notes that offenders are often under the influence of drugs or alcohol at the time of their offence and, in that state, it is unlikely they will be deterred by either the certainty or severity of punishment because they have a temporarily impaired capacity to consider the pros and cons of their actions. Wright (2010) reports the majority of offenders in the Canadian Federal prison system show evidence of some kind of substance abuse problem. Canadian data indicates that 70% of offenders in the Federal correctional system have engaged in problematic use of alcohol and other drugs during the one-year period prior to their incarceration. In the Canadian prison system, the use and abuse of alcohol and other drugs is strongly associated with a broad range of criminal activities and conduct including fraud. Brochu, Cousineau, Gillet, Cournoyer, Pernanen, and Motiuk (2002) conducted a review of the data on Federal offenders and discovered that, for 22% of the offenders with a fraud conviction, alcohol and/or drugs were identified as a problem leading to their choice to commit the crime.

Rational choice theory, despite its apparent flaws, has been the focus of research on situational determinants of specific crimes (Clarke & Cornish, 2001; Nagin & Paternoster, 1993; Piquero, Gibson & Tibbetts, 2002). The theory has contributed to the development of situation-based crime prevention strategies and programmes that attempt to reduce the person's perception of the benefits and increase the perceived costs of crime (Clarke, 1997 and Clarke & Cornish, 2001). Historically, this theory has been primarily applied to violent street crimes committed by *blue-collar* criminals and applied rarely to *white-collar* crime (Braithwaite & Geis, 1982; Shover

& Bryant, 1993; Cohen & Simpson, 1997; Weisburd, Waring, & Chayet, 2001). However, over the past two decades, criminologists have examined the applicability of rational choice to *white-collar* crime.

Researchers also examined whether an individual's estimate of the costs and benefits of crime influence his/her levels of offending (See, McCarthy & Hagan, 2005; Nagin & Paternoster, 1993; Paternoster & Bachman, 2001; Piquero, Gibson & Tibbetts, 2002; and Tittle & Botchkovar, 2005). These studies found that crime is more likely when its costs are seen as low and its benefits as high. Another factor that may be important is the fear of social consequences. However, the CFIP does not use this information to determine whether claimants perceive the risk of administrative and legal consequences or the risk of related social consequences as being the most influential. This means the CFIP is unable to say which factor (or factors) has the most potential for a deterrent effect.

Tombs and Whyte (2013) state that one of the most common challenges to deterrence theory is based on its reliance on rational choice theory; that is, the idea that people make rational choices depending upon the individual having perfect knowledge of the risk of detection and a capability to exercise rational judgment. Bourdieu (1998) adds that the precondition for rational thought and action is the ability to calculate future consequences. Therefore, for deterrence to be effective, the individual must have a future orientation. However, Tombs and Whyte (2013) note that deterrence is most often applied to those who are least capable of acting rationally while at the same time the evidence indicates that relatively low-status

offenders are not in a position to respond to rational choice/deterrence-based forms of crime control. The main reason is that low status offenders' ability to act rationally is arguably reduced because they do not have total control over the financial and social conditions that influence their present and their future. As such, they are less likely to be able to make rational choices. In contrast, individuals with higher status have more reasons to consider the long-term consequences of their decisions. This includes their ability to calculate the likelihood of detection and the severity of sanctions and the impact on their social status; therefore, they are more likely to be more 'future-oriented'. It is more probable they have the ability to make the calculation, but they do not necessarily have the information necessary to make a rational and precise calculation of the probability of detection and punishment, a state of mind more traditionally, if not accurately, seen in those who commit *white-collar* crime.

The critique of deterrence and its reliance on the concept of rational choice in relation to social position is important in relation to workers' compensation fraud as opposed to frauds perpetrated by other social groups. A major issue for the CFIP to consider in relation to its policy goal of deterrence is that it rests on the principle of 'future orientation'; that is, from a subjective point of view, the target of deterrence needs to actually care about what is going to happen to him or her. A workers' compensation claimant may not have future employment opportunities and/or the financial means to address their immediate needs. This is why deterrence has a different effect on *white-collar* offenders as deterrence is mediated by class/social position. The question that arises from this is how the

choices of potential light blue-collar offenders may be affected. This is important in terms of the CFIP's chances of success in adopting a deterrence approach.

4.5 The Effects of Deterrence

Cullen and Jonson (2012) reviewed macro-level studies of punishment and crime rates. They report on Pratt and Cullen's (2005) meta-analysis and drew several conclusions:

> Of the thirty-one (31) predictors of crime rates measured, the deterrence measures were among the weakest predictors; The only punishment variable to have strong effects was the level of incarceration and this was most likely a measure of incapacitation and not deterrence; that is, the effect of incarceration was so different from the other deterrence variables, it suggests that it was measuring incapacitation; Overall, macro-level studies suggest that there is at best a moderate deterrent effect on crime; The variables that most account for the macro-level differences in crime rates are social variables, especially the concentration of social disadvantage; and it suggests that efforts to control crime through deterrence are likely to be only minimally successful because the other causes of crime will remain unchanged. (Cullen & Jonson, 2012, p. 422)

The general conclusion reached by Cullen and Jonson (2012) from this review is that "measures of deterrence have effects, but they are not among the stronger macro-level predictors of crime" (p. 80).

What would be the impact of the CFIP seeking to have the claimants punished more often and severely in the courts as well as placing more controls on them in an effort

to achieve a deterrent effect? Cullen and Jonson (2012) reviewed studies that focused on punishment oriented correctional interventions. These studies examined offenders who had more controls placed upon them or more punishment handed down by the courts for evidence of a deterrent effect. Cullen, Wright and Applegate (1996) revealed that the deterrence-oriented programmes had little impact on offender recidivism although they were able to find a few isolated successes. They concluded "[i]ntermediate punishments are unlikely to deter criminal behavior more effectively than regular probation and prison placements" (Cullen, Wright, & Applegate, 1996, p. 114). Byrne and Pattavina, (1992); Caputo (2004); Gendreau, Goggin, Cullen, and Andrews (2000); MacKenzie (2006) and Tonry (1998) also reviewed the evaluation literature on this topic and reached the same conclusions. Bernburg and Krohn (2003); Bernburg, Krohn, and Rivera (2006); Chiricos, Barrick, Bales, and Bontrager (2007); Gatti, Tremblay, and Vitaro (2009) and McGuire (2002) concluded that involving offenders in the criminal justice system has a minimal impact on recidivism and can actually increase their recidivism risk.

Cullen and Jonson (2012) argue that there is minimal evidence to support deterrence theory when punishment oriented correctional interventions are evaluated. The evidence leads to the conclusion that there is doubt whether punishment has a specific deterrent effect for all offenders. As Paternoster (2010) adds:

> [t]he empirical evidence leads to the conclusion that there is a marginal deterrent effect for legal sanctions, but this conclusion must be swallowed with a hefty dose of caution and scepticism [sic]; it is very difficult to state with any precision how strong a deterrent effect the criminal justice system provides. (p. 765)

Criminological research illustrates that enhancing the certainty of punishment produces a stronger deterrent effect than increasing the severity of punishment. Von Hirsch, Bottoms, Burney, and Wikström (1999) concluded that "the studies reviewed do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects" (p. 86). Yet, when reviewing macro level studies that examined offence rates of a specific population, they found that increasing the certainty of apprehension and punishment was associated with declining crime rates.

There is also an assumption made about the need for efficiency by the Commission and the justice system in administering the punishment. This requires the CFIP to provide adequate resources to detect fraud as well as a commitment to swiftly process and punish those culpable. The authors of the CFIP's policy and procedures also assume the use of well-trained investigators, the Fraud Tip Line, and covert video surveillance are essential to the goal of fraud deterrence. The CFIP uses these methods to optimise detection in order to maximise the opportunities for deterrence. Yet, there are issues with this set of assumptions. One important issue is the fact that the CFIP, while a programme of a government agency, does not and cannot have a direct effect on how the justice authorities prosecute or punish those charged with fraud. They can only refer cases of claimant fraud to the courts without any specific say on the application of punishment. Within their own bailiwick, the use of investigators, the Fraud Tip Line, and covert video surveillance by the CFIP can, as has been discussed, be affected by outside privacy legislation, making these strategies for control perhaps less effective.

4.5.1 Deterrence and Regulation

In the criminological literature, the use of legislation/regulation (in this case the WHSCC Act) and the criminal justice system as mechanisms to achieve deterrence are discussed. For example, Almond and Colover (2012) contrast two schools of thought in the regulation literature: deterrence and a regulatory school of thought. Deterrence is punitive, requiring a proactive enforcement strategy and severe penalties. In contrast, what they term the 'regulatory orthodoxy' suggests a more selective use of the threat of prosecution where it is only used as a last resort (p. 1010). Enforcement only occurs in a limited number of cases when alternative approaches have been tried and failed (p. 1000). Tombs and Whyte (2013) argue that a wide variety of regulation scholars generally reject 'deterrence-based' approaches. They provide, as an example, a listing of the following scholars and their approaches such as:

> compliance-oriented (Hawkins 1984), twin-track (Gunningham & Johnstone 1999), smart (Gunningham, Grabosky & Sinclair 1998), problem-solving (Sparrow 2000), risk-based (Hutter 2001), private or market-based (Hutter, 2006) and those who advocate for varieties of responsive regulation (Ayres & Braithwaite 1992) including really responsive or really responsive risk based regulation (Black & Baldwin 2010). (p. 3)

Tombs and Whyte (2013) add that the State prescribing what constitutes compliance and then responding on the basis of a deterrence-oriented approach is unsustainable.

4.5.2 Deterrence Theory in Practise: Swiftness, Severity, and Certainty

The primary mechanism in the application of deterrence theory is the application of punitive measures, specifically incarceration, the most severe form of punishment, resulting in a loss of liberty. Yet, the literature illustrates the problematic issues with the efficiency and the application of swift, severe, and certain punishments that lead to viable deterrence and a decrease in recidivism.

Nagin and Pogarsky (2001) conclude that "punishment certainty is far more consistently found to deter crime than punishment severity, and the extra-legal consequences of crime seem at least as great a deterrent as the legal consequences" (p. 29). The CFIP, however, is not able to take steps that ensure the certainty of punishment in the courts.

Research by Williams, Gibbs, and Erickson (1980) as well as Von Hirsch, Bottoms, Burney, and Wikström (1999) indicated that the general public tends to underestimate the severity of punishment imposed by the justice system. Since the CFIP does not communicate its activity and specific case outcomes to the members of the public, other claimants are unaware of the specifics of sentencing. Even if the sentences were severe, this absence of communication diminishes the possibility of a deterrent effect. It follows that claimants will not be as concerned about the severity of punishment for committing fraud if they do not believe that they will ever get

caught or if they think the probability of arrest and punishment is low. As Ball (1955) wrote, the "deterrent effect of a law obviously depends upon the individual's knowledge of the law and the punishment prescribed" (p. 204).

Studies of policy changes that increase the severity of punishment, such as Felson (2002) and Welsh and Farrington (2009), indicate that claimants might be prevented from committing fraud if they think there is a high probability that their crime will be detected. However, their research concluded when policies that increase the severity of punishment cannot also ensure the offender receives swift and immediate punishment they are not likely to have a strong deterrent effect.

Farrington, Langan, and Wikström (1994) compared sentencing trends in the US, England, and Sweden, and failed to find an effect for severity. The statistical associations were weak and, even when there was a negative relationship between severity of punishment and crime rates, the findings were not strong enough to achieve statistical significance.

A period of incarceration is the most severe sentence a court can impose for fraud. Gendreau, Goggin and Cullen (1999) tested the assumption that the more severe the imposed sentence, the less likely offenders should be to recidivate. They found that longer prison sentences were associated with a three-percent increase in recidivism (p. 22). They also assessed the impact of serving a prison sentence versus receiving a community-based sanction. They found being incarcerated versus remaining in the community was associated with a seven percent increase in recidivism (p. 24). In

addition, they found an increased likelihood that lower-risk offenders would be more negatively affected by incarceration.

Dejong's (1997) study suggests that incarceration does not conclusively work as a deterrent for recidivism. Her findings suggest that social conformity carries more weight for both repeat offenders and first-time offenders: "a sentence of incarceration increases the probability of re-arrest. However, for arrestees with few ties, and for experienced offenders, longer periods of incarceration predicted longer time until re-arrest" (p. 561).

Dejong's (1997) research also found that:

> [i]ncarceration of experienced offenders does not affect their probability of recidivism following release, nor do most covariates. More variables show significant effects only for naïve arrestees and for experienced offenders the best predictor of future behavior is prior behavior. Experienced arrestees seem very likely to recidivate regardless of anything else. However, longer incarcerations do seem to extend the time until experienced offenders return to crime. (p. 571)

Dejong's (1997) study evidenced the fact that "[c]ontrary to the hypothesis, naïve arrestees are more likely to recidivate following incarceration" and that "[a]lthough experienced arrestees are no more likely to recidivate after confinement than are inexperienced ones, they do delay their return to crime proportional to the length of confinement" (Dejong, 1997, p. 573). While this seems to confirm that more experienced criminals may feel the effects of deterrence more acutely, she points out that a longer delay between the end of a specific deterrent, incarceration, and recidivism does not mean that the specific deterrent is completely successful.

Accordingly, "[a]lthough some experienced offenders seem to be deterred from offending in the short term, they are still just as likely to recidivate eventually. Their overall probability of re-arrest, does not change following incarceration" (Dejong, 1997, p. 573). Dejong claims "that [the] expectations for universal, sweeping effects for incarceration, common among policymakers and the public, are unrealistic" (p. 573). Indeed, she argues that:

> [f]or some, spending time in jail may increase their perceptions of the severity and certainty of future punishment, leading to deterrence. For others, jails and prisons can be "schools for crime," where offenders can learn more about their possible profession. And for still others, the incarceration may afford a chance for change through education or job training. And, serving time in confinement may result in stigma so that they are more likely to be rearrested despite law-abiding behavior, or it may activate a transformation of self and life-style leading to enhanced criminal careers. (Dejong, 1997, p. 573)

When the length of the term of imprisonment was examined by Cullen and Jonson (2012), they concluded offenders given longer prison terms were not less likely to recidivate than those given shorter prison terms. When they studied offenders placed in intensive community supervision programmes with the threat of probation/parole revocation, their risk to recidivate was not reduced and offenders sentenced to prison were not less likely to recidivate than those placed on probation (p. 71).

Laub and Sampson (1993) conclude that serving time in prison weakens conventional social bonds and increases the risk of recidivism. Spohn and Holleran (2002) compared the recidivism rates of 776 offenders placed on probation versus 301 offenders sent to prison after forty-eight months concluding that being sent to prison actually increased recidivism.

Smith (2006) studied male offenders in the Canadian Federal penitentiary system and concluded that imprisonment increased recidivism among low-risk offenders. Nieuwbeerta, Nagin, and Blokland (2009) compared first-time inmates with a matched sample of non-imprisoned offenders in the Netherlands and found that imprisonment increased the risk of recidivism. Reviews of the literature on studies of prison effects conducted by Nagin, Cullen, and Jonson (2009); Smith, Goggin, and Gendreau, (2002); Villetez, Killias, and Zoder (2006) concluded that imprisonment, when compared to a non-custodial sentence, either has a null effect or can slightly increase the risk of recidivism.

There is a lack of clear evidence that incarceration works to deter crime as all correctional punishments are not necessarily swift and certain, and they may not be severe. Cullen and Jonson (2012) contend that the inability to impose punishments efficiently is one barrier to achieving large deterrent effects when attempting to put deterrence theory into practise. Another problem is that of individual perceptual differences, since people experience the threat of a correctional punishment differently. Cullen and Jonson (2012) state:

> [s]ome people pay attention to future consequences but others do not—or at least not as much. Some people are more impulsive, short-sighted, inebriated, under the sway of peer influence; alas, these people tend to be offenders! They are not good at paying attention to future consequences. But paying attention to future consequences is essential if someone is to be deterred by the threat or even the imposition of a criminal punishment. Scaring offender's straight is thus a difficult business. (p. 68)

Wright (2010) concludes that increasing the certainty of punishment, as opposed to the severity, is more likely to produce deterrent effects. Cullen and Jonson (2012) examined studies of *policy changes* that increased the severity of punishment to assess if criminal sanctions deter criminal acts. They reported four primary conclusions:

> There appear to be real short-term deterrent effects; The deterrent effects tend to decay over time; Many interventions show weak or no effects on crime, or they vary by context; and, in limited circumstances, there may be a "brutalization effect," in which increased punishment is associated with increased crime. (Cullen & Jonson, 2012, p. 76)

These studies suggest that when a claimant is punished in a way that is visible to the community, then it has the potential to generally deter crime for a limited period of time. The fact that the effects tend to decay over time suggests that the individual may return to crime when he/she believes he/she can avoid being detected. The propensity to commit fraud also increases when one is no longer thinking about the punishment handed down to another person because the publicity around the punishment ceased, or when his/her criminogenic risk factors resurface.

4.5.3 Rational Actors: Choice and Perception

A key factor for deterrence to be effective is the idea that those who may be potential fraudsters are 'rational actors' who are able to weigh the costs and benefits of committing a crime. Yet, as illustrated, this is one of the assumptions of deterrence theory that is perhaps the most problematic. As such, two auxiliary areas of study

look to understand the assumptions criminologists make with regard to the choices and perceptions of would-be offenders, including rational choice theory and perception.

4.5.4 Perception and Deterrence

As has been shown, a range of factors might influence a person's propensity to commit crimes, but one factor in determining whether a crime takes place is their perception of the certainty and severity of punishment (Cullen & Jonson, 2012). As Cullen and Jonson note:

> [i]f this were the case (and we suspect it is), this is good news and bad news for deterrence theory: The good news is that increasing certainty/severity of punishment should have some deterrent effect (because part of the reason for crime is the view that it pays). The bad news is that the deterrent effect is likely to be modest (because other factors involved in the causation of crime are not changed by punitive interventions). (Cullen & Jonson, 2012, p. 73)

Cullen and Jonson (2012) reviewed perceptual deterrence studies. These studies examine an individual's perception of punishment that is certain and/or severe to determine if they are less likely to be involved in criminal behaviour, providing evidence of a deterrent effect. The general conclusions they draw from this body of research are:

> it is likely that perceptions of punishment are related to criminal involvement; Perceptions of certainty of punishment are more strongly

> related to criminal involvement than are perceptions of the severity of punishment; Compared to other known predictors of crime, perceptions of deterrence are a relatively weak to moderate cause of criminal involvement. (p. 84)

Nagin (1998) notes, "knowledge about the relationship of sanction risk perceptions to actual policy is virtually nonexistent [sic]" (p. 36). This means that even if the perceived risk of punishment is related to the level of criminal involvement, it is not known whether the information about sanction risk ever reaches the potential offenders in a population and whether this information affects their thinking and causes them to not commit the crime.

Continuing with the research on offenders' perceptions, Pratt, Cullen, Blevins, Daigle and Madensen (2006) conducted a meta-analysis on the findings of forty studies that had examined perceived deterrence. The significant findings were:

> Multivariate studies suggest that the effects of certainty of punishment are weak and the effects of severity of punishment are weak to non-existent; Perception of punishment is thus likely to be a minor cause of criminal involvement; and, Legal sanctions might have effects on future crime not through fear of sanctions, but through the non-legal or social costs they evoke. This might include rejection by family members, feelings of shame or guilt, and loss of a job. (Pratt, Cullen, Blevins, Daigle, & Madensen, 2006, pp. 22-25)

The conclusion is that research on the effects of perceptions of deterrence with offending behaviour does not offer strong and consistent support.

In addition, Klepper and Nagin (1989) studied how the perception of both the "detection risk and the fear of criminal prosecution play an important role in deterring tax noncompliance" (p. 722). While Klepper and Nagin (1989) note that previous deterrence "studies generally find that neither certainty nor severity of formal sanctions is an important deterrent to crime," informal sanctions such as those associated with socialization and moral considerations "are key determinants of criminal activity" (p. 721), particularly within the realm of tax compliance. For them, the differential between the studies of others and their own research "call into question the efficacy of conventional forms of punishment in deterring crime" (Klepper & Nagin, 1989, p. 721). Is being labelled as or being perceived as a criminal more effective than actual punishment? Klepper and Nagin (1989) argue that one of the failures of previous deterrence studies is "a failure to account for differences among individuals in the personal consequences of being formally sanctioned" (p. 723).

Nagin (1998) notes that his own research indicates that "individuals who report higher stakes in conventionality are more deterred by perceived risk of exposure for law breaking," noting that his own "most salient finding in this regard is for tax evasion" (p. 70). This is particularly relevant when considering formulating a policy for deterring crimes of fraud. Nagin (1998) argues that "[s]tated differently, if the evasion gamble also involved putting reputation and community standing at risk, our middle-class respondents were seemingly unwilling to consider taking the non-compliance gamble" (p. 70). In a seeming contrast, he also notes that "my tax evasion research also suggests that people do not perceive that costs are proportional to potential punishment. Instead, it seems that they perceive that there is fixed cost

associated with merely being convicted or even apprehended if it is public record" (Nagin, 1998, p. 70).

A finding of interest relevant for the CFIP is that among active fraudsters their assessment of the risk of getting caught is dependent on their prior success in committing crime without being arrested. Consistent with this is a finding from Horney and Marshall (1992) reporting that for convicted males, "the data suggest[s], at least for certain crimes, that perceptions are formed in a rational manner, that is, the likelihood of arrest is judged on the basis of how many times a person has been able to commit the crime without being arrested" (p. 589). In terms of the CFIP, this would mean that if a claimant has been committing fraud for a period of time and has not been detected then it is highly probable this behaviour will continue.

In the introduction to this study, I presented and described the term *light blue-collar* crime, meaning the *white-collar* crime of fraud committed by *blue-collar* workers. This notion of *light blue-collar* crime is an interesting contribution to criminological scholarship, provided to address some of the debate in the literature about the application of the term *white-collar* crime. In the next section, I will review the literature that reflects the many meanings of *white-collar* crime and the fact these meanings are deeply contested.

4.6 *White-Collar* Crime

Sutherland (1949) introduced the concept of *white-collar* crime to draw attention to the fact that crimes are committed by individuals from all social classes and not only by members of the lower class. The result was criminological research focusing on the crimes committed by individuals from the upper class. Sutherland (1949) explained that *white-collar* crime "may be defined approximately as a crime committed by a person of respectability and high social status in the course of his occupation" (p. 9). This definition has not helped with limiting the range of criminal behaviours that constitute *white-collar* crime. Instead, the literature indicates that the concept is ambiguous and challenging to define. As an example, Robin (1974) noted that *white-collar* crime was originally vaguely and loosely defined by Sutherland and that this vagueness has fostered an ambiguous use of the term and encouraged vague interpretations. Edelhertz (1983) suggests the concept is totally inadequate to characterise the kinds of behaviour that are at the root of the phenomena. Friedrichs (2002) further argues that "perhaps no other area of criminological theory has been more plagued by conceptual confusion than that of white-collar crime" (p. 243). Edelhertz (1983) argued that by focusing on the offender's status and the workplace as the location of the crime, rather than the offence, the concept did not accurately reflect the behaviours that needed to be addressed. Introducing the term *light blue- collar* crime is intended to address this problem of the offender's status and the workplace as the location of the crime. The claimants committing fraud at the Commission are primarily *blue-collar* workers committing the *white-collar* crime of fraud. They tend to be lower in social position than Sutherland's *white-collar* criminals, and their crimes are not committed in the

course of their occupation, but rather while on workers' compensation. It could be argued that *earnings-related* fraud is committed in the course of their occupation, but only because they have reported to the Commission they cannot work and earn an income, an act that constitutes fraud.

Shapiro (1990) also recognised the problems that the conceptualisation of *white-collar* crime created for future researchers. She wrote:

> The concept has done its own cognitive mischief. It . . . is founded on a spurious correlation that causes sociologists to misunderstand the structural impetus for these offences, the problems the offences create for systems of social control, and the sources and consequences of class bias in the legal system. (p. 346)

White-collar crime became part of the focus of criminology because it refers to violations of the criminal law. Since its original definition is limited to a violation of the criminal law, the literature has debated whether or not the term should include crimes that are not addressed in criminal courts. In this study, the term *light blue-collar* crime will refer to both *disability-related* fraud cases and *earnings-related* fraud cases.

A review of the literature indicates the term *white-collar* crime has empirical ambiguity. For example, one study of convicted *white-collar* offenders found that most offences described as *white-collar* crimes were actually "committed by those who fall in the middle classes of our society" (Weisburd, Chayet, & Waring, 1990, p. 353). The term also has policy ambiguity because the vagueness of the definition,

and its academic focus, has created a gap between those developing policies and practises responding to *white-collar* crime and those studying it (Edelhertz, 1983).

Sutherland defends the vagueness of the term. He noted that his point was not precision, but to demonstrate how *white-collar* crime is "identical in its general characteristics with other crime rather than different from it" (Sutherland, 1941, p. 112). He argues:

> The purpose of the concept of white-collar crime is to call attention to a vast area of criminal behavior which is generally overlooked as criminal behavior, which is seldom brought within the score of the theories of criminal behavior, and which, when included, call for modifications in the usual theories of criminal behavior. (p. 112)

There are scholars who define *white-collar* crime by the type of offender (e.g., high socioeconomic status and/or occupation of trust). Some of the criticism of defining *white-collar* crime in terms of the type of offence is because this definition emphasises the nature of the acts rather than the offender's background. There are also those that define it in terms of the type of offence (e.g., economic crime) or in terms of the organizational culture rather than the offender or offence. There are also those that restrict the definition mainly to economic crime as well as others that include other corporate crimes like environmental law violations and health and safety law violations.

This lack of a universally accepted definition of *white-collar* crime makes it difficult to measure the most effective responses to the problem. The varying definitions also make it difficult to draw comparisons between different *white-collar* crime studies

and vague conceptualisations make it difficult to identify the specific causes of the behaviour and accurately determine the extent of *white-collar* crime.

White-collar crime can be defined as violations of criminal law. From this definition, *white-collar* crimes are criminally illegal behaviours committed by members of the upper class during the course of their occupation. It can also be defined as violations of civil law. An example would be a case of corporate wrongdoing against a consumer that is addressed by the civil justice system. *White-collar* crime can also be defined as violations of regulatory law. Some workplace misdeeds might not violate criminal or civil laws, but may violate a particular occupation's regulatory laws.

White-collar crime can also be defined as workplace deviance. This is a broader way to define *white-collar* crime and such an approach would include all of those workplace acts that violate the norms or standards of the workplace, regardless of whether they are formally defined as illegal or not. Violations of criminal, civil, and regulatory laws would be included, as would those violations that are set by the workplace itself.

Definitions can also focus on the social harm caused by the crime**.** Those defining *white-collar* crime from this perspective are more concerned with the harm done by occupational activities than whether behaviour is defined either formally or informally as illegal or deviant. According to one author, "by concentrating on what is defined as illegal or criminal, a more serious threat to society is left out" (Passas, 2005, p. 771). Galbraith (2005) offers the following examples: "[t]he common

practises of tobacco companies, hog farmers, gun makers and merchants are legal. But this is only because of the political nature of the perpetrators; in a democracy free of their money and influence, they would be crimes" (p. 731). Additional examples of *white-collar* crimes that illustrate this social harm perspective have been noted by Passas (2005), who highlighted the following 'crimes' that occur without law breaking occurring: cross-border malpractices, asymmetrical environmental regulations, corrupt practises, child labour in impoverished communities, and pharmaceutical practises such as those allowing testing of drugs in third world countries (p. 779). Passas (2005) emphasised that law breaking does not occur when these actions are performed, but argues the actions are, in fact, criminal (p. 781).

Another way to define these behaviours is to consider *white-collar* crime as research definitions**.** When researchers study and gather data about *white-collar* crime, they define *white-collar* crime in a way that allows them to reliably and validly measure the behaviour. For example, in 2005, the National White-Collar Crime Center conducted a national survey on *white-collar* crime. The researchers defined *white-collar* crime as: "illegal or unethical acts that violate fiduciary responsibility or public trust for personal or organizational gain" (Kane & Wall, 2006). Using this definition as their foundation, the researchers were able to conduct a study that measured the characteristics of *white-collar* crime, its consequences, and contributing factors. However, had they chosen a different definition, their results may have been different.

Another way to define *white-collar* crime is as violations of trust that occur during the course of legitimate employment. To some authors, offenders use their positions

of trust to promote the misconduct (Reiss & Biderman, 1980). Criminologist Susan Shapiro (1990) has argued for the need to view *white-collar* crime as abuses of trust, and she suggests that researchers should focus on the *act* rather than the *actor*. She claims:

> Offenders clothed in very different wardrobes lie, steal, falsify, fabricate, exaggerate, omit, deceive, dissemble, shirk, embezzle, misappropriate, self-deal, and engage in corruption or incompliance by misusing their positions of trust. It turns out most of them are not upper class. (p. 358)

Following Clinard and Quinney (1973), some have suggested that these *white-collar* criminal behaviours should be classified as occupational crimes**.** One author defines occupational crimes as "violations that occur during the course of occupational activity and are related to employment" (Robin, 1974, p. 255). Robin argued vehemently for the broader conceptualisation of *white-collar* crime. He noted that various forms of lower class workplace offences "are more similar to white-collar crime methodologically than behaviorally," (p. 258) suggesting that many occupational offenders tend to use the same methods to commit their transgressions. He further stated that the failure of scholars to broadly conceive *white-collar* crime "results in underestimating the amount of crime, distorts relative frequencies of the typology of crimes, produces a biased profile of the personal and social characteristics of the violators, and thus affects our theory of criminality" (p. 261).

Green (1990) advocates for focusing on occupational crime rather than the limited conceptualisation of *white-collar* crime and defines occupational crime as "any act punishable by law which is committed through opportunity created in the course of

an occupation that is legal" (p. 13). Green described four varieties of occupational crime: (1) organizational occupational crimes, which include crimes by corporations, (2) state authority occupational crimes, which include crimes by governments, (3) professional occupational crimes, which include those crimes by individuals in upper class jobs, and (4) individual occupational crimes, which include those crimes committed by individuals in lower class jobs. The strength of his conceptualisation is that it expands *white-collar* crime to consider all forms of misdeeds committed by employees and businesses during the course of employment.

Using each of the above definitions as a framework, *white-collar* crime can also be defined as violations occurring in occupational systems**.** *White-collar* crime can therefore be defined as "any violation of criminal, civil, or regulatory laws—or deviant, harmful, or unethical actions—committed during the course of employment in various occupational systems" (Geis & Jesilo, 1993, p. 106). This definition allows for numerous types of workplace misconduct to be considered.

As an alternative to the socio-economic definition, many define *white-collar* crime by the manner in which the crime is committed. In 1981, the United States Department of Justice described *white-collar* crime as:

> [n]onviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the person's occupation. (Encyclopedia.com, 2008, para. 1)

This definition focuses on the use of deception as the criminal means. The defendant, however, still must be at least "semi-professional" or have "special technical and professional knowledge."

Sutherland conceptually limited *white-collar* crime to violation of the criminal laws regulating occupations by persons who are 'respectable' or of the 'upper' socioeconomic class. His reason for emphasising social status was primarily for the purpose of demonstrating that persons of high status commit crimes.

The exact meaning of occupational activity is drawn into question when one reviews the literature on *white-collar* crime. The study of offences such as embezzlement, price fixing, and unfair labour practises involve behaviours that occur directly in the course of one's occupational activities. However, to include acts such as income tax evasion and violation of welfare and compensation laws in the category of occupational crime is problematic because these latter behaviours usually do not strictly occur in the course of the person's occupational activity. There are scholars who argue that the behaviour must be directly related to the violator's occupational activities if it is to be included in *white-collar* crime or occupational crime categories. Introducing the concept of *light blue-collar* crime for benefit and claimant fraud has the potential to reduce conceptual problems in theory development and future research.

4.6.1 Deterrence and *White-Collar* Crime

As most of the deterrence literature reviewed for this study has involved studies of what is generally termed *blue-collar* crime, the question becomes what happens when such theories and models of deterrence are applied to those who commit *white-collar* crimes. Lilly, Cullen and Ball (2012) report that "a general consensus exists that, similar to street crime, imposing harsh criminal sanctions is limited as a crime control strategy" (p. 292). Yet, as Weisburd, Waring, and Chayet (1995) note, it is "generally argued that white-collar criminals will be particularly influenced by punishment policies" (p. 587). This may be due to the perception of *white-collar* criminals as being less dangerous than *blue-collar* criminals. A person who commits a non-violent crime like fraud is perceived as less threatening than someone who commits, for example, an armed robbery. Weisburd, Waring, and Chayet (1995) state that "[w]hite-collar crime is seen as a highly rational form of criminality, in which the risks and rewards are carefully evaluated by potential offenders, and white-collar criminals are assumed to have much more to lose through sanctions than more common law violators" (p. 587). However, they claim that studies illustrate that this perception is false (Weisburd, Waring, and Chayet, 1995, p. 588); that is, the image of *white-collar* crime appears to overstate the degree to which these *white-collar* criminals and their offences differ from *blue-collar* criminals and their crimes.

White-collar criminals, because of their economic and social positions, are perceived to have more to lose when they face criminal sanctions. It is reasonable to conclude therefore that they should be more responsive to punishment. However, studies provide evidence that sanctions may have the reverse effect and lead to more serious

or frequent offending (Bridges & Stone, 1986; Petersilia, Turner & Peterson, 1986). Such evidence necessarily influences the understanding regarding the impact of sanctions on *white-collar* criminals.

Paternoster and Simpson (1993) examined the willingness of *white-collar* corporate employees to commit corporate crimes such as fraud. They postulated the key to the decision to offend for *white-collar* criminals is not the costs and benefits of the act, but rather their perceived utility of the act. They identified two other kinds of costs that might also shape this perceived utility. First, there are the perceived informal sanctions that include the costs to the company of negative publicity or costs to the individual of negative reactions from friends and family. Secondly, there are the individual's own internally imposed sanctions, in particular, their fear of losing self-respect.

4.7 Conditions Necessary for Deterrence to be Achieved

According to the theory, for deterrence to work, the sanctions must be certain, swift and severe. The literature reviewed indicates that the sanctions provided by the legal system are not swift, certain, or severe and do not offset the claimant's immediate benefit from the crime of fraud. These inefficiencies create a problem for achieving deterrence when attempting to put this theory into practise at the CFIP. The research reviewed suggests that being punitive can make claimants more likely to offend. This strategy of increasing the punishment does not decrease crime.

The research does indicate that increasing the certainty of apprehension and punishment is likely to deter crime. However, the CFIP has no control over the certainty of fraud detection, claimant apprehension, obtaining a conviction, or the criminal sanction imposed. Additionally, the CFIP has no control over the decision of a Case Manager of whether or not an administrative sanction will be imposed on a claimant under the WHSC Act.

Deterrence theory does not provide an explanation of the role perceptions of sanction threats play in an offender's decisions to commit crime. Research is lacking about exactly how perceptions concerning punishment, certainty, swiftness, and severity are formed. Even though perceptions of sanction threats do increase in response to an arrest, consistent with the deterrence process, Paternoster (2010) suggests that this effect is very modest. The evidence indicates there is a modest deterrent effect because of the perceived certainty of legal punishment and no consistent effect for the perceived severity or swiftness of punishment. There is also a modest to strong effect due to perceived benefits from offending.

For deterrence to be effective, potential fraudsters need to perceive the likelihood of detection and punishment as high when the reality is they may be poorly informed. Research by Zimring and Hawkins (1973) suggested that would-be fraudsters are not well-informed about the actual risks of administrative or criminal sanctions. In addition, the public does not know much about the maximum and minimum punishments provided by law for different offences. The public also tends to underestimate the severity of punishment imposed by the justice system. They are largely unaware of the specifics of sentencing which diminishes any deterrent effect.

The severity of punishment will therefore not likely be a consideration for claimants if they do not believe they will ever get caught or if they think the probability of arrest and punishment is low.

Another problem is individual perceptual differences amongst claimants. The research reviewed indicated not everyone experiences the threat of a correctional punishment in the same way. The research calls into questions the efficacy of the CFIP's goal to punish claimants as a means for deterring fraud. Paternoster (2010) reports that researchers have discovered offenders do not see increments in punishment in the same way they are intended to see them which also creates a problem for the CFIP's goal to deter the *light blue-collar* crime of fraud.

Consistent with the rational actor assumption, the research has shown that an individual's assessment of the risk of being legally sanctioned is affected by his/her and others' experiences of committing crimes with impunity of getting arrested. Those who have committed fraud and 'got away with it', and those who know of others who have had the same experience, are more likely to lower their estimate of the risk of fraud. Claimants who are arrested for fraud will probably update their perception of the attendant risk. However, prior perceptions of the risk of being punished are generally modified downward when a claimant commits fraud and gets away with it.

Also, the research findings regarding perceptions of sanction threats do not strongly correlate with the actual levels of punishment. This is indicative of the CFIP's and

the criminal justice system's inability to regulate criminal conduct through making punishment more certain, severe, or swift.

Paternoster (2010) concluded "[t]here is evidence that would-be fraudsters are not completely unmindful of the objective risks and costs they run if they commit fraud, but the correlations in the research indicate they are weak" (p. 804). In fact, there really is not much evidence in support of a strong correlation between the objective and the subjective effects of punishment. Would-be fraudsters' perceptions of the certainty and severity of punishment are not strongly related to the objective purposes of punishment and are, therefore, not likely to be responsive to policy changes. The research needs to continue in an effort to explain the variation amongst individuals in perceptions of sanction threats. The current state of the research indicates we know very little about how perceptions of punishment are formed.

The research suggests claimants will often commit their crime with little planning and consideration for the costs and benefits. They act impulsively, and their immediate financial need outweighs the uncertain future consequences should their fraud be detected. Dejong's (1997) conclusions illustrate the difficulty in calculating the exact formula to determine the efficacy of deterrence. Also, as discussed previously, Dejong's (1997) study of deterrence indicated how negative consequences for those with a future orientation such as impacting community reputation and familial connections through incarceration may have a deleterious effect on recidivism.

Research on prison sentences or longer prison sentences show they do not deter, and, for low risk offenders, they may actually slightly increase the risk of recidivism. The literature on the specific deterrent effect of imprisonment does not suggest that either imprisonment itself or the length of imprisonment is effective in deterring crime for those who experience it.

The criminal justice system has not demonstrated it is capable of exploiting offender rationality in a manner that ensures actual/potential offenders will be effectively deterred by sanction threats. In order to be effective in offsetting the perceived benefits of crime, the punishment for claimants must come soon after the offence. The benefit of fraud must be countered in the claimant's mind by the anticipation of swift punishment.

Bottoms and Tonry (2002) assert that "deterrence works best for those persons who have strong ties of attachment to individuals, or to social groups or institutions, in a context where those individuals, groups, or institutions clearly disapprove normatively of the behaviour at which the deterrent sanction is aimed" (p. 32). However, the study by Weisburd, Waring, and Chayet (1995) did not find a demonstrative difference between the specific deterrence of incarceration in *blue-collar* and *white-collar* criminals.

4.8 The CFIP and the Deterrence Approach

The Commission's policy makers constructed the CFIP to detect claimant fraud through the use of investigators, the Fraud Tip Line, and covert video surveillance. It was believed that when there was evidence of fraud, subsequent punishment, applied through administrative and criminal processes, would reduce the risk of recidivism. They further assumed making an example of a sanctioned claimant would influence the risk perception of others, increasing their perception of the risk of being detected and punished leading those considering fraud to refrain from committing the crime.

In the CFIP context, deterrence theory proposes that the best way to prevent claimant fraud is through punishments that are swift, certain, and appropriately severe. Consequently, a deterrent effect is evidenced when a claimant refrains from committing fraud because they fear the certainty, swiftness, and/or the severity of the formal legal punishment (Paternoster & Bachman, 2001, p. 14).

In terms of sanction severity, the Commission's policy makers assumed the deterrent effect is derived from the level of punishment with a further assumption that severe sanctions achieve a higher level of compliance. In reference to severity, this works when claimants perceive the consequences of being caught as severe and consider this threat of being caught and punished as credible. Wikström (2007) states the "perceived risk of being caught and punished is for obvious reasons a more important factor in influencing an individual's actions than the actual risk (in cases

where these two differ), although it is plausible to assume that the perceived risk is to some degree dependent on the actual risk" (p. 7).

Using the basic assumptions of deterrence as a justification, the CFIP increased its investigative capabilities and also hired private investigators throughout the province as a means to enhance its ability to detect and deter claimant fraud. One would expect the resulting increased investigative activity to influence the perception among would-be offenders that the certainty of detection and prosecution had increased and that, as a result of these changed perceptions, crime would be deterred. The criminological research evidence base, however, gives very little cause to believe that this will, in fact, be the case, and the Commission's policy makers may have been flawed in the first place by their lack of a firm understanding of deterrence theory. For example, Paternoster (2010) reviewed the research literature examining an increased law enforcement presence and concluded that "reviews of this literature are more optimistic than definitive" and "many studies, in fact, show that even with massive police effort the return in reduced crime is marginal" (p. 794).

Now that the literature and studies regarding deterrence as well as *blue-collar* and *white-collar* crime have been reviewed, the literature is used to answer Research Question 1.

4.9 Conclusion: Answer to Research Question 1

The first research question asks whether the current claimant fraud investigation programme can work in principle. To answer this question, key aspects of legislation, policy, and procedure are analysed from a criminological and socio-legal standpoint using the empirical literature relating to deterrence and rational choice.

As stated by Shover and Hochstetler (2006), programmes such as the CFIP, grounded in theories of deterrence and incapacitation, intend to increase the odds and severity of punishment. The belief in the effectiveness of deterrence theory for the CFIP appears to be driven by its political attractiveness and ready-made application to Policy EN-11: Investigations.

In principle, the Commission and the justice system should be efficient in administering punishment by providing sufficient resources to detect fraud and to swiftly process and punish them. The reality is that there are long delays in processing individuals through the courts and severe punishment for fraud is unlikely and out of the control of the CFIP and other Commission officials.

To deter other claimants there would need to be evidence that criminal activity has negative consequences, and this would have to be communicated to the wider community. The reality is that only the Commission knows which claimants have been sanctioned and the punishment they received. The use of deterrence in policy appears to be grounded in a kind of 'common sense' approach and the literature

reviewed does not provide consistent support for deterrence theory. The assumptions of the Commission's policy makers evidence a lack of understanding of deterrence theory and the claimant population it has targeted for this strategy. The research reviewed indicates that deterrence theory proves to be weakly supported, and the likelihood of the CFIP achieving such effects is low. The claimants are *blue-collar* workers and deterrence strategies are not effective due to a lack of a 'future orientation' when a claimant's financial needs in the 'here and now' take priority in their cost benefit analysis.

Without an understanding of which mechanisms of deterrence impact a claimant's perceptions of certainty and severity, and how that affects their choices and behaviour, the CFIP cannot explain how its policy goal of deterrence will affect the claimant's choice to commit fraud. The belief that its use of a zero-tolerance policy, referring fraud cases for criminal prosecution in addition to administrative sanctions, the presence of well-trained investigators, the use of a Fraud Tip Line, and covert video surveillance can work in principle, is not supported by the research.

The conclusion reached based on criminological research outlined above is that the CFIP's policy of deterrence is unlikely to work in principle.

5 THE CLAIMANT FRAUD INVESTIGATION PROGRAMME: FACTORS SHAPING SUBJECTIVE AND OBJECTIVE EFFECTIVENESS

5.1 Introduction

This chapter organises and reports the study's findings relevant to RQ 2: To what extent does the CFIP actually work? The quantitative and qualitative findings are presented together such that the findings of each are used to inform the other, therefore maximising the potential of the mixed methods approach.

Throughout this chapter, the findings are presented in tables accompanied by a narrative using verbatim quotes to provide thick description when appropriate. Inconsistent, discrepant, or unexpected data are noted with discussion of possible alternative explanations. The findings are organised according to data categories with the first category being the investigation of *light blue-collar* crime.

5.2 Investigating *Light Blue-Collar* Crime

The data indicates that the percentage of the workforce whose wages are covered by the Commission's maximum wage-loss benefit, and the sectors of the workforce from which these compensation claims arise situate the claimants as primarily *blue-collar* workers. In the Statutory Review Report (2006) *Finding the Balance*, the

Commission's actuary indicated that 86% of the Provincial work force would have their pre-injury income replaced if they were injured on the job, since their income was insured by the Commission's weekly maximum wage-loss benefit provided in Table 3. The other 14% of the workforce earn higher than this benefit. The Commission's weekly maximum wage-loss benefit increases annually based on the Canadian Consumer Price Index.

Table 3: Weekly Maximum Wage-Loss Benefit (Canadian dollars)

Year	2005	2006	2007	2008	2009	2010	Average
Weekly Maximum	889.9	908.56	931.24	947.98	968.83	985.29	938.63

In addition, an analysis of the Commission's claims data for the period under study indicates that 81% of the claims filed at the Commission come from the construction, mining, manufacturing, wholesale/retail, transportation, health care, and fishery industries, indicating that the majority of the compensable injuries are injuries to *blue-collar* workers. Table 4: Weekly Earnings by Occupation below provides the weekly gross wages provided by Statistics Canada (2011) for workers in this Province employed in the occupations that constitute 81% of the claims filed at the Commission.

Table 4: Weekly Earnings by Occupation (Canadian dollars)

Industry	2005	2006	2007	2008	2009	2010	Average
Construction	732.39	761.83	801.13	885.02	952.16	953.11	847.60
Mining	856.05	881.39	928.32	976.58	1,004.53	1,017.46	944.05
Manufacturing	799.51	803.34	836.42	876.18	844.54	803.72	827.28
Transportation	773.41	800.10	823.73	829.72	878.55	889.15	832.44
Health care	687.51	691.09	693.84	712.48	781.40	833.46	733.30
Fishery	517.39	557.30	594.67	637.50	653.36	648.55	601.46
Wholesale/Retail	475.59	487.03	501.82	523.23	546.16	556.80	515.11

When the data in Table 4 is compared with the Commission's weekly maximum benefit data, which increases annually based on the Consumer Price Index for Canada provided in Table 3, it is evident that the majority of these claimants would have their full wages replaced while on compensation, thus explaining why the majority of the Commission's claimants come from these occupations. The other 14% of workers in this province who earn higher wages, such as those employed in the oil and gas industry, would not have their full weekly wages replaced while on a claim, and they are less likely to make a claim for workers' compensation for purely financial reasons. When injured, these higher wage earners often do not make a claim for workers' compensation choosing instead to take sick leave from their employer or go on a private disability insurance claim when they have such a policy.

In addition, the occupations of the claimants that were referred to the police and subsequently resulted in a criminal convictions indicates, but does not definitively

establish, that the CFIP is attempting to deter fraud committed by persons primarily working in *blue-collar* occupations. Three claimants were working as taxi drivers, one was a labourer in construction, one was an ambulance attendant, one was insulating homes, and the other was working as a health care attendant. This data indicates that claimant fraud for the CFIP is the *white-collar* crime of fraud committed by *blue-collar* workers.

The CFIP reports that the incidence and cost of claimant fraud in this system remains difficult to quantify as it only has data on suspicious claims that have been reported and/or investigated, and their data may only represent a percentage of the actual amount fraud. To date, there has not been an audit conducted on, nor any data analysis applied to, the Commission's claims data to estimate or determine the extent of claimant fraud within the system. While the participants agree that there may be some fraud in the system, intentional or unintentional, the participants' perceptions of the frequency and quantity of fraud reflects their past experiences and roles within the system rather than an analysis of the CFIP's data.

For the period under study, there were 1,851 investigation files open by the CFIP during the same period as the Commission accepted 25,974 new claims. Table 5: Claims Accepted provides the number of wage-loss claims accepted annually for compensation.

Table 5: Claims Accepted

Year	2005	2006	2007	2008	2009	2010	Total
Wage-Loss Claims	4,787	4,568	4,353	4,255	3,999	4,012	25,974

This data indicates that the equivalent of seven percent (7%) of the new claims accepted by the Commission had a fraud investigation file opened by the CFIP. This number of investigations is three to four times higher than the one to two percent that literature indicates is the estimated percentage of fraudulent claims. The literature reviewed for this study indicates that the claimant fraud rate in workers' compensation is estimated to be approximately one to two percent (1-2%) of all wage-loss claims. Based on this literature, since the Commission accepted an average of 4,329 wage-loss claims per year for the period under study, the number of fraudulent claims should be between 43-86 claims per year. This estimate is compared to the perceptions of the study participants as they were asked for their perception of the claimant fraud rate. Twelve of the participants provided responses while two stated they had no idea what the fraud rate might be and declined to answer the question. There was significant variation in their perceptions of the fraud problem that the CFIP was designed to detect, investigate, and deter. Their perceptions of the percentage of fraudulent claims ranged from 1% to 75%. The mean was 18.18%, with the median and mode both 10%. Based on the accepted claims data, the participants perceive the number of fraudulent claims to range between 43 and 3,245 claims. These perceptions of the incidence of claimant fraud are also compared with the actual experience of the CFIP in detecting this type of

fraud. The comparison begins with the findings relevant to how these investigations are triggered by referrals for investigation.

5.2.1 Referrals to the CFIP

The number of investigation referrals made to the CFIP, and their sources are provided in Table 6: Referral Sources.

Table 6: Referral Sources

	Year						
Referral Source	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**Total**
Anonymous	178	192	200	173	170	230	1,143 (62%)
Commission Employees	109	109	80	48	45	9	400 (22%)
Employer	30	24	30	26	22	29	161 (9%)
Public	16	7	9	6	22	65	125 (6%)
Email/Letter			2	2	5	1	10 (<1%)
Not Recorded	4	1					5 (<1%)
Video Surveillance					2	1	3 (<1%)
Crime Stoppers			1		1		2 (<1%)
Ex-Wife		2					2 (<1%)
Total	**337**	**335**	**322**	**255**	**267**	**335**	**1,851**

The data in Table 6 indicates that the majority of the CFIP files, 1,143 (62%), are initiated by anonymous tips. Four hundred (22%) are initiated due to a referral made by Commission employees, and 161 (9%) referrals are initiated by employers. The 'public' category is comprised of individuals who identified themselves 'as a

member of the general public' as opposed to those who made a referral but preferred to remain anonymous. Sending in a fraud referral by letter or an email does happen, but it is very infrequent. Fraud tips are also left on the Crime Tip Hotline operated by Crime Stoppers funded by the Provincial police force. Once received, these tips are then sent by Crime Stoppers to the CFIP providing another source for detecting fraud. The Crime Stoppers' tips come from citizens when they see someone that they think is a workers' compensation claimant, and they see that person active outside of work, and report it to Crime Stoppers instead of the Commission's Fraud Tip Line. The CFIP reports that this probably happens due to citizens being unaware that the CFIP has its own tip line.

Interestingly, there were also two ex-wives who made referrals to the CFIP. Further analysis of these investigations indicated that both of these files were closed as there was no evidence supporting an allegation of fraud.

The data base did not indicate the job classification for Commission employees that made the internal referrals to the CFIP. A follow up discussion with the Legal Assistant who receives these referrals indicated that the majority (>90%) of these referrals are made by Case Managers. This is consistent with the perception provided by ten participants who perceived the Case Managers as playing a role in the investigation and deterrence of claimant fraud.

5.2.2 The Case Managers' Role

The participants' perceptions that Case Managers play a role in the investigation and deterrence of claimant fraud appear to be based on two commonly held beliefs. First is the belief that Case Managers should inform claimants about previous situations in which claimants were prosecuted and/or had their benefits reduced, suspended, or terminated for non-compliance. Secondly, the participants perceive having a conscientious Case Manager, who tracks a claimant's recovery and documents his/her functional abilities during recovery, plays a significant role in reducing the opportunity for fraud. Five participants viewed the Case Managers as playing a role in minimising the opportunity to commit fraud through the 'return-to-work' programme and identified this role as a deterrence mechanism.

Three of the participants perceived the Case Managers as having too much of a focus on rehabilitation and compensation, which led to them tending to shy away from investigations generally and not acting on evidence indicative of fraud when it is presented. These participants stated they were personally aware of cases when Case Managers were reluctant to question a claimant when presented with evidence of fraud. These participants perceived the Case Managers as looking for ways to dismiss or 'explain away' the evidence. In this instance, the Case Managers were perceived as reluctant to take the extra step of holding the claimants accountable when in receipt of evidence of non-compliance with the WHSC Act. This data is indicative of the participants perceiving a conflict between the role of Case Manager and the role of investigator.

In contrast, four participants perceived the roles of investigators and Case Managers as complementary. These participants had an intimate knowledge of how the investigator's role had evolved and improved over time. In particular, they were aware of investigations that were started at the request of Case Managers. This is also evidenced by the data in Table 9 that 400 referrals were made by Commission employees, primarily Case Managers. In addition, from an investigation point of view, the perception was that much had improved. For example, the fact that Case Managers were now allowed to make referrals for a fraud investigation and the use of private investigators that specialise in surveillance and the use of covert cameras were viewed as progressive. As for Case Managers, the policies relating to early and safe return-to-work and the obligations of the employer to re-employ injured workers were also perceived as reducing the opportunity for fraud by increasing the claimant's perception of the risk of detection. The reason for this is that the focus on a claimant's return to work and their improvement in physical function reduces the time they are off work and therefore minimising the opportunity for fraud.

5.2.3 Policy and Procedures

The participants were also asked for their perception of the appropriateness of the CFIP's policies and procedures for claimant fraud investigation. Nine participants perceived the Commission's policies and procedures to be appropriate for claimant fraud investigation. Three participants did not perceive them as appropriate to conduct effective investigations as they were of the view that claimant privacy considerations were trumping the CFIP's right to conduct effective investigations.

Two participants did not comment as they were not familiar with the details of the policies and procedures. When the participants were asked if the policy and procedures were effective in deterring fraud, eight of the participants perceived them to be working and effective. Their responses indicated the policies and procedures are perceived as effective in specifically deterring individual claimants, but no references were made to achieving a more general deterrent effect.

Four participants believed the policies were not appropriate for fraud deterrence as they do not refer to specific mechanisms necessary to deter it. In addition, these participants perceived the absence of a dedicated Crown Prosecutor to be problematic in getting charges laid and then moving these cases through the courts. They also perceived the Commission as not having the will to enforce its own zero-tolerance policy for fraud. Again, two participants did not respond. These two had privacy expertise, but were external to the Commission, and did not comment as they were not familiar with the specific details of the Commission's policies and procedures guiding investigations. Hence, while their expertise was valuable to the study, they were not able to provide responses to the questions posed regarding the CFIP policy EN-11 and procedures 52 to 57 due their lack of specific knowledge.

There are two consistent themes in the statements made by three of the participants, indicative of their perception of the CFIP's inability to prove and deter *disability-related* fraud. The themes are: 1.) disability fraud is the hardest type of fraud to prove, and 2.) if you cannot get a conviction and a sentence for this type of fraud, and if nobody knows about the conviction and sentence, then all fraud cannot be

deterred. These participants contended the procedures do not indicate how to achieve a deterrent effect, and they do not reflect investigative best practises. The four participants who perceived them as not appropriate to deter fraud were primarily concerned with the Commission's lack of will to communicate to the public the 'deterrence message'. This perception is best demonstrated by a statement made by I4 who stated:

> [t]he deterrence message is not communicated to the public and the policy could not act as a deterrent because the claimants and the public do not know about it. The policy and procedures are available on the Commission's homepage, but they are not promoted and the investigation outcomes are not disclosed.

The policy and procedures are generally perceived as equally appropriate for fraud investigation and for fraud deterrence. More specifically, five of the eight participants who perceived the policy and procedures as appropriate for fraud deterrence, and seven of the nine who viewed them as appropriate for fraud investigation, were specific in pointing out that they were only appropriate for *earnings-related* fraud, but not for *disability-related* fraud. This is consistent with the data provided indicating there were no cases of *disability-related* fraud referred to the police and all seven convictions were for *earnings-related* fraud.

Four participants made specific reference to Procedure 53 for video surveillance stating it needed to be strengthened allowing for the collection of more covert video surveillance evidence in more cases. These participants believed that a strengthened procedure would allow video evidence to be used more frequently to compare the

claimant's reported activities with his/her actual activities recorded on video that are indicative of fraud.

The participants were also asked for their perceptions of the information protection and access limitations that should be provided to a claimant during an investigation. The responses are provided in Table 7: Limitations.

Table 7: Limitations

	Frequency
Privacy Laws/ATIPPA	14
Access to Medical Records	9
The Claim File	3
Too Many Limits	2

All of the participants perceived privacy laws, such as ATIPPA, as providing the privacy framework for determining who should have access to confidential health information during an investigation. Nine participants were concerned about the investigators having direct access to the claimant's medical records. There was a perception held by these nine participants that providing this type of access for investigators goes too far. Three participants perceived that access to the claimant's file was only appropriate for Case Managers who are required to medically manage the claim, but not for investigators. Two participants perceived there to be too many limits on investigations and believed that investigators should be able to access whatever information already in the Commission's possession.

The CFIP reported that the investigators do not have access to claimants' files or medical records as there is no legitimate business purpose. The medical information is only able to be accessed by the Case Manager. When the findings from investigations are collected, it is the Case Manager who is required to consider and weigh all the evidence about the legitimacy of the claim making a decision either for or against future entitlement to benefits.

5.2.4 The Fraud Tip Line

There were 1,143 anonymous referrals made to the CFIP, representing 62% of the 1,851 referrals made. These referrals were further analysed to determine the methods used to make an anonymous referral. Table 8: Anonymous Methods provides a breakdown for the methods used.

Table 8: Anonymous Methods

	Year						
Anonymous Methods	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**Total**
Fraud Tip Line	148	180	185	156	152	215	1,036 (91%)
Letter	13		14	16	18	15	88 (7%)
Not Recorded	14		1				15 (1%)
In Person	3			1			4 (<1%)
Total	**178**	**192**	**200**	**173**	**170**	**230**	**1,143**

This data indicates that of the 1,143 anonymous tips received by the CFIP, the majority [1,036 (91%)] were received through the Fraud Tip Line. In addition, document analysis confirmed that there was evidence the Commission implemented the Task Force recommendation to promote the Fraud Tip Line. There are four sources where it is promoted: on the Commission's webpage, in the Injured Workers' Handbook, in the Employers' Handbook, and in Procedure 52: Investigations Referral. The number of anonymous referrals received annually increased from 148 to 215 during the study probably as a consequence of its promotion to the public.

Eleven of the participants perceived the Fraud Tip Line to be an effective mechanism for detecting claimant fraud, and they further perceived it to provide a deterrent effect. This is evidence that the majority of the participants perceived the CFIP to take fraud deterrence seriously. Yet, four of the participants did not think the CFIP had the potential to achieve this effect due to the inadequacy of its policies and procedures. This may be an effect of asking general as opposed to specific deterrence based questions to the participants. The majority of the participants believe that the Fraud Tip Line has a deterrent effect, but they thought it should be promoted more to the public in a wide variety of publications and in the media.

Three participants did not believe the Fraud Tip Line deterred claimant fraud, and they contended that many of the calls alleging fraudulent behaviour were not supported by the facts. This is consistent with the quantitative data in Table 13 indicating many of the fraud allegations did not reveal evidence of fraud as the

claimants were involved in normal activities of daily living. The Case Managers had confirmed that the alleged fraudulent activity was within the claimant's functional ability. In other cases, the allegation was made about a person who was not on a claim for compensation with the Commission. The three participants that did not perceive the Fraud Tip Line to deter claimant fraud thought that it only positioned the CFIP to investigate more allegations of fraud compared to a Commission or Board that did not have one. In addition, six participants perceived the promotion of the Fraud Tip Line to be part of the CFIP's mandate.

The CFIP was perceived to function primarily based on anonymous tips by seven participants. This perception is consistent with the data provided in Table 6 indicating that 62% of the tips are anonymous. The participants having the most familiarity with the CFIP acknowledged that anonymous tips received through the Fraud Tip Line provide the basis for the majority of the claimant fraud investigations.

The participants were asked for their perceptions of the circumstances that should be necessary to commence a claimant fraud investigation based on an anonymous tip. The majority of the participants suggested several circumstances. Eight believed that anonymous tips should be authenticated prior to an investigation. Seven participants made reference to the presence of red flags on a claim as being important triggers for an investigation to commence. Seven participants suggested that an investigation should commence when previously established CFIP criteria had been met. Three participants believed that an investigation could be initiated with a 'reasonable

grounds' test, and three participants suggested an investigation should start when auditing detects fraud markers or red flags in addition to the anonymous tip.

A statement provided by participant L1 cautioned on the use of red flags for claimant fraud suggesting:

> [we need to consider][t]he remedies for a case which has the red flags, but has nothing concrete to investigate; there is not much we can do. This will result in a tension of who could do what. Why does a person with a sedentary eight hour work day tolerance not seem to get back to work? Why does the Case Manager continue to authorise more medication? Is there an addiction? The answer may be that the person has little education, poor employment opportunities, may or may not have some sort of addiction, and is very attached to their benefits and they cannot survive without them. If we use the red flag method, we have to make it clear that this is not a Panacea for those claims. The reasons these people are not working must be clearer. Other questions need to be asked to the Case Manager. Is there something else going on? Do you think there is an over reliance on medication? We still must have reasonable grounds.

Next, the data on claimant fraud investigations is analysed to determine the CFIP's outcomes and, in particular, examine the findings related to both administrative and/or criminal justice sanctions arising from these investigations.

5.3 Investigation Status and Outcomes

Table 9: Investigation Status provides the annual number of the CFIP's files "closed" and "ongoing" on an annual basis for the 1,851 investigations.

Table 9: Investigation Status

	Year						
Investigation Status	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**Total**
Closed	299	309	303	248	250	276	1,685 (91%)
Ongoing	38	26	19	7	17	59	166 (9%)
Total	**337**	**335**	**322**	**255**	**267**	**335**	**1,851**

The vast majority of investigation files opened by the CFIP are also closed in that same year. In total, 91% of the claimant fraud investigation files opened by the CFIP were closed and nine percent remained open at the conclusion of the study.

For the 166 investigation files (9%) that remained "ongoing" by December 31, 2010, the reasons were:

- the investigation had not commenced for forty-eight (29%) files. These were files opened in 2009 or 2010, but had not yet commenced primarily due to the fact that pre-surveillance had not yet been conducted. The CFIP acknowledged that these were cases that were intended to be investigated, but, since so much time had passed since the referral, it was unlikely that an investigation so delayed would result in any evidence;

- the investigation/surveillance was not complete and were continuing for seventy-nine (48%) files; and,

- the investigation/surveillance was completed for thirty-nine (23%) files, but, at the time the study concluded, the data base did not have an outcome code entered.

An analysis was then conducted to determine the outcomes for the 1,685 (91%) files "closed". The data base provided the reasons a file was closed as *no result or action taken* and *cases resulting in an outcome*. There were no results or actions taken on 1,630 files and fifty-five files resulted in an action taken against the claimant. The investigation outcomes are provided in Table 10: No Result or Action Taken (2005-2010) and Table 11: Cases Resulting in an Outcome (2005-2010).

Table 10: No Result or Action Taken (2005-2010)

Investigation Outcomes	Number of Files (%)
No Investigation Required	607 (37%)
Activity Unsubstantiated	455 (27%)
Information Gathered-No Change	286 (18%)
Not on a Claim	106 (7%)
Activity Substantiated on One Day Only	62 (4%)
Multiple Referrals	59 (4%)
Information Dated/Lacking	37 (2%)
Unable to Locate the Worker	10 (<1%)
Investigation Not Approved Due to Barriers	8 (<1%)
TOTAL:	**1,630 (100%)**

Table 10: No Result or Action Taken (2005-2010) indicates that for 1,630 (88%) of the 1,851 of the files opened by the CFIP, there was no outcome for a variety of reasons. In 607 cases, a determination was made that no investigation was required since the claimant's activity reported to the CFIP was known by the Case Manager and these activities were known to be within the worker's documented functional abilities. These are cases of a worker complying with the WHSC Act requirement to report a change in their functional abilities to their Case Manager. In 455 cases, the investigation was completed, but did not result in evidence of fraud. In 286 cases,

there was evidence collected of *disability-related* fraud which was forwarded to the Case Manager. The data base indicates that an administrative sanction was applied in only thirty-five of these cases (12%) and seven cases of *earnings-related* fraud were referred to the police for a criminal fraud investigation. This finding is consistent with the perception that Case Managers are looking for ways to explain away the evidence of fraud and/or are not taking action when presented with the evidence indicative of fraud.

Interestingly, there were 106 instances of a CFIP file opened but then closed shortly thereafter as it was determined that the person reported to the CFIP was not on a claim for compensation with the Commission. This finding indicates that citizens may be using the Fraud Tip Line to address their perceptions of an unfair advantage given to workers' compensation claimants, and, in these cases, it was unjustified.

When pre-surveillance indicates that a fraud investigation is warranted, the investigators are required to collect evidence of fraud, usually on video, for at least three consecutive days. The video evidence is collected covertly and is used to prove that a claimant is demonstrating greater functional abilities than the claimant has reported to their Case Manager. If video evidence is only collected for one day, the claimant usually asserts that he/she was just feeling better on that one day and tried to do more than he/she should have been doing. This explanation is usually accompanied by the claimant alleging the activity resulted in him/her later having a flare- up of his/her compensable injury and having suffered for days afterwards. In sixty-two cases, there was no outcome because the investigator could only locate the

claimant and collect evidence on one or two days, not on three consecutive days, of a claimant doing more than he/she alleged they could do. As a result, this evidence was not forwarded to the Case Manager.

There were fifty-nine investigation files set-up for claimants for whom an investigation file had already been previously opened. This is indicative of multiple referrals made to the CFIP by multiple sources for what turned out to be the same claimant.

In thirty-seven cases, by the time the investigation had commenced, the information provided to the CFIP about the claimant's activity was outdated and, hence, unable to be corroborated or substantiated by evidence. There were thirty-one cases where more than one month had passed between the time when the fraud referral was made and when the investigation had commenced. In the other six cases, by the time the investigation had commenced, the person was no longer on a claim for benefits with the Commission. In eight cases, there were barriers identified that prevented the investigation from being conducted. Four cases had the barrier identified as "the claimant living in a remote location," two cases were identified as "high cost," and two cases were identified as having "investigator safety issues." For these eight files, the investigation was also coded as "not approved" and the file was subsequently closed.

Table 11: Cases Resulting in an Outcome (2005-2010) summarises the outcomes for the fifty-five files where action was taken by the CFIP against the claimant.

Table 11: Cases Resulting in an Outcome (2005-2010)

Investigation Outcomes	Number of Files (%)
Benefits Reduced	14 (25%)
Worker Returned to Work	10 (18%)
Benefits Terminated and Referred to the Police for a Fraud Charge	9 (17%)
Benefits Terminated Only	6 (11%)
Benefits Suspended	6 (11%)
Claim Denied	5 (9%)
Claim Accepted	4 (7%)
Worker Withdrew the Claim	1 (2%)
TOTAL:	**55 (100%)**

In these fifty-five cases, the Case Manager or the Intake Adjudicator took action on the claimant based upon evidence of fraud collected by the CFIP. An administrative sanction was applied to fourteen claimants who had their benefits reduced for *disability-related* fraud by their Case Manager. Nine other cases resulted in the administrative sanction of benefit termination by the Case Manager, and these cases were also referred to the police for a criminal fraud investigation. Seven of these nine cases were for *earnings-related* fraud and two were for forgery in an attempt to fraudulently claim benefits. Another six claimants had the administrative sanction of their benefits terminated for *disability-related* fraud. The Director of Legal and Investigations considered the evidence of fraud in these six cases as insufficient to also warrant a referral to the police. Six other claimants had their benefits suspended

pending a further medical review of their claim and a further review of the evidence collected during the investigation. Five claimants had their applications for benefits denied by the Intake Adjudicator. Ten other claimants returned to work with their pre-injury employers, and one worker withdrew the application for benefits while under investigation for fraud.

As such, only thirty-five claimants received an administrative sanction of termination, suspension, or a reduction of benefits when the evidence of fraud was provided to the Case Manager. The evidence of fraud was determined based on 'the balance of probabilities' standard. This means the evidence indicated that fraud was more probable than not. These thirty-five claimants represent less than 2% of the total number of investigation files opened by the CFIP.

Eight participants perceived administrative sanctions to be easier to achieve and more effective as a deterrence mechanism compared to criminal convictions. A statement made by I1 is illustrative of that perception:

> [t]he Commission should use more administrative sanctions than judicial sanction. What I mean by that is, in a claim, during an investigation, you can make the determination to suspend benefits, or to refer the file to the police or stay focused on our administrative sanctions by terminating or reducing benefits. When you go the judicial route, it's costing the Commission extra money and what does it gain? It's not deterrence. Yes, one person will have a criminal record and that might affect their ability to get employment in the future, which is deserved. But, that's it. Maybe I'm missing something. What are we gaining from that? We are tying up lawyers and spending money and sending a message to whom? Nobody. Its

> public information but what percentage of the population actually knows about it"? No one.

Of these thirty-five cases, only nine claimants faced the additional possibility of a criminal sanction and were reviewed to determine whether or not they received a criminal sanction. For these nine cases, the wage-loss benefits were terminated, and there was evidence sufficient to substantiate a criminal charge of fraud. For these nine, the Director had decided that the evidence would meet the 'the balance of probabilities' standard required under the WHSC Act and the 'beyond a reasonable doubt' standard of proof for a criminal conviction. Seven cases were categorised as *earnings-related* fraud as the claimants were receiving benefits from the Commission while at the same time receiving unreported income from employment. The two other cases were referred to the police because the evidence indicated forgery in an attempt to fraudulently receive benefits. As previously noted, there were no cases of *disability-related* fraud referred to the police. This is consistent with Molzen (1999) who asserted that this is the hardest type of fraud to prove.

This data provides quantifiable evidence that only a very small number, representing two percent of the cases investigated by the CFIP, resulted in an administrative sanction. An even smaller number of cases were referred to the police for a criminal fraud investigation. The nine CFIP investigations forwarded to the police for a criminal fraud investigation were then analysed. The following tables provide a summary of these cases. Table 12: January 1- December 31, 2005 indicates that there was one criminal fraud referral made that year, and it also provides the outcome from the criminal justice system.

Table 12: January 1- December 31, 2005

Code	Reason	Covert Video Obtained	Amount of Fraud	Disposition
R7	Working as a labourer	Yes	$7,928.54	Probation One year + restitution $7,928.54

This is a case of a claimant receiving income from working as a labourer while at the same time receiving wage-loss benefits. He pled guilty and was sentenced to one year probation and ordered to make full restitution. There were no referrals made to the police in the subsequent two years, 2006 and 2007.

Table 13: January 1- December 31, 2008 indicates there were two criminal fraud referrals made to the police. These were both cases of forgery in an attempt to fraudulently claim benefits as opposed to earning an income while receiving wage-loss benefits from the Commission, *earnings-related* fraud. At the time the study concluded, these two cases had not been processed by the courts and, therefore, there have been no dispositions.

Table 13: January 1- December 31, 2008

Code	Reason	Covert Video Obtained	Amount of Fraud	Disposition
G2	Forgery (in attempt to claim benefits)	No	>$2,000	Had not proceeded to court.
N4	Forgery(in attempt to claim benefits)	No	>$2,000	Had not proceeded to court.

At the conclusion of this study, the Crown had not decided to proceed with a criminal charge and, therefore, there was no conviction, disposition or restitution order.

Table 14: January 1- December 31, 2009 indicates there were six referrals made to the police.

Table 14: January 1- December 31, 2009

Code	Reason	Covert Video Obtained	Amount of Fraud	Disposition
R8	Working as taxi driver	Yes	$18,856.11	One year probation
T7	Working as taxi driver	Yes	$9,459.00	Restitution $783.57 + 6 months' probation
E5	Working as ambulance attendant	No	$2,594.79	Conditional discharge + 1 year probation and restitution of $553.06
T2	Working for a home insulation company	Yes	$2,703.36	One year probation
R10	Working as a taxi driver	Yes	$1,409.00	One day in jail and victim surcharge $50.00
K5	Working at a health care facility	No	$1,778.49	Two years' probation and restitution of $1,778.49

At the conclusion of this study, all six cases for 2009 had proceeded through the Courts. These were cases of fraud committed for receiving workers' compensation

benefits while earning an income from employment. Three were working as taxi drivers, one was an ambulance attendant, one was insulating homes, and the other was working as a health care attendant. These frauds ranged from $1,409 to in excess of $18,000. The judicial sanctions included probation, restitution, a conditional discharge, and one claimant received a sentence of one day in jail. There were no referrals made to the police in 2010.

In summary, there were a total of seven convictions provided by the courts out of the nine cases referred to the criminal justice system. One was convicted and sentenced in 2005 and the other six were convicted and sentenced in 2009. The total value of the wage-loss benefits paid to the seven claimants who were charged and convicted was $23,169.82. Of that amount, only $11,093.36 (48%) was ordered by the Courts to be repaid to the Commission through restitution orders. This low percentage is explained by the Courts taking into account the claimants' financial circumstances at the time of sentencing. When the Court is presented with evidence that full restitution would create undue financial hardship for the claimant, it can impact the severity of the restitution order the Court imposes. This indicates that even when cases proceed to the Courts, there is no guarantee the Injury Fund will be restored by recovering all of the wage-loss benefits that were collected fraudulently.

All seven claimants were working and earning an income, but were not reporting to these earnings to their Case Manager nor did they report the improvement in their functional ability that allowed them to earn an income. These were all cases of *earnings-related* fraud. These are all cases of *light blue-collar* crime, the *white-*

collar crime of fraud committed by *blue-collar* workers. Six of the claimants received a sentence of probation ranging from six months to two years, and one claimant received a sentence of one day in jail. In five of the seven cases, covert video surveillance was also used to gather evidence of fraud.

As is evidenced from the data, there were a limited number of claimant files that resulted in a punitive measure (either through administrative/regulatory sanctions or criminal sanctions). This means that the processes associated with deterrence theory, namely that punishment be swift, certain, and severe, is clearly lacking. Added to this is the fact that once the files are recommended to judicial authority external to the Commission, such as the police force or the Courts, the punitive measures that may lead to deterrence are impacted by factors uncontrollable by the CFIP such as judicial leniency. The small percentage and/or amount of actual punitive measures illustrate the problematic nature of the CFIP's focus on deterrence as a method of protecting the interests of the Injury Fund.

5.3.1 Video Surveillance

The literature and the participants' perceptions indicate that video surveillance has the greatest potential for violations of a claimant's liberty and privacy and therefore requires significant analysis. The use of covert video surveillance for the CFIP requires authorization of the Director of the Legal and Investigations Department. Table 15 provides an annual summary of the ninety-eight cases for which covert video surveillance was authorised.

Table 15: Cases Approved for Covert Video Surveillance

Year	Number of Cases
2005	31
2006	12
2007	11
2008	10
2009	13
2010	21
TOTAL	**98**

The highest number of cases was thirty-one in 2005 with the lowest number authorised being ten per year in both 2007 and 2008. It appears that authorisation for this form of surveillance is only given in a very limited number of cases. It is important to note that I could not locate or identify any observable, objective criteria that determined which cases would be approved for covert video surveillance or under what circumstances it would be deployed. The data base does provide evidence that the Director authorised this form of surveillance when the investigators documented that other measures were tried and failed first or exceptional circumstances necessitated its use, but, other than this, the authorisation appears to be made using subjective criteria when the decision was made by the Director.

The cases approved for covert video surveillance were conducted by private investigators under contract with the CFIP. Table 18: External Investigations indicates the use of external investigators varied significantly from year to year with the highest number being thirty-one in 2005 and the lowest number being ten in 2007.

In addition, a review of the CFIP's records regarding video recordings provided to the CFIP by outside sources revealed that a total of twenty-six videos were provided. The records did not indicate the year in which they were provided. Twenty of these video recordings were returned to the source that provided them (e.g. employers, private citizens, and private investigators hired by an employer) after a determination was made by the CFIP that they were not relevant to the investigation nor did they provide new information. Video recordings were considered in six cases; however, the data base did not indicate whether any of these videos were used as a basis for an administrative or a criminal sanction.

The participants were also asked if they believed covert video surveillance had a deterrent effect on claimant fraud. Eight participants perceived it as having a deterrent effect, three believed it did not, and three did not know. The fact that covert video surveillance can be used by investigators might be perceived to be part of a general deterrent effect. If its use is well known in workplaces and in communities, claimants may refrain from fraudulent activities if they believe these activities will be caught on video and used against them. Seven of the participants perceived covert video surveillance to be a mechanism to deter *earnings-related* fraud, and one participant perceived it as effective for both types of fraud. This perception was best evidenced by F1 who argued that:

> I think that it makes the claimants more careful about deciding to earn an additional income while on benefits. For some, I think the fact that they know we are out there and many eyes are watching, deters some [sic]. Others, I think it just makes them more careful about what they do and where they are seen doing it.

In addition, these seven participants perceived this type of surveillance as a way of achieving instrumental compliance, because the claimants should be aware that the Commission conducts covert video surveillance and, therefore, they would report changes in their functional abilities out of fear of being watched. Promoting the CFIP's use of video surveillance was perceived by these seven participants as showing the public that the Commission conducts effective investigations, and they believe that is enough to deter most of the fraud and abuse in the system. An exemplar quote provided by I2 demonstrated this perception stating that:

> I think it does deter because Newfoundland is a small place and people talk. If John Smith just had his claim closed because we have five days of video showing he was building a house, then the guy down the street will think twice about it. This seems to work in a neighbourhood or a community for a while, but then it all goes back to the way it was again. There is a time period on it. There is a trickle-down effect, but it only lasts so long. There is a deterrent there.

This is an interesting point about how a deterrent effect might work in a high social-capital community where formal outcomes are spread by word of mouth and influence risk perceptions. This statement is also evidence of a perception that the perceived deterrent effect of covert video surveillance decays over time.

The participants were also asked for their perception of whether or not covert video surveillance should be deployed when a fraud tip is received by the CFIP. Two participants perceived this to be an appropriate strategy to deter fraud, while twelve perceived this to be inappropriate when only based on a tip.

This finding is indicative of the participants perceiving covert video surveillance as an intrusive method of collecting personal information. They further believe that it should not be automatically deployed at the request of someone alleging fraudulent activity without further corroborating evidence to warrant its deployment. They were also asked for their perceptions about the requirements that should be met, if any, for deploying covert video surveillance. The findings are presented in Table 16: Requirements for Deploying Covert Video Surveillance.

Table 16: Requirements for Deploying Covert Video Surveillance

	Frequency
Objective Criteria	7
A Reasonableness Test	4
Privacy Legislation	4
Other things tried first	3
Immediacy and Necessity	2

The responses ranged significantly with the majority of the participants believing in applying objective criteria or applying a reasonableness test prior to deploying covert video surveillance in an investigation. However, there was a minority perception justifying using this form of surveillance immediately in an investigation in an effort to do whatever is necessary and legal to catch claimants in the act of fraud enabling the termination of their benefits. Yet, the majority of the participants believed that steps should first be taken to determine if the person is actually on a claim and then determine if the allegation conflicts with or is consistent with the medical history and current medical information as there might be some alternative explanation for the observed behaviour. This perception indicates that some ground work should be

done first at the pre-surveillance stage in addition with consultation with the Case Manager.

Eight of the participants believed that the Commission should inform all claimants about its use of surveillance when they file a claim for compensation. The consistent perception for these participants was that an informed consent process would let the claimants know that any suspicious activity or information received could warrant the use of video surveillance, thus deterring the claimant from committing fraud in the first place by elevating their perception of the risk of being caught on video.

Six participants perceived that the public was already aware of the Commission's use of covert surveillance. An example of this perception was made by P1 who stated that:

> [t]he public is aware that covert video surveillance exists. If the public was more aware of what the Commission does to investigate fraud and the consequences of someone charged and convicted of fraud, it may change their minds when they think about committing fraud.

These participants perceived the Commission should do more to publically communicate its use of covert video surveillance to increase the perception of risk for being detected, hence ensuring a general deterrent effect.

Five participants commented on the intrusive nature of video surveillance and the potential for privacy violations and intrusions on liberty and freedom. Four of these

five participants also perceived there to be ethical considerations that are of primary importance when considering the use of covert video surveillance by the CFIP. These four participants cautioned against the potential for over-reliance on the use of any type of video surveillance. They believed that visual surveillance and note-taking by a good investigator is just as, or more, effective. This perception was in contrast to seven other participants who perceived covert video recordings as the required standard for evidence of fraud.

Ten participants believed that both the internal and the external investigators should be authorised to use covert video surveillance, and four believed it should only be used by external investigators. It was interesting that none of the participants considered it appropriate for only the internal investigators to use covert video surveillance on the basis they are employed by the Commission and, therefore, bound by ATIPPA. Three participants perceived external investigators to have more freedom in the manner, tools, and techniques they can use. In addition, external investigators were not perceived to be as limited as much as the internal investigators. Limitations such as the internal investigators using their own vehicles and eventually becoming noticed and compromising their ability to stay covert were viewed as problematic. Discussions about this with the CFIP's Director confirmed that the internal investigators mostly do pre-surveillance and not the more lengthy and tactical surveillance typical of a claimant fraud investigation.

Five participants perceived privacy legislation as setting limits such that covert video surveillance can only be conducted in public places. Two perceived the legislation

and the associated privacy guidelines as going too far in the privacy direction and, therefore, impeding effective investigations. The rights of a claimant to privacy and liberty were perceived by these five to supersede the Commission's right to conduct effective investigations.

The participants were asked what liberty and privacy considerations should trump the Commission's right to use covert video surveillance. The frequencies for which the considerations were mentioned by the participants are provided in Table 17: Privacy Considerations.

Table 17: Privacy Considerations

Privacy Considerations	Frequency
Expectation of Privacy	11
In a house	11
In a business	4
ATTIPA	2
ATTIPA and PIPEDA	1

There appeared to be majority agreement that claimants have a reasonable expectation of privacy in their home and while in a place of business that should preclude the use of covert video surveillance. In particular, eleven of the participants made specific reference to the home as being a private place where this form of surveillance should not be conducted. Nine participants made a similar reference to a place of business with the other two referring to a place of business as a public place where covert video surveillance should be used.

Privacy protections that extend into public places were a concern for five participants. This concern is best demonstrated by I1 who stated that:

> [t]he Commission is going a little too far by not allowing covert cameras in public places. An example of that, I just did surveillance last week where the worker had so many functional ability restrictions, like only being able to stand for a couple of minutes at a time. So, he was in a store shopping and he was standing in there for an hour and 40 minutes. His medically documented functional restrictions on file show he reports that he can only stand for less than five minutes. The Commission doesn't allow me to go in and video record that, so I wasn't able to capture any of that activity.

These examples indicate there is some debate in the CFIP over what should be considered a public place. Places considered public, but inappropriate to conduct video surveillance, were also provided by the participants. Three participants suggested that schools, churches, graveyards, hotels, and places where people vote in an election are public locations but are perceived as locations where ethics should prohibit gathering evidence.

Three other participants perceived fraud investigations as an exceptional circumstance necessitating the use of covert video surveillance in all locations except the claimant's place of residence; they considered the CFIP's mandate to catch potential fraudsters as trumping privacy consideration. This perception was highlighted by a statement made by L4 who stated "[p]rivacy is a right, but not an absolute right. There are certain situations that you invite your privacy to be breached as in fraud. Recording information on video for a legitimate reason is acceptable."

Privacy issues are also associated with videotaped evidence in which other individuals are captured on the video, along with the target of the surveillance. The participants were asked for their perceptions of what should be done with the information collected about others individuals. Specifically, they were asked if the images of the 'others' should be 'pixelated.' Eight participants believed that the 'others' should be taken out through pixilation. Five participants believed they should not with the primary reason being that it is not practical and is also cost-prohibitive. The secondary reason is related to the possibility of being accused of tampering with the evidence. These participants believed that collateral information collected on innocent people should be managed according to the privacy legislation. Four of the eight added that technology is available to de-identify people from digital video. De-identifying the 'others' in the video was viewed as protecting their information and privacy. Two participants cautioned that video surveillance can be thrown out or inadmissible when someone's privacy has been compromised.

In addition to conducting video surveillance, the CFIP receives video surveillance from outside sources such as employers. All fourteen participants perceived it to be appropriate for the CFIP to receive video from parties external to the Commission.

5.4 Cost Benefit Analysis

For each year, 2005-2010, the annual budget for external investigation services was $45,000. The actual payments made for external investigations and the payments made are presented in Table 18: External Investigation. For the six year period, the

costs ranged from $20,940 to $72,238 per year with the average cost for each investigation being $2,210. The average annual expenditure is $38,455.56 indicating that, over the long-term, the budget covers the expected and actual external investigation costs. The CFIP reports that fluctuations in annual expenditures are directly related to the annual variations in the types of cases that require the resources of private investigators annually.

Table 18: External Investigation (Canadian Dollars)

Year	External Investigation	Cost
2005	31	$72,238.94
2006	14	$31,682.71
2007	13	$33,789.70
2008	10	$20,940.47
2009	15	$27,569.11
2010	21	$44,512.43
Totals:	**104**	**$230,133.36**

When comparing the data in Table 15 and Table 16, it became evident that, in almost all cases, private investigators were used for conducting investigations where covert video surveillance was authorised by the CFIP. The number of investigations conducted and the instances where covert video surveillance was used were identical for 2005, 2008 and 2010. In 2006, there were two instances of covert video surveillance conducted by CFIP investigators, two in 2007 and two in 2009. Covert video surveillance evidence was collected and used in five of the seven CFIP investigations referred to the police.

The CFIP employs four full-time investigators, two lawyers, a legal secretary and a Director. For the period 2005 to 2010, the total cost for salaries and operations

attributable to CFIP activity was $1,320,000 and the external surveillance cost an additional $230, 133.36. The amount recovered by restitution order through the courts was $11,093.36. This means that less than 1% of the investigative costs were recovered by the Courts. Therefore, the CFIP spent in excess of $1.5 million dollars to operate and recovered only $11,043.66 in restitution ordered by the Courts for a cost/benefit ratio of 136:1.

It is important to note, however, that due to investigation outcomes, where action was taken, the Injury Fund was protected from continuing fraud. This was due to the fact that the Commission did not have to commence, or continue to pay, wage-loss benefits to fifty-five claimants [(see Table 11: Cases Resulting in an Outcome (2005-2010)]. The costs for this group of claimants is difficult to specifically quantify because of the variability in the length of time these claims would have continued in the absence of evidence provided by the CFIP. Using the estimating model used by the Commission in Evaluation Report (1993) and Evaluation Report (1994), I calculated an estimated overall savings of approximately $680,000 to the Injury Fund for these fifty-five claims. The calculation indicated a savings to the Injury Fund of $12,363 per claim. This data is indicative of administrative sanctions being more effective than deterrence in protecting the Injury Fund from claimant fraud.

As such, the naked cost/benefit figures and the small number of successful prosecutions suggest that the system has more of a symbolic than an instrumental value. In reality, it is not working as intended and, therefore, there is a lack of probability for a deterrent effect.

Prior to this study, there had been no cost/benefit analysis conducted on the CFIP since its establishment in 2002, nor has any quantitative data indicating CFIP activity and outcomes been shared with Commission employees, the stakeholders, or the public. A document analysis determined that the Commission's Annual Reports 2005 to 2010 are also silent on claimant fraud investigations, convictions, and administrative sanctions and the associated costs. This may be in part explained by the low enforcement rate. To advertise these statistics would be counter-productive in deterrence terms as it might shape the perceptions of those tempted to commit claimant fraud, confirming that there is virtually no chance of being successfully prosecuted.

5.5 Perceptions of CFIP Ineffectiveness

In this section, the participants' perceptions of factors contributing to the CFIP's ineffectiveness are presented. Seven participants described the CFIP's procedures as frustrating and ineffective in supporting the CFIP's policy goal to deter fraud. These participants provided five similar reasons for their perceptions. First, the number of investigations resulting in an administrative and/or criminal sanction are minimal. Secondly, fraud referrals were not getting the investigative due diligence required. There was no consistent approach for the length or type of investigation conducted. For example, an investigator may drive by the claimant's house and, if he does not see anything right away, sometimes he will leave, sometimes he will stay. This might be done for two weeks or it might be done for a week depending on the location. Thirdly, when a claimant lives a significant distance from the CFIP, the

investigators were waiting for tips on other claimants living in that geographic area before they travelled to that location. The data indicates that investigations which are far from the Commission's offices take longer to commence compared to those that are close. On average, rural investigations take three weeks longer to commence and the problem is that the reported activity that the claimant is allegedly involved in is usually over by the time the investigation started. Generally, the amount of time that passes between when a referral is received and when the investigation commences is too long in many cases. Sixty-four percent of the investigations had not commenced within seventy-two hours from the time the referral was received. This data may be contributing to the high number of investigation files closed by the CFIP without evidence of fraud and the resulting low probability of a sanction. Fourthly, the hours of work for the CFIP investigators do not match the time frames when investigations need to be conducted. The hours of the day when surveillance must be conducted does not fit with the internal investigators' hours of work. The investigators are unionised and their hours of work are prescribed by their collective agreement. Claimants deciding to work for cash while receiving benefits are working general, unskilled labour type jobs. Those jobs typically do not start at 9:00 a.m., so if the investigator is not at the claimant's house to see him/her leave for work, there is little to investigate. The investigators need to be conducting surveillance when all activities are happening. The investigators cannot come in to the office at 8:30 a.m., set up their voice mail and then do a few things on the computer to leave at 9:30 a.m., go out into the field and drive by, go to lunch and maybe check again in the afternoon and come back to the office. To conduct surveillance an investigator needs to first determine the best place and time to set up for surveillance rather than just do a drive by. Fifthly, the amount of investigative

activity and time spent on each investigation was inconsistent from investigation to investigation. For example, I 2 stated:

> [y]ou have got to be there. You absolutely got to be there. My thoughts are give each referral its due justice. Spend three-four hours there. Obviously, there are some cases where you wouldn't do that depending on factors such as positions and locations. But give each one its due, because what's happening is they're driving by a couple of times, signed off and closed and it shows in the numbers. Going by the numbers, there is no incentive here to get those numbers up.

Other factors perceived as contributing to the programme's ineffectiveness were identified by other participants. Six participants perceived the Case Managers as not acting on evidence of fraud and, therefore, making the CFIP ineffective. These participants were frustrated because of the lack of follow-up and action taken on evidence. This data seems to suggest a lack of willingness to enforce and erodes the potential for deterrence to occur. For example, L3 stated:

> [w]hat's happening is the Case Managers are delaying because they don't want to deal with it. So we are putting in an effort to try and get the surveillance, then it comes in and they don't seem to want to use it and there is no consequences, no repercussions if these Case Managers don't deal with it. Who is asking what's going on?

This statement provides a perception that the Case Managers are not accountable for their decision to not take action when there is evidence of fraud. Seven participants perceived the Commission as being too concerned with its image in the public eye to conduct effective investigations.

Two participants perceived another problem for effective investigations. The investigations were based on the 'reasonable grounds' test and not based on red flags used by private insurance companies. Accordingly, L1 noted that "if red flags are recommended then we should use them. Perhaps, we could develop that policy".

Six of the participants perceived the CFIP as ineffective due to its primary reliance on anonymous calls/tips. The lack of investigation targets, benchmarks, and incentives was viewed as contributing to its ineffectiveness by five of these participants. In reference to the use of internal investigators and the lack of incentives for performance, I4 stated:

> [t]he Commission needs more resources from the outside. If you are an employee, you're still getting paid and there is no incentive for you to come back with an hour and a half of video. Whereas a private company, you got lots of incentive to come back with an hour and a half of video, because if you don't, you're probably not going to get called again, or somebody else will get called. It's result driven. You are not going to get those results with internal investigators. If, for example, a guy is on the roof of a house, you just catching him putting the cap on the shingles, he goes to the other side. In order to get the other side, you've got to walk through a bog and get over a hill in the woods in the middle of summer with black flies biting and you got to get that video. You think that somebody that's going to get paid anyway and is getting a certain salary, are they going to do that?

A lack of criteria for investigators for signing off and closing an investigation was perceived by four participants to be a problem. In addition, a lack of clarity as to whether there should be an administrative and/or a judicial sanction applied to fraudulent claims was also identified. Nine participants believed the Commission

should use more administrative sanctions, three recommended more use of judicial sanction, and two did not know what to recommend. For example, L3 stated:

> [w]hat I mean by that is in a claim, during an investigation, you can make the determination to suspend benefits, or to refer the file to the police or stay focused on our administrative sanctions by terminating, reducing benefits. When you go the judicial route, it's costing the Commission extra money and what does it gain? It's not deterrence. Yes, the person will have a criminal record and that might affect their ability to get employment in the future, which is deserved, but, that's it. Maybe I'm missing something. What are we gaining from that? We are tying up lawyers and spending money and sending a message to whom? Its public information, but what percentage of the population actually knows that Joe Blow got charged with fraud for abusing workers' compensation. Who knows that"?

The perception was that the Commission, as a government agency, has a political and social impression to manage, and they do not want to be viewed as oppressive, seeking to suspend citizens' liberties and appear as 'Big Brother'.

Four participants identified the lack of information provided to the public, claimants, and employers about the CFIP's framework and outcomes as contributing to its ineffectiveness.

L3 provided a very succinct summary of the entire problem: the need to balance competing demands and rights. L3 thought:

> [t]he biggest challenge is can you find an appropriate balance of all the interests given the complexity of each of those individual interests. The individual demands privacy, the Commission demands integrity with its commitment to the legislation, the employer demands fidelity and their property rights.

5.6 Summary and Conclusion

The above findings are presented to answer RQ 2: To what extent does the CFIP actually work?

The data effectively paints a picture of the CFIP as an ethical, legitimate, but intensely ineffective system where there is a basic lack of will to effectively investigate and prosecute allegations of abuse. The data indicates that privacy, liberty, due process, and the Commission's desire to 'do the right thing' are driving this perceived lack of will.

Of the 1,851 investigation files opened, there are 286 cases where there was evidence collected of *disability-related* fraud with an administrative sanction applied in only twenty-eight of these cases, and none of these were referred to the police for a criminal fraud investigation.

There were an additional seven claimants who received an administrative sanction of having their benefits reduced, suspended, or terminated as well as being convicted by the Court of fraud as these were cases of *earnings-related* fraud. The Commission

did not communicate or make public the investigations conducted by the CFIP, or the outcomes, an action that negates the effort to produce a general deterrent effect. The outcomes data indicates the CFIP is ineffective in achieving its policy goal to deter fraud and abuse. Further, the cost benefit analysis indicates it is an expensive programme that may primarily be 'working' to provide the public with an avenue to complain about the activities of those they believe are on claim with the Commission. The general conclusion is that the liberty and privacy tensions have pulled the programme in the direction of a highly ethical, privacy compliant programme that is ineffective in addressing fraud through deterrence mechanisms.

The Case Managers are reluctant to take action on evidence of fraud and impose administrative sanctions in the appropriate cases. The investigators were delaying some investigations in rural areas while waiting for additional tips or waiting for the opportunity to conduct more investigations in that area so they could justify the travel time and associated expenses. The hours of work for CFIP investigators are not suited to the time frames when investigations need to be conducted. The amount of investigative activity and the time spent on each investigation is inconsistent. There were a high number of investigation files closed by the CFIP with a low probability of an administrative and/or criminal sanction.

The data indicates the CFIP cannot legitimately claim it is enforcing its zero-tolerance policy. This means any attempt at generating a principle of general deterrence through criminal prosecution is minimal. The general deterrent effect depends on claimants anticipating that they are likely to be investigated and are just

as likely to be punished in the event of non-compliance. The CFIP is not taking action to influence the claimant's expectation of detection and punishment and, therefore, the general deterrent effect is negated.

The participants' perceptions of the percentage of fraudulent claims ranged from 1% to 75% and, based on the convictions data, the participants have an inflated perception of the number of fraudulent claims in the system.

The findings in this chapter reinforce the Research Question 1 conclusion *that the CFIP's policy of deterrence is unlikely to work in principle.* The next chapter will provide recommendations to improve the CFIP.

6 POSSIBLE FUTURE DIRECTIONS FOR THE CFIP

6.1 Introduction

This chapter provides recommendations from the participants and the literature suggesting possible future directions for the CFIP. The first section isolates the participants' perceptions of problems with the CFIP and their recommendations to improve it. The second half of this chapter provides the socio-legal and criminological research literature used to make recommendations as to how other actors and other institutions need to take complementary, but non-deterrence based, approaches to produce compliance.

6.2 Participant Recommendations

Many of the participants recommended improving the conditions of deterrence in the CFIP while others recommended it change its policy direction. Their recommendations to improve conditions for deterrence are only provided because all of the participant data were analysed and considered. The recommendations to improve conditions for deterrence, however, are not supported by the literature. These recommendations to improve conditions for deterrence appear to be driven by their ready-made application to Policy EN-11 and also appear to be grounded in a common-sense approach to 'what works'. Subsequent sections also provide the

recommendations from the participants who perceived that deterrence is not a viable strategy for the Commission.

6.2.1 Participant Recommendations to Improve Conditions for Deterrence

Currently, the Commission does not communicate to the public the number of claimants or their names when charged and/or convicted of fraud. Six of the participants believed the CFIP should release to the media or place on its website the names of all individuals charged with fraud in an effort to achieve a deterrent effect. The majority, however, believed that claimants' names should not be published as they have not been convicted and should be presumed innocent unless convicted. When they were asked about releasing the names of claimants convicted of fraud, nine believed that communicating this information was appropriate for the CFIP to achieve a deterrent effect. This data indicates that the participants' beliefs in deterrence appear to be ingrained in their common sense understanding of 'what works'. Seven of these nine participants further suggest this information should automatically be made available to the public on the Commission's website, in media releases, and in annual reports as long as the CFIP continues with its policy position to deter fraud.

Several participants thought the CFIP was ineffective due to inconsistencies in how sanctions are pursued. They recommended the CFIP implement guidelines and criteria to guide how sanctions are to be pursued when evidence of fraud is being

collected. These participants also support the practise of seeking criminal convictions for fraud in the Courts as a mechanism to achieve deterrence.

An issue identified by seven participants was that there were no objective criteria to determine the circumstances of when an investigation should result in an administrative sanction and/or a criminal sanction. These participants recommended that mechanisms under the WHSC Act allowing a claimant's benefits to be reduced, suspended, or terminated should be exercised simultaneously with seeking fraud charges under the Criminal Code of Canada. Arguing for a different approach, six participants thought that the Commission should only use mechanisms under the WHSC Act and not pursue criminal sanctions. The reasons provided by these participants indicated they believed that claimants suffer enough; they thought being injured and then financially stressed is enough punishment. They did not see how the Commission or society in general would benefit from claimants going to jail and/or having a criminal record. This approach was described by one of the participants as 'kicking a person when they are down'.

Four participants perceived the CFIP as not adhering to its own zero-tolerance policy as they were aware of many cases that were not followed up on when there was evidence of fraud. They recommended the CFIP strictly enforce its zero-tolerance for claimant fraud, and they further believed the CFIP should develop and use specific guidelines for referring fraud cases for criminal prosecution.

Many of the participants perceived there to be a lack of communication from the Commission, as well as from employers, about the methods used by the CFIP to detect and deter claimant fraud. This lack of communication was perceived to directly affect the deterrence policy that the Commission has adopted. These participants recommended that the public be made aware, through a sustained communication campaign, of the consequences of fraud and how it is detected by and responded to through the policies and procedures of the CFIP. This perceived lack of communication may also cause issues with non-deterrence based initiatives in the future that will rely more on normative based appeals to claimants and the public.

6.2.2 Participant Recommendations for Change

In this section, the participants' recommendations to improve the CFIP are provided. These are recommendations for a change in how sanctions are administered, how investigations and surveillance are conducted, the Fraud Tip Line, the implementation of red flags, as well as recommendations for the CFIP's procedure(s).

Of the fourteen participants, the minority identified deterrence based strategies as problematic and ineffective. These participants specifically recommended the Commission abandon its deterrence based policy and strategies in favour of an approach that does not include criminalising an injured worker.

One recommendation was to only impose administrative sanctions under the WHSC Act. Five participants also recommended the Commission establish an overpayment for the financial benefits fraudulently or inappropriately obtained and take steps to recover it rather than proceed to the Courts. Two of these five further believed that if the Commission continues to seek criminal prosecution then it should be limited to only the most severe cases of fraud. The five who recommended the Commission set-up and collect overpayments in accordance with Section 83.1 perceived this tactic to be more efficient than judicial sanctions and restitution orders from the Courts for ensuring the Commission's Injury Fund is not financially deprived.

Even though the Commission does not communicate the names and numbers of clients charged and/or convicted of fraud, four participants perceived this to be an inappropriate tactic for a public body to use. These participants believed the Commission should continue to respect a claimant's right to privacy over the CFIP's right to use this information as a mechanism for general deterrence. They believed the CFIP should be held to a higher privacy standard compared to investigations conducted by a private insurer. For example, L1 stated that:

> [t]he investigation policies and procedures may make us seem to private insurers as if our hands are tied, but we take the claimant's right to privacy very seriously. As a public body, we can't play with that.

Three of these four participants also made statements cautioning the CFIP about publishing the names of those convicted of fraud as a mechanism to generally deter claimant fraud. These participants were concerned that general deterrence, if it could

be achieved, is counter to the intent of worker's compensation legislation being a 'no fault insurance scheme'. The punishment of one claimant used for deterrence purposes was described by one participant as 'shaming and blaming'.

Six of the participants were aware the Commission had not quantified the amount of claimant fraud in the system, and they recommended the agency reliably establish the level of claimant fraud before it considers any future investment in the CFIP. If the level of fraud warrants it, five of these participants further recommended the CFIP then develop a claimant fraud strategy in consultation with its stakeholders.

Four of the participants were aware that the consent section of the Worker's Report of Injury (Form 6) did not provide a specific reference to the Commission's use of investigators and covert video surveillance. They recommended Form 6 be changed to specifically inform claimants that personal information can be collected on video by the CFIP without their consent. By adding this reference, claimants signing the form would then be providing informed consent to the Commission to manage their claim using investigators to collect information when necessary. For example, participant P3 stated: "when a claimant first applies by completing the form, it should be very clear on these forms that the Commission retains the right to undertake video surveillance. It should also be in policy and posted on the website, in order to inform the claimant." He/she further emphasised this idea by recommending that:

> [c]laimants should be advised by having access to policies that in the event that the Commission expects fraudulent activity, this information will be shared. That needs to be made up front in the policies and on the website, such as if we expect such activity we will investigate. The Privacy Commissioner's website covert and overt surveillance is good guidance on this. Often time[s] the perception is the issue. Many cases have been lost or won based on someone's perceived privacy. Balancing privacy and surveillance is the issue. By including this in the policy of Worker's Compensation, that by signing on for compensation you are agreeing to video surveillance, there will be no way to state that your privacy has been violated as you agree upon signing that, if questions arise, covert video surveillance will be conducted.

Another participant added "[i]t is important for the Commission to let people know what is happening with their information and that by filing a claim you are saying this is a true and legitimate claim".

Two participants identified that asking investigators in the field to determine the locations considered to be public places is problematic. They recommended the CFIP clarify the conditions, circumstances, and the meaning of 'monitoring a claimant's activities that are reasonably apparent to members of the public'. This recommendation is intended to ensure consistency in its interpretation by the investigators in the field and minimise the risk for intrusions or violations of a claimant's privacy and liberty.

The five participants with investigative experience perceived a serious problem with the CFIP as being the limited number of investigative tools authorised for their use. They recommended that both the internal and external investigators use, or be provided with, all modern technologies and surveillance tools available.

Specifically, they recommended investigators have video cameras and access to a variety of vehicles (possibly rental vehicles) so they can stay covert.

Five participants recommended the investigators have more access to a claimant's private personal data and the means to collect it. They recommended the CFIP have access to the claimant's medical information on file with the Commission, as well as his/her Provincial and Federal tax information. Two participants also recommended that access be provided to the investigators to determine if the claimant suspected of fraud had a criminal history, and one recommended access to the claimant's bank records.

Many of the participants were aware that CFIP files were not audited and were concerned this was creating an environment contributing to its ineffectiveness. Nine participants recommended the Commission audit CFIP files and those cases referred to Case Managers for a decision. They further recommended the Commission communicate publically about these efforts advising that the Commission evaluates evidence from the time a claim is opened through to completion. Four of these participants recommended that a direct statement regarding the claim processes for Case Management as well as the function and resources of the CFIP should be provided to all claimants. In particular, one participant stated "I think just telling them when they come to the Commission, listen, you do the right think, we'll do the right thing. That should help." This recommendation constitutes a normative approach.

Two participants identified that employer supplied video is problematic for the CFIP. The problem they identified with this is an employer cannot use closed circuit television (CCTV) recordings in its possession to contest a claim for compensation if the employees in that workplace are not aware that it can be used for that purpose. They recommended that information should be communicated by employers to their employees about their intent to use CCTV recordings from the workplace and that it will use CCTV evidence if it indicates fraud. Then it can be submitted to the CFIP to dispute the legitimacy of a claim for compensation.

Two participants went further recommending the CFIP use all video evidence provided by external parties. However, one participant qualified this recommendation stating "[i]f we have the video, and it serves the purpose, then we should use it and take it into account. But the worker should be aware that there was video surveillance being conducted on the premises where they work." This qualification illustrates the perception of how this type of investigative tool could be perceived to infringe upon an individual's rights to privacy. In seeming contrast, F2 recommended "[i]f there is video surveillance from other sources, you should use it. Privacy can be compromised for the greater good of the public." However, even this participant cautioned against the use of video surveillance evidence from a claimant's neighbour as the claimant would have an expectation of privacy. This emphasises the difficulty of balancing justice and liberty tensions.

The concern about the sometimes conflicting interests of detecting fraud and adhering to privacy guidelines was also recognised by participant P2. In particular,

this participant was concerned about the perceived legal ramifications of using video surveillance. Accordingly, he/she recommended "[a]s you collect information through video surveillance from a third party, you need to confirm if it was collected properly." This recommendation ensures that the CFIP needs to be cautious making sure that evidence is collected in compliance with privacy legislation and established guidelines for video evidence. Further, this participant added that "transparency must be maintained so the Privacy Commissioner could independently determine how is it was handled, stored and track who viewed this video evidence." This need for transparency is both practical and legal; the Commission needs to be perceived as being objective and legal in its procurement of evidence of fraud in its use of video surveillance. This could enhance both the public perception of the Commission as well as making the possibility of legal sanctions more viable.

One participant in particular was critical of the CFIP and perceived it to be particularly ineffective. This participant's in-depth knowledge about how the CFIP functioned led him to conclude that "not having specific guidelines and criteria on how and when investigations should be conducted makes it ineffective. Just look at the outcomes."

Three participants perceived there to be an absence of due diligence criteria for what should be done for each referral starting at the pre-surveillance stage of the investigation. I1 stated:

> [t]here are no parameters set out as to what should be done on each file. Do you just drive by? Who decides what time? Do you stay for an hour? Too many referrals are being closed without the due diligence being done. For each referral, there needs to be a determination made as to the best time to investigate and demonstrate attempts made.

Similarly, three participants were concerned that there were not any established criteria for opening and closing a file and for tracking referrals against outcomes. A statement made by E1 highlights this perception: "there should be an accountability framework including benchmarks, key performance indicators and targets for investigations."

Four participants made reference to the need for the CFIP to have an appropriate number of investigators to conduct more timely investigations. The perception is that the effectiveness of the CFIP would increase if the investigation was initiated in closer proximity to the time the referral was received. For example, I4 recommended "they should use external investigators more often in an effort to provide a more timely investigation." These four participants emphasised that when a fraud referral is received, the CFIP must have the investigative resources to investigate it in a timely manner.

The four participants with a background in conducting investigations provided specific and practical recommendations to make investigations more effective. First, they recommended using external investigators because the internal investigators were using their own vehicles and were easily identified compromising their ability to stay covert. Secondly, they recommended access to the claimant's personal

information, such as medical information in the Commission's possession, and access to records in the possession of other government programmes such as social services, employment insurance, taxation, and vehicle registration. As I2 notes, "access to this information would mean that an investigator was aware of a claimant's functional restrictions ensuring that investigators are not conducting surveillance on activities that are permitting to the claimant". Thirdly, they recommended using two investigators in rural areas. For example, I3 stated "rural surveillance is difficult and, if you are proposing to use only one investigator, you are throwing away money." This participant believed that when conducting investigations in rural areas, two investigators should be used to conduct surveillance.

Three participants recommended a team of accountants and auditors be used in addition to investigators in the CFIP. The primary function of this team would be fraud detection.

With reference to persons captured on a video who are not the target(s) of surveillance, eight participants believed this constitutes an infringement of their rights and freedoms. The perception is that the CFIP does not have the right to collect their personal information on video, and the participants recommended that collateral information collected on innocent people be managed according to the privacy legislation and, where necessary, technological solutions be used to de-identify people. De-identifying others in the same frame as the person under surveillance was perceived to be appropriate for protecting information and privacy. These participants further recommended filtering-out or deleting collateral

information about third parties as soon as is practically possible in an effort to protect claimant's rights and freedoms. However, not all of the participants agreed with de-identifying people who are not under investigation but were recorded during the covert video surveillance. Participant I3 questioned the purpose of pixeling-out the third party images. He stated that:

> it does not seem practical. The Privacy Commissioner is concerned with it, but the counsel of the insurance industry has stated the cost of following that guideline would be cost prohibitive. I suggest disregarding that privacy guideline as you are tainting the evidence by tampering with the evidence.

The concerns of this participant include the cost of using the technology (a concern for the fiscal efficacy of the CFIP) and the possible legal implications of being perceived as 'doctoring' evidence.

The participants were asked for their recommendations of where surveillance should or should not be conducted. There was complete agreement by all fourteen participants that claimants have a right to privacy, and this precludes surveillance while they are in their homes. Nine of the participants were more specific and qualified their statement noting that surveillance should only be conducted if the activity on the claimant's property can be viewed by the public. For example, L4 stated that "[i]f they are up on a roof of their own home carrying out roofing repairs, and you can see them from the street, then that is not an invasion of privacy".

While many of the participants perceived the use of video surveillance as an important tool in investigating and detecting claimant fraud, there were also some differences in their perceptions concerning how the use of video surveillance, particularly covert video surveillance, may impact a claimant's right to privacy. This led to a recommendation for the CFIP to document in every case how the decision to use of video surveillance was made and how the need to detect fraud should be balanced with the claimant's basic privacy rights.

Twelve participants perceived the need for the CFIP to have criteria in place before an investigation is commenced based on an anonymous tip. It was believed that whenever the CFIP receives a tip on the Fraud Tip Line the investigators need to first determine whether the allegation is substantiated or not prior to commencing a full investigation. There was the perception that the anonymous phone line could encourage prank or trouble-maker calls as well as legitimate tips. The participants recommended the authenticity of the allegation be determined by ensuring it meets pre-established criteria.

As had been noted previously, the CFIP's Fraud Tip Line provides a great deal of information to the Commission. While many of the participants saw the value in using the Fraud Tip Line as a tool to detect and deter fraud, they also had several suggestions to improve its use by the CFIP. Since the Fraud Tip Line is the primary referral source for the CFIP, P1 recommended that there be a pre-established set of criteria stating for investigating tips noting:

> [b]ecause we don't have the resources to thoroughly investigate all tips, if we receive multiple tips on the same individual we should pursue that for further investigation. We have to be careful that the person providing the tip is not a disgruntled ex-spouse or someone with a grudge. Perhaps we should consider looking at the monetary amount of the fraud to determine if further investigation is warranted.

To be more proactive in assessing the probable validity of tips, I1 recommended "[y]ou should not have a tape recorded tip line but a live person answering. It's more efficient and effective." To further accentuate the potential efficacy of the Fraud Tip Line, L4 recommended more training for the CFIP employees who answer the calls coming in on the Fraud Tip Line. This recommendation focused on using the opportunity to get very specific information from the caller that can be used to determine the legitimacy of the tip. In addition, the training would focus on providing inquiry skills to gather information to facilitate an investigation. He/she adds:

> I think whoever is taking the tips on the phone line should be trained on what to ask and the importance of the information they are receiving. What activity did they see? Why are they calling? What's your relationship to the individual? What is your motive for calling in? Would you mind speaking to an investigator? When did the activity occur? I don't think they are inquisitive enough. A person with an investigative approach would be better, or even give training to those that receive the tips on the Tip Line to ask the right questions and not to be passive about the answers.

When discussing insurance and claimant fraud, the term 'red flags' is one that appears frequently. Indeed, seven participants recommended implementing red flags as a method for Case Managers to detect potentially fraudulent claims. This was

perceived as also having the potential to integrate the efforts of Case Managers and the CFIP in detecting and investigating fraud. However, there is also a perception that red flags alone are not enough to commence a claimant fraud investigation. Instead, they are perceived as being useful in identifying high-risk cases for the claims adjudicators and Case Managers that should be referred to the CFIP. Participant L1 made a statement cautioning the CFIP against only using red flags to commence claimant fraud investigations:

> [t]he remedies for a case which has the red flags but has nothing concrete to investigate, there is not much we can do. This will result in a tension of who could do what. Why does a person with a sedentary eight hour day can't seem to get back to work? Why do they keep getting more medication? Is there an addiction? The answer is the person may have little education, poor employment opportunities, may or may not have some sort of addiction, low self-esteem and is very attached to their benefits and they cannot survive without them. If we go down the red flag method, we have to make it clear that this is not a panacea for those claims. We need clarification as to the reasons these people are not working. Other questions need to be asked. Is there something else going on? Do you think there is an over reliance on medication? These are the questions for Case Managers to answer.

While L1 is cautious about the primacy of the role of red flags in claimant fraud investigation, I2 suggests that identifying red flags is necessary and recommended the CFIP take an industry approach to risk identification stating:

> [f]rom my experience I think claims from certain industries should be investigated. Certain claims by construction workers or fishermen who get hurt just before their season closes should be looked at. Certain family names in certain communities warrant a further look. Injuries that go on way beyond normal time frames for recovery also need surveillance. If the Commission opens up its view on these types of files, and these are just a few examples, I am sure we would be surprised what we find.

There are many problems associated with allowing investigators to conduct surveillance or investigate claimants because of their family name or the community in which they live. There are no reasonable grounds to conduct an investigation based solely on a person's last name and/or the community in which they live. This would amount to claimant and geographic profiling: targeting individuals or groups for unsubstantiated reasons because an investigator may believe, falsely or ignorantly, that having a particular family name and coming from a particular community warrants investigation for claimant fraud. Such an approach would likely result in targeting the innocent and constitute an inappropriate or unlawful use of the Commission's resources, authority and power.

This participant also recommended that Case Managers should be more proactive in their approach to detecting fraud asserting that "red flags such as reoccurring names and family names, people getting a new job in the same field and ending up on worker's compensation over and over, claimants who 'doctor shop', and prescription narcotic drug abusers" should be investigated more thoroughly. In support of I2's recommendation, another five participants recommended the Case Managers should be analysing all of their claims for the presence of red flags. This method of detection would then formalise the link between the CFIP's investigators and its Case Managers. While there is some concern about the possible misinformation that can be inferred from the red flags method, there does seem to be a majority perception on the part of the participants that this is or could be a very helpful tool in detecting claimant fraud.

In addition to the above recommendations for the CFIP, there were also recommendations for its specific procedures. Seven of the participants made reference to the CFIP developing a procedure to guide its use of the red flags for claimant fraud and five participants recommended revisions to Procedure 57. Their recommendations focused on the issues of how video surveillance evidence was used in decision making. They recommended the procedure address how Commission initiated surveillance is used compared to unsolicited surveillance provided by employers. They also recommended sections be added to the procedure to ensure unsolicited surveillance is privacy compliant, authenticated, and not altered from its original version.

Three participants recommended Procedure 57 be updated to reflect that any and all video surveillance must be conducted from a public vantage point in circumstances where the target has no reasonable expectation of privacy, must not contain any audio, and must not be collected in contravention of any laws.

Most of the participants' recommendations were focused on the current policy and procedures for the CFIP. That is, they were making recommendations to improve upon what already exists as opposed to advocating for something very different like a normative based approach. Accordingly, this affected their perceptions of what should be changed to improve the CFIP. Many of their recommendations, however, are congruent with the literature on normative compliance and have the potential to enhance claimant's perceptions of legitimacy.

6.3 Normative Compliance and Legitimacy

Claimants are advised they must comply with two main legislated requirements set out in the WHSC Act as stated in Section 54 (1). As long as they comply with these two requirements, wage-loss and health care benefits continue. A review of the criminological literature provides scant evidence of theoretical developments focused on compliance. As Bottoms and Tonry (2002) state:

> [w]ith the important major exceptions of Travis Hirschi's (1969) control theory and John Braithwaite's (1989) theory of reintegrative shaming, most theoretical work in criminology has not been much concerned with legal compliance, but has – for understandable reasons – focused instead on law-breaking. Yet compliance is clearly a topic of considerable importance for criminologists, not least because so much applied criminology is concerned to try and identify programs that will lead to successful crime reduction – that is, to greater compliance with the law. (pp. 28-29)

In Chapter Four, it was concluded that deterrence is unlikely to work in principle, so then what is recommended by the research literature? Bottoms' (2002) model of compliance, introduced in the first chapter, provides literature on the normative route and is reviewed and recommended as an alternative to deterrence (instrumental compliance). Bottoms and Tonry (2002) provide a characterisation of normative compliance which suggests that, in relation to claimant fraud, if claimants believe in complying with the rules, and if that becomes the norm for this group, then it is the most obvious way in which normative factors may be linked to legal compliance. There are exceptions, but for policy purposes their literature indicates that it is reasonable to assume that claimants who sincerely

believe in the immorality of fraud will be less likely to engage in it compared to those who do not hold that belief. They argue that there is good empirical support for such a proposition (see Braithwaite, 1989, p. 48). Bottoms and Tonry (2002) provide support in principle for persuading claimants about the correctness of compliance, and this theory provides a method to accentuate crime prevention.

This first subtype of normative compliance is compliance based on the claimant accepting the Commission's rules as a social norm as this can influence compliance. The second subtype is attachment leading to compliance. Bottoms and Tonry (2002) contend that attachment is derived from Hirschi's (1969) control theory and is noted in the criminological literature as an informal social control. The third subtype of normative compliance results from a claimant recognising that the Commission is a legal authority and is legitimate. Bottoms and Tonry (2002) assert that:

> first, that normative compliance has three subtypes; second, that all three subtypes can be influenced by social circumstances, sometimes very pervasively as shown in the Wikström/Loeber research; third, that moral choices constantly recur in the life course, and that even persistent offenders may sometimes desist from crime for normative reasons; and fourth, that, unsurprisingly, such desistance seems to be greatly assisted by a favorable social context, which allows pro-social normative attachments to flourish within conditions of legitimacy. (p. 41)

This assertion indicates that, should the Commission wish to explore the normative route, the relationship between the Case Manager and the claimant is critical as this relationship will be the primary vehicle for altering or enhancing claimant's perception that the rules and laws are legitimate.

Blumenthal, Christian and Slemrod (1995) examined the effect of normative appeals on tax compliance. This examination provides a recommendation for an important discussion that should take place at the Commission. The agency must decide whether its budget should continue to be spent on investigation and enforcement by the CFIP and prosecution or spent on more gently persuasive activities such as normative appeals for compliance. They argue that agencies such as the Commission can continue to attempt to deter crime by detecting and punishing non-compliance; it can streamline its procedures to make the rules for compliance simpler; or they can encourage normative support for compliance by reminding claimants of their social commitments and the necessity of compliance to ensure the continuation of the financial and health care services provided by the Commission.

Blumenthal, Christian and Slemrod (1995) explored attitudes, beliefs, and social norms about compliance, and research conducted by Sheffrin and Triest (1992) indicate the reason why attitudes could be important. The impact of an attitude might go beyond the individualistic approach of most deterrence theory (as presented in Allingham and Sandmo, 1972) as attitudes are influenced by membership in social networks and institutions or by perceptions of the extent to which the rest of the society complies. In the Commission's context, a claimant's willingness to comply flows from feelings about right and wrong, and, ultimately, from attitudes about the appropriateness of workers' compensation norms and laws.

Kaplan, Newberry, and Reckers (1997) research concludes "the existing literature is rather cautious in its assessment of the role normative appeals can play in improving compliance. There is however evidence that normative communication can affect

attitudes and that attitudes matter" (p. 105). Blumenthal, Christian and Slemrod (1995) also concluded that "support does exist for the propositions that moral persuasion will be more effective for certain groups of people, that an appeal will have more impact the closer it is to the time of the desired behavior, and that the half-lives of normative communications are likely to be short" (p. 128).

While the importance of normative compliance has been reviewed to illustrate that the Commission could enhance legal compliance through normative mechanisms, there are a variety of possibilities to consider. Bottoms and Tonry (2002) caution that policies based on normative routes to compliance need to pay close attention to the normative understandings of the population in which they are being proposed, in this case injured workers on a claim with the Commission. If attention is not paid to the characteristics and norms of this population, the normative appeals may be perceived as irrelevant.

Tyler (2006) indicates that claimants will view workers' compensation structures, officials, and processes as legitimate when they believe that its rules should be obeyed by virtue of who made the rules and how they were made. The workers' compensation system is governed by a Board of Directors comprised of employers, labour, and members of the general public reflecting the key stakeholder roles. This governance structure should facilitate the system and its rule makers being viewed as legitimate and therefore influence the claimants to accept that the system has a right to govern. This legitimacy route to normative compliance is in contrast to the CFIP's current goal to compel compliance through deterrence.

Sacks and Levi (2007) propose that the major effect of enhancing legitimacy is an increased likelihood of compliance with the rules and regulations. Tyler (1990) claims that legitimacy also leads to an increased willingness to defer to rules and the law. Hetherington (2005) indicates that without legitimacy claimants may be less willing to support government programmes such as workers' compensation that redistribute economic resources. In basic terms, the literature suggests legitimacy shapes citizens' reactions to government policies (Weatherford 1992) and provides officials with grounds for eliciting support other than appeals to a person's self-interest. Levi, Tyler, and Sacks (2008) state:

> [w]ithout legitimacy, governments have to expend more resources on monitoring and enforcement to induce sacrifice and compliance. The existence of legitimacy reduces the transaction costs of governing by reducing reliance on coercion and monitoring. Hence, while scholars of politics disagree about whether legitimacy is a necessary component of an effective government, everyone recognizes that governments benefit when they have legitimacy. This is especially true of emerging governments, which find motivating their publics to be a key element in viability, and during periods of crisis or change, when governments are least able to either reward their citizens or effectively deploy system of surveillance and sanctioning. Governments are most dependent upon the cooperation of their citizens under those circumstances in which they are least able to obtaining it via the mechanisms or reward and punishment. (p. 5)

Tyler (2006b) discusses the concepts of responsibility and obligation and argues these are core features of legitimacy. When claimants view the workers' compensation rules as legitimate, they defer to the policies enacted out of a normative sense of obligation to do so, because it is perceived as appropriate for workers' compensation authorities to make these rules. It will then be the responsibility of the claimant to defer to those rules, separately from judgments of whether they or other claimants benefit from or are harmed by them. The core of

legitimacy is this sense of doing what is normatively appropriate. The key issue is for the claimants to judge the Commission's rules as legitimate. There is a potential benefit to basing the Commission's authority on legitimacy in that it removes the continual need to provide claimants with threats of punishments by the CFIP in an attempt to achieve compliance.

Levi, Tyler, and Sacks (2008) propose that legitimacy has four normative pre-conditions: procedural justice, trust/confidence in authorities, government performance, and administrative competence. Specifically:

> [p]rocedural justice, that is the commitment of government to uphold the laws fairly and to apply them equally to all, should enhance deference and willing obedience. Trust and confidence reflects the judgment that the authorities are motivated to do what is right for the people they serve, seeking policies that truly benefit their societies. This reflects the confidence that government officials can be relied upon to deliver on their promises. (Levi, Tyler, & Sacks, 2008, p. 6)

Research by Tyler (1990) indicates that claimants will comply with the rules and the law not because they fear punishment, but rather because they feel the authorities are legitimate and their actions are generally perceived as fair. Tyler (1990) also concluded it was the perceived procedural fairness of law enforcement authorities, rather than the perceived fairness of the outcome, that was important in shaping subsequent compliance. Tyler (1990) is critical for the Commission because, by paying attention to procedural fairness, it is more likely to lead to a claimant's decision of acceptance and an initial ascription of legitimacy to its authority. He further argues that defiance, hostility, and resistance can then be diminished. Tyler (1990) indicates that claimants are likely to comply with the law for normative as

much as instrumental reasons, and that claimant's preparedness to obey the law is a function of the Commission's perceived legitimacy. Hence, the Commission should work to prioritise normative compliance over instrumental compliance, and, within normative compliance, emphasise legitimacy.

6.3.1 The Normative Route to Compliance

If the Commission decides to enhance legal compliance through normative mechanisms, there are a variety of possibilities to consider. In this section, the recommendation for including a normative route to promoting compliance is elaborated upon by recommending roles that other actors and institutions can play regarding normative appeals. Employers can educate their employees in the workplace by providing training regarding the employer's and the Commission's policies and procedures about early and safe return-to-work plans/programmes and describing the benefits of such programmes. Employers can also actively and willingly facilitate the claimant's smooth return to their pre-injury work. Transitional work programmes are essential to getting claimants back on the job, in their own or in another department, while accommodating their functional limitations during recovery at work. These efforts by the employer can actually reduce the opportunity for both *earnings-related* and *disability-related* fraud as well reducing or eliminating the financial reasons often cited by claimants for committing fraud.

Employers can also demonstrate to their employees that they care about them by maintaining a safe work environment. In addition, they can educate their employees

about their workers' compensation rights, responsibilities, and obligations. Employers and the Commission have traditionally relied on tighter medical management and 'get tough' approaches. However, taking steps to prevent a claimant's attitudes from souring during their recovery, demonstrating concern for their wellbeing, and supportively intervening earlier in the disability management and recovery processes are examples of normative recommendations to promote compliance. The claimant's attitude toward his/her job, manager, and co-workers can carry a great weight in the motivation for a claimant to return to work. Therefore, building and maintaining a positive workplace culture is one of several strategies that employers can deploy.

The worst mistake an employer can make is to suggest that an employee is 'faking it'. Instead, the employer should be encouraged by the Case Manager to maintain periodic contact with the claimant letting the person know he/she is not forgotten and is valued at work. In this context, the Case Manager is offering a supportive service designed to maintain positive contact between the employer and the claimant.

A return-to-work plan formulated by the claimant and his/her supervisor, then implemented by his/her Case Manager, reduces the probability of further injury or relapse by creating a comfort zone for the returning employee. A plan for a gradual return to full productivity provides education about problems that may arise and provides a forum to discuss special accommodations. This is important to restoring productivity since the claimant may have alienated co-workers because of the injury

or the amount of time he/she was off work and, hence, may need to re-establish workplace relationships.

The Commission can continue to allocate financial and human resources to investigation, enforcement, and punishment, or it can focus on providing more normative appeals for compliance. The Commission can also streamline its policy and procedures to make the rules for compliance simpler. In addition, it can encourage normative support for compliance by reminding claimants the purpose the Commission serves in providing financial and health care benefits to legitimately injured workers and their families. The principle advantage is that normative strategies and tactics eliminate the continual need for a Case Manager to provide claimants with threats of punishment.

6.3.2 Alternative to Criminal Justice Sanctions

The economic perspective provided by Ogus (2010), reviewed for this study, indicates that the use of criminal processes for contraventions of the WHSC Act is a costly strategy; it is unlikely to achieve deterrence and court ordered restitution has not restored the Injury Fund. Sanders' (2010) notion of freedom indicates that sanctions provided under the WHSC Act have the least impact on a claimant's liberty and freedom and arguably this is more effective as a remedy for wrongdoing.

The literature by Ogus (2010) indicates the enforcement of legislation/regulation involving both administrative and criminal justice processes is not a recommended approach in the future. First, the use of criminal processes for deterrence purposes is

not supported by the literature. Secondly, the Commission has been criticised for using the criminal justice system as a response to claimant fraud because it is considered heavy-handed and infringing unnecessarily on a claimant's liberty when other legislative solutions such as suspension, reduction, or a termination of benefits are available to it. The use of legislative/regulatory enforcement primarily without the use of the criminal justice system is recommended. As Sanders (2010) contends, regulatory crime rarely leads to formal criminal sanctions (p.43).

Sanders (2010) believes that regulatory and criminal justice agencies must prioritise the use of already scarce resources and, as the data indicates, claimant fraud is not a significant problem for the Commission. The CFIP has limited resources and Sanders (2010) argues investigation and the invocation of these powers has to be considered against what else could be done with the resources. There must be a balance between the cost of enforcement to the Commission and to the claimant and the likely harm done by the fraud. For Sanders (2010), prosecution uses more resources than other alternatives such as terminating benefits and criminal processes encroach more on the freedom of the claimant than do its alternatives. Sanders (2010) argues that unless there are obvious gains to freedom by using more criminal prosecution, there is no good reason to do it (p. 64). In addition, Cohen (1985) observed that softer alternatives are sometimes more coercive and controlling than a swift punitive sanction. Therefore, this study recommends legislative/regulatory contraventions can be adequately addressed by non-criminal processes as financial penalties are available to it under the WHSC Act.

6.4 Summary

In this chapter, the recommendations from the literature about the normative route to compliance were presented. Consistent with this recommendation, the participants' recommendations to improve the CFIP were presented, focusing on various aspects of the programme such as its use of investigators, surveillance, the Fraud Tip Line and the use of criminal and legislative/regulatory sanctions. These recommendations provide an opportunity for the CFIP to enhance the perceived legitimacy of the Commission's rules stated in legislation, as well as those reflected in policy and procedure.

The next chapter provides a discussion of all of the findings and recommendations provided in the last two chapters.

7 DISCUSSION and CONCLUSION

7.1 Introduction

The first section of this chapter provides a brief summary of the key findings from the study. These findings emphasise the uniqueness of the subject, the data, the insights, as well as the uniqueness of the concept *light blue-collar* crime. The second aspect includes a summary of the answers to the three research questions, providing the opportunity to discuss their implications for theory, research, policy, and practise. The findings and recommendations along with the theoretical implications are also discussed.

7.2 Summary of the Findings

The evidence in this study from the participants and the literature suggests that the CFIP's policy choice to use deterrence for claimant fraud is fundamentally flawed. It is flawed in principal as there is no significant evidence in the criminological literature that the mechanisms of deterrence, specifically punishment, actually work to deter crime for the blue-collar population it is targeting with this strategy. In addition, the participants perceived the CFIP as ineffective in achieving its policy goal to investigate and deter claimant fraud and the data base demonstrated it is ineffective in how it conducts investigations and its outcomes.

The deterrence concept was recommended by a Task Force, influenced by allegations from employers that there was substantial fraud in the system contributing to the financial crisis. There was no evidence provided to the Task Force to substantiate this allegation and the data in this study is not indicative of substantial fraud. The claimants investigated by the CFIP are primarily *blue-collar* workers, working in *blue-collar* occupations. The research literature indicated that deterrence strategies are usually not effective with this population primarily due to the absence of a forward orientation and their belief they have nothing to lose. There were seven claimants convicted of fraud during the six year period under study. They were working in *blue-collar* jobs and earning an income, but not reporting this to the Commission so they could fraudulently continue to receive wage-loss benefits. The only period of incarceration was for one claimant who received a sentence of one day in jail. There were 1.851 investigation files opened by the CFIP, equating to approximately seven percent of the new claims accepted by the Commission. This percentage is three times greater than the two percent the literature indicates is the real potential fraud rate, but less than the ten percent that most of the participants estimated the fraud rate to be.

The CFIP primarily operates on tips initiated anonymously as well as tips from the Commission's Case Managers and employers. The participants perceive the Case Managers as playing a significant role in both the investigation and deterrence of claimant fraud. They also recommend that red flags for claimant fraud be used by the Case Managers to assist them in detecting potentially fraudulent cases.

Consistent with the commonly held belief in deterrence amongst the general public, three quarters of the participants perceive the CFIP's policies and procedures to be appropriate for claimant fraud investigation as well as for fraud deterrence. Those who did not share this perception were concerned that the CFIP did not have the will, or the mechanisms, to achieve a deterrent effect. This perception was driven by the lack of communication about the CFIP's activity and outcomes, and this lack of public awareness clearly negates using its policies and procedures to create a general deterrent effect. The fact that only *earnings-related* fraud cases were referred to the Courts for prosecution, while *disability-related* fraud was addressed by administrative sanctions, illustrates that even the choice to generate a specific deterrent effort was not overly effective due to the lack of punishment certainty, swiftness, and severity. Of interest is the fact that the participants perceived the CFIP to have wider goals than deterrence. For example, the majority believed the Policy EN-11 and Procedures 52-57 are generally more appropriate for fraud investigation than they are for fraud deterrence.

The majority of investigation files opened in one year were also closed in that same year with few of the investigations resulting in an outcome. There were fifty-five cases resulting in an outcome, with nine claimants having their benefits terminated by the Commission and also referred to the police for a fraud investigation and charge. Seven of these nine cases resulted in a charge and a conviction for *earnings-related* fraud. In addition, there were thirty-five claimants who received an administrative sanction having their benefits terminated, suspended, or reduced for

disability-related fraud. Over half of the participants perceived administrative sanctions to be easier to achieve and more effective than criminal sanctions. Administrative sanctions were viewed as having the least impact on a claimant's liberty but were considered appropriately certain, swift and severe as the sanctions were financial and not criminal. Some of the participants perceived the Commission as placing too much emphasis on a claimant's privacy rights, while others were far more concerned about the legal implications of not adhering to privacy legislation. This conflict illustrates, to some extent, professional biases on the part of the participants. The participants involved in investigation felt the Commission was too reluctant to use a conviction in a communication to the public in an attempt to achieve a general deterrent effect. They also felt that investigations were impeded by the CFIP's adherence to privacy legislation. On the other side, those participants involved in both the legal and privacy fields were far more attuned to the potential problems that could arise with overzealous investigation.

The CFIP acknowledges it has not achieved a deterrent effect, particularly given that 'no action' was taken in eighty-eight percent of the investigations. The cost benefit analysis indicated the system has more of a symbolic than instrumental value, and in reality, it is not working as intended.

7.3 Summary of the Answers to the Research Questions

The answers to the research questions developed for this programme evaluation have provided information for the Commission to consider with regard to the CFIP's desire to battle fraud as well as making a contribution to criminological research as a whole. Generating the answers to these questions was made possible by my privileged, yet restricted access to the CFIP and its data bases. The answers to these questions provide information about the functioning of a workers' compensation claimant fraud investigation programme, specifically the CFIP, that were unknown prior to this research.

The answer to the first research question is the CFIP's policy of deterrence is unlikely to work in principle. The research literature by Wikström (2007), Cook (1980), and Dejong (1997) indicated that deterrence is only weakly supported for the blue-collar claimant population it is targeting with this strategy, and, therefore, there is a low probability of a deterrent effect.

The answer to the second research question is that the CFIP appears to be ineffective. In the 1,851 investigation files opened, there were only fifty-five cases resulting in an outcome from CFIP investigations. The participants further perceived there were operational problems contributing to its ineffectiveness. The CFIP was perceived as only 'working' for the Commission. The existence of the CFIP, and not necessarily its activities and outcomes, demonstrate to the public and employers the

Commission had implemented the Task Force recommendations, using investigators, surveillance, the Fraud Tip Line, to catch, prosecute, sanction, and deter claimant fraud. Prior to this study, the Commission has not evaluated this programme, and the public and employers are, for the most part, completely unaware of how, and if, the CFIP actually works in achieving its policy goal of deterring claimant fraud.

The recommendations from the literature and the participants documented in Chapter Six provide the answer to the third research question. Many of the recommendations provided by the participants, based on the current configuration of the CFIP, are simply reforms that alter the justice and liberty/privacy rights balance. However, the changes recommended by the literature, in particular, to change its deterrence policy and focus instead on fraud detection as well as the use of normative approaches and tactics to enhance legitimacy, are considered fundamental changes. It is difficult to imagine complete system changes for the CFIP as it does have an established role and event schema. Yet, in light of the evidence of its outcomes in deterring claimant fraud, it is suggested that such changes should be seriously considered.

These answers to the three research questions contribute to the literature by building upon our understanding of deterrence theory and its limitations. This study concludes that deterrence theory is not a general theory of crime as the literature indicates it is not equally applicable to both *white-collar* and *blue-collar* crimes and/or criminals. These answers and the theoretical issues raised in this study are next viewed through the prism of the CFIP.

7.4 The Colour of the Collar

The literature reviewed, for example, Edelhertz (1983) and Friedrichs (2002), and the data analysis in this study highlight problems with the traditional *blue-collar* and *white-collar* distinctions, the former being the crimes of proletarians, the latter of the patrician. The crime of fraud is normally associated with *white-collar* criminals; however, the data from the CFIP and, in particular, the data on the seven perpetrators convicted in the criminal Courts, indicate the crime was committed by *blue-collar* workers. This discovery led to my description of the crime as the '*white-collar* crime of fraud committed by *blue-collar* workers'. This description then influenced the development of the concept developed in this research, the concept of *light blue-collar* crime. This points to both the imprecise and fuzzy boundaries of this artificial distinction of the 'colour of the collar' between *blue-collar* and *white-collar* crime (see Weisburd, Chayet & Waring, 1990; Weisburd, Waring & Chayet, 1995). It also points to criminology`s difficulties in conceptualising class, particularly in criminology in the United States. This is something that could be explored further in future research to determine if general principles apply across claimant fraud and other forms of fraud. In particular, this study evokes the need for more informative case studies about government sponsored systems, like workers' compensation, social assistance, and employment insurance, where fraudulent activity occurs and how the authorities deal with such activity. As previously indicated, this study is very specialised; it deals with one system in one province in Canada—the CFIP. However, I believe that similar studies on similar systems in different provinces and countries could help develop future criminological strategies for dealing with this

type of fraud by providing a better understanding of the circumstances that lead to such behaviour. In addition, I think the development of the term *light blue-collar* crime for this type of criminal behaviour is beneficial in dealing with the problematic nature of the class distinction found in current criminological research and literature with reference to the two major classifications of *white-collar* and *blue-collar* crime.

The link between social class and crime has been central to sociological criminology; however, scholars such as Andrews and Bonta (1998) argue there is minimal evidence, if any, for criminology to support a continued focus on social class and crime. Sutherland's *white-collar* crime research linked social class with particular types of crimes. This study was designed to revisit his *white-collar* crime ideas as well as modern views and versions of them. The literature reviewed indicates the term '*white-collar*' crime originated to distinguish the non-violent nature and the high social status of *white-collar* criminals, from the more violent street crimes typically committed by *blue-collar* criminals. The term '*white-collar*' referenced *white-collared* managerial or executive employees, working in a position enabling them to commit crimes such as fraud. It is the individual's high status and position of authority in the company that differentiates them from the *blue-collar* worker. Weisburd, et al. (1991) added that more individual and less organised *white-collar* crimes, such as insurance fraud, tend to be perpetrated by persons who enjoy less financial stability and status.

Taking the class-based/collar-based approach, the literature reviewed in this study indicates potential *white-collar* criminals are influenced more by punishment based

policies due to their 'future orientation' and ability to evaluate the risk and rewards (Weisburd, Waring & Chayet, 1995). Sanctions have failed to provide a specific deterrent effect for *blue-collar* offenders, attributed to the fact they have little to lose through contact with the justice system while the *white-collar* offenders have more to lose. As Paternoster and Simpson (1993) suggest, *white-collar* criminals fear losing their social and or professional status, losing their possessions, and maybe even their family through a conviction.

The quantitative data situated workers' compensation claimants as primarily *blue-collar* workers. The claimants convicted of fraud were employed in *blue-collar* jobs and were not reporting their ability to work and earn an income from employment. The crime of fraud, more typical of the *white-collar* professional, was not evidenced. This is consistent with the literature reviewed by Tittle, Villemez and Smith (1978) indicating there is minimal evidence for a relationship between socio-economic status and crime. They concluded that class-based theories of criminal behaviour rest on empirically weak premises.

Factors that can contribute to why a claimant commits fraud are usually based in the claimant's perception of the pressures he/she faces, his/her perception of the opportunity to commit fraud, and his/her rationalizations for committing it, or his/her integrity preventing it. Claimants experience financial pressures, personal debts, over use of credit cards, divorce, family or peer group expectations, and lifestyle factors such as the use of alcohol or drugs, a gambling habit, or even an addiction. Other work related factors such as feelings of resentment stemming from being over-

worked, underpaid, or injured, play a role. Claimants' rationalisations for committing fraud are demonstrated in statements such as: 'I am entitled to this money', 'nobody is getting hurt', 'the Commission treats me unfairly, so they owe me', 'the money is needed for a good purpose', or 'I needed it and had no other choice'.

One of the objectives of this study was to review Sutherland's ideas of *white-collar* crime and consider to what extent these *white-collar* crime concepts apply to cases of *light blue-collar* crime. *White-collar* crimes, committed by *white-collar* criminals, have typically received shorter sentences. In this study, the only period of incarceration for the *blue-collar* worker convicted of fraud was one day, the shortest period of incarceration possible. Upon completing a review of Sutherland (1949), I concluded the obvious difference between those offenders wearing the blue and white collars is that the *white-collar* criminal commits the crime from a position of privileged access, and it is more often organised in nature. However, individuals wearing blue and white collars committing the crime of fraud are both still defrauding a system of knowable dimensions and with particular financial aims.

Sutherland's work indicated that fraud is usually committed by individuals in higher levels of management; they are typically well-educated and enjoy a higher social standing. They use this social standing, as well as their specialised skills and knowledge, to their full advantage when committing financial crimes such as fraud and embezzlement. The term '*white-collar* crime' actually covers a broad range of

offences; however, the crimes are usually non-violent and committed with the intent to achieve financial gain.

As Weisburd, Chayet and Waring (1990) indicate there is controversy in the literature over Sutherland's description of the perpetrators of *white-collar* crimes suggesting that it is an upper-class activity. Sutherland was interested in exploring an alternative to the assumption that crime is a working-class occupation, committed by the stereotypical working-class person committing crimes such as robbery, break-entry, and/or theft. Sutherland believed that non-violent crimes committed by the upper-class needed a focus. In this study, however, fraud is clearly a crime committed by the *blue-collar* worker and, hence, the phrase used throughout this study 'the *white-collar* crime of fraud being committed by a *blue-collar* worker'. This phrase captured this novel discovery and influenced the coining of the term *light blue-collar* crime.

Paternoster and Simpson (1993) and Lilly, Cullen and Ball (2012) provide modern views of *white-collar* crime since Sutherland's original research have been reviewed in this study. This research indicates there have been further developments in this area and several criticisms and new definitions have now arisen, challenging it (see Weisburd, Chayet & Waring, 1990). The findings in this study and the term *light blue-collar* crime/criminal are additional examples of criticisms and new definitions.

There are also legal implications for Sutherland's definition of *white-collar* crime and the term *light blue-collar* crime. The term crime should only refer to actions that are in violation of the criminal law. The CFIP data indicates that only *earnings-related* fraud cases were referred to the Courts while the thirty-five cases of *disability-related* fraud detected were only addressed by administrative sanctions rather than through the criminal justice system. The claimant's behaviours related to *disability-related* fraud should not be labelled criminal unless a conviction has been achieved despite the CFIP referring to it as such.

In contradiction to Sutherland's *white-collar* crime definition, some studies show there is no difference between the social classes of offenders committing these crimes (see Weisburd, Chayet & Waring, 1990). For example, Gottfredson and Hirschi (1990) argue there are few differences between age, gender, and social class of conventional offenders and *white-collar* crime offenders (p. 83). They suggest the purpose of the offence is the pursuit of self-interest and financial gain. This is consistent with the findings in this study as the frauds were committed for the purpose of financial gain.

The frauds detected by the CFIP are not committed by the same kind of people that Sutherland had in mind when he developed his idea of *white-collar* crime being committed by a person of 'respectability and high social status in the course of his occupation'. The occupational component of the definition arguably may apply as the claimant is only injured and technically is still in an occupation (*blue-collar* occupation) as efforts are made to return the claimant to their pre-injury occupation

through early and safe return-to-work programmes. However, these claimant fraud offences are not committed in the course of climbing the career ladder. They are committed for their own financial benefit while on a claim for benefits while technically still employed due to the re-employment obligation that exists for their pre-injury employer. There also exists the self-interest motivation in the offence but, once again, the class and occupational status ideas do not apply.

One of the main concerns regarding Sutherland's definition and profile of the offender is the use of the term *white-collar*, as it refers to all jobs that are not manual labour or *blue-collar* occupations. The data in this study indicates clearly that there are *blue-collar* workers who do manual labour in occupations such as construction who commit similar offenses to *white-collar* workers. Sutherland's definition is still reflected in conversation today, and the majority of people would agree with his profile and description of a *white-collar* criminal and many recent scandals support Sutherland's assertion that it is committed by a person of respectability and high social status. Yet, as this study illustrates, *white-collar* crime can, and is, committed by workers defined as *blue-collar*.

The literature providing definitions and meanings for *white-collar* crime have built upon the foundations that Sutherland created, but still differ in how *white-collar* crime and criminals should be defined. The data and findings in this study present a challenge to Sutherland's definition. Sutherland (1949) was produced in a more class orientated period in criminology. Some of the well-publicised crimes of fraud

reflect the relevance of the term '*white-collar* crime' in today's society. Classic examples of *white-collar* crimes that members of the general public are aware of include Bernie Madoff's crime. He stole billions of dollars from investors who thought they were investing with a respectable business man. In addition, there was the Enron scandal, with this business overstating its worth by more than $1.5 billion. However, studies such as this challenge the definition. This study adds to the criminological literature by providing a focus on *light blue-collar* crime, the *white-collar* crime of fraud committed by *blue-collar* criminals. *White-collar* crimes are typically about greed and profits and are fundamentally different from issues experienced by an injured worker going through desperation, financial hardship, hunger, or even addiction.

7.5 Deterrence

The perspective of employers is that claimant fraud is theft from the Injury Fund, and they are concerned about the impact of the 'theft' on their assessment rates. Their focus and belief in deterrence also demonstrates their lack of understanding of the target population upon which it wants the CFIP to deploy deterrence tactics. As previously discussed, the issue of future orientation is important here if deterrence is to be effective.

McCarthy and Hagan (2005) suggest the crime of fraud is more likely when formal and informal sanctions are not severe; the person does not lose self-respect; they can

justify the act; they view the rules as unfair; and they perceive the benefits of non-compliance and the costs of compliance as high, especially if the person has broken the law before. The CFIP was established to ensure that formal and informal sanctions are severe; however, the data indicates this was not achieved. *Blue-collar* workers on a claim for compensation are already receiving less income than they receive from employment due to the wage-loss benefit being eighty percent of their net income. Their current financial needs and stresses can provide specific claimants with a justification or rationalisation for committing fraud. Believing there is no other choice certain claimants do not perceive they will lose self-respect. Instead, they justify and rationalise their actions, often times blaming the Commission for providing insufficient compensation. Claimants have mortgages, car payments, children to feed and put through school, and perceive the benefits of non-compliance as necessary to maintain family, the home, and, in many cases, their place in the community.

Punishment is designed and intended to deter future crimes, retaliate against the offender, and rehabilitate him/her so he/she does not recidivate, or remove the threat they represent to society. Few of these purposes of punishment will work unless there is some perception of risk of it happening to the individual claimant considering it (Zimmering & Hawkins, 1973). Perception is important because deterrence does not work unless people get the impression that violators are probably going to be punished, and likely to be punished harshly, to make the consideration of the crime choice not worthwhile. The literature reviewed indicates that *white-collar* criminals have a greater likelihood of being deterred. *White-collar* crimes are

usually calculated and are not crimes committed in a moment of haste or on an impulse. They usually have considered the risk and consequences of punishment should they be caught (Bourdieu, 1998).

In order for deterrence to be effective, there also must be a commitment to have the resources to investigate to detect fraud, ensure the claimant is charged, as well as a commitment to process and punish them in the Courts. In addition, the consequences for the claimants must be such that they are feared for their severity. Deterrence also requires that the public know about the law, the risk of getting caught and the risk must be perceived as high with the severity of punishment also instilling fear. *Blue-collar* workers tend to be living in the here and now, living from pay check to pay check, and they do not have the luxury of having this forward orientation, rationally considering the costs and benefits. The social sanctions that also can act as a deterrent usually depend on the claimant's social situation, especially if they have a job or family to loose. The findings in this study indicate the extent to which the Commission and its policymakers can succeed in creating an environment that supports compliance and law-abiding action is the extent to which claimant fraud prevention will be effective.

In the study, I have reviewed the evidence both for and against the determination of whether or not deterrence works. It is reasonable to conclude based on the literature that for the correctly targeted population deterrence can in some ways help prevent some crimes some of the time. Some of the evidence certainly favours support of deterrence more than it favours the absence of deterrence (Nagin, 1998; Tittle,

1995). However, a lot of the general conclusions about the effect of deterrence are analytically based. This study concludes that it does not work for the typically *blue-collar* worker and the Commission would benefit from an alternative approach.

Employers thought that expedited and severe punishment in each fraud case prosecuted would serve as a *deterrent* for claimant fraud. This belief was a major contributor to the Task Force recommendations that directly influenced the establishment of the CFIP. However, the data indicates that very few cases are prosecuted, the sentences were not severe, relatively speaking, and the Commission did not use any of these convictions in a communication to the public to achieve a general deterrent effect. The literature and studies reviewed indicate the deterrence goal has a low probability of working for the CFIP. The Commission can continue with the CFIP, but should shift its focus to fraud detection rather than deterrence. The investigations would then be conducted for the purpose of providing evidence to the Case Managers for decisions to be made regarding a claimant`s future entitlement to benefits under the WHSC Act rather than for the purpose of making referrals to the criminal justice system in attempt to achieve a deterrent effect. The Commission would also benefit from allocating resources to different approaches and programmes based on normative theory instead of deterrence. This has the potential to lead to achieving the overall aim of the CFIP, protecting the Injury Fund thus ensuring the sustainability of the workers` compensation system. Future studies can evaluate this type of response in the area of *light blue-collar* crime.

Taking the approach that claimants are 'criminals' made it easier to justify an enforcement approach be taken with claimants based on the premise they were all trying to cheat the system. This approach fosters distrust of the Commission by claimants and, in turn, fosters distrust of claimants. This culture of distrust fosters the perception that anyone participating in the system must have criminal intentions and therefore must be investigated and sanctioned.

7.6 Justice and Liberty

The justice tension created by the Commission's right to pursue the truth through the CFIP using investigators, the Fraud Tip Line, covert video surveillance, and criminal sanctions has pulled the workers' compensation system in a direction that criminalises claimants in cases of *earnings-related* fraud. The CFIP investigations have the potential to lead to unwarranted criminalization and a significant impact on claimant liberty when a less intrusive, and potentially more effective, option exists; the use of administrative sanctions rather than criminal convictions and subsequent punishment. This criminalization can create a tendency to perceive all claimants as potential fraudsters. In turn, this justifies the extent of, and the means dedicated to, investigation, surveillance, and punishment for deterrence purposes.

The socio-legal literature suggests that, in many cases, investigating injured workers has resulted in ignoring the Canadian Charter of Rights and Freedoms justified by the importance of protecting and/or restoring the Injury Fund. The data analysed in this study indicates the CFIP is a mainly a highly ethical programme and should maintain its vigilance in this regard to ensure the decision regarding a regulatory

offence under the WHSC Act that results in the termination, reduction, or suspension of wage-loss benefits to a claimant is done ethically and in accordance with the privacy and liberty protections afforded through legislation such as ATIPPA and the Canadian Charter of Rights and Freedoms. The claimant's rights to liberty and privacy should not be sacrificed in the name of administrative needs of a regulatory agency such as the Commission.

7.7 Legitimacy

Tyler (2006) indicates that a claimant's perceptions of legitimacy are linked to the justice and perceived fairness of the Commission's procedures and practises. In addition, legitimacy encourages compliance with the rules and the law having the potential to shape a claimant's cooperation with their Case Manager. Experiencing procedural justice during a claimant`s personal experience with the Commission can also increase legitimacy irrespective of how favourable the outcome of the decisions were on his/her claim. This suggests that Case Managers and investigators should implement procedures and tactics that can enhance a claimant`s perceptions of legitimacy.

A major effect of legitimacy is an increased likelihood of compliance with the Commission's rules and policies, as well as the WHSC Act. Perceptions of legitimacy may make the claimants more willing to defer to the rules and the law as well as the decisions made by authorities at the Commission. This can potentially

shape their reaction to the Commission's policies and provide the Commission with grounds for eliciting claimant support other than appealing to their immediate self-interest. Enhanced legitimacy through legitimate use of power can make governing a system such as workers' compensation easier and more effective. If the Commission intends to commit its resources to deterrence and surveillance, this monitoring of behaviour and punishing rule violators can reduce perspectives of legitimacy. Legitimacy can help reduce the Commission's reliance on coercion, monitoring, and surveillance and provides a plausible future direction as a way to improve voluntary compliance. If claimants have trust and confidence in the Commission and believe that its authorities are trustworthy, and if it provides and the appropriate benefits and services to claimants, then the Commission's rules, policies, and laws can be viewed as benefiting them. Hence, the Commission should consider implementing normative and legitimacy enhancing strategies replacing the efforts and costs associated with enforcement and criminal prosecution.

7.8 Normative Compliance

For the Commission, the deterrence focus is intended to prevent claimants from committing fraud based on a fear of the consequences. Alternatively, compliance theories (for example, Bottoms, 2002) concentrate on the power of the Commission to encourage claimants to comply with the law before the fraud happens. The big difference in these two theories is how the laws are enforced; deterrence relies on criminal prosecution after the crime has been committed while compliance theories suggest the Commission encourage compliance with the law before the crime takes

place. The Commission should implement tactics and strategies to encourage compliance, rather than rely on prosecution to deter fraud. Making prosecution a last resort would gain greater respect for the law and trust in the system thereby making it less likely that claimants will commit the crime of fraud in the first place. If the agency, through the use of administrative sanctions under the WHSC Act, uses its own legislation to enforce its own law, that may be either more or equally effective because it is less likely to invoke the confrontation that exists in a court setting. It could be argued that administrative sanctions are less effective than criminal prosecutions. There are already a low number of sanctions imposed each year yet, despite this fact the number of administrative sanctions imposed are already greater than the number criminal prosecutions.

The rules for compliance at the Commission are complex. In its pursuit of compliance, the perceptions of legitimacy and fairness may have suffered through its application of policy and procedures. In an effort to enhance perceptions of legitimacy, the Commission could consider making its rules for compliance more explicit, easy to understand and with which to comply. Technical deviations from the rules should not result in the immediate sanctioning of that claimant. It may be more appropriate to use these situations as an opportunity to explain the rules and reframe the claimant's understanding of it. This is consistent with making appeals for normative compliance and also has the potential to enhance perceptions of legitimacy.

In the workers' compensation context, normative compliance would result from a claimant recognising that the Commission has legitimate authority and uses this authority for the benefit of its claimants. The Commission is always facing tough economic decisions and should consider whether it wants to continue to spend its budget on investigation for the purpose of criminal prosecution and deterrence or on more persuasive activities such as normative appeals for compliance. It can streamline its procedures to make the rules for compliance simpler and easier, or it can encourage normative support for compliance by reminding claimants of their commitments and responsibilities so they will continue to receive the benefits and services provided by the Commission. In a compliance framework, Case Managers could provide normative appeals at an early stage of a compensation claim, and these could be repeated and discussed often with claimants. The resulting claimants' attitudes might go beyond the specific deterrence approach dictated by deterrence theory.

The Commission has changed its approach from keeping claimants off work until they recover from their injury to the current approach with the current focus being placed on returning claimants to their pre-injury job through early and safe return to work. This focus enhances rehabilitation and expedites the restoration of their pre-injury earnings. Focusing on normative appeals with clients in the return-to-work process is consistent with the supportive, yet firm, relationship that exists between the claimant and his/her Case Manager. The Case Managers are already reluctant to switch from a therapeutic relationship to one of confrontation and being adversarial that can exist or arise in a deterrence based approach. Making normative appeals is an approach that is considered to be more consistent with their training and

professional perspectives normally grounded in social work and rehabilitation. If the system is perceived as legitimate, the majority of claimants will accept the system has a right to govern. This legitimacy route to normative compliance is in contrast to the CFIP's goal to compel compliance through deterrence. The literature reviewed indicated that the major effect of enhancing legitimacy is an increased likelihood of compliance with the rules and regulations. The CFIP would be there to collect evidence of non-compliance and the consequences for rule breakers should be administrative rather than criminal.

An added potential benefit to basing the Case Managers' authority on legitimacy is removing the reoccurring need for them to provide claimants with threats of punishments in an attempt to achieve compliance.

The literature indicated that it makes good sense for the Case Managers to persuade claimants about the benefits and appropriateness of complying with the WHSC Act. Normative compliance can be achieved by enhancing a claimant's belief in the norm of reporting changes to functional abilities, returning to work as early as safely possible, and reporting income received from employment while on benefits. Normative compliance can also be enhanced if claimants recognise that the Commission's rules and regulations are legitimate and that its legal and social authority is also legitimate. The Commission must play a role in creating a favourable social context which will allow for conditions appropriate for claimants to perceive the Commission as legitimate. The Commission should also exert significant energies and efforts to encourage normative support for compliance by

making the rules to comply with simpler and by reminding claimants of their social commitments and the services provided as a result of a legitimate work injury. Normative communications on the Commission should appeal to the claimant and describe desired claimant behaviour. This communication can be in written form and also take place during the frequent interactions between the claimant and their Case Manager. Now that the findings and recommendations have been discussed, it is also important to consider the implications they have for future criminological and socio-legal research.

7.9 Implications for Future Research

This study is considered exploratory and raised several interesting topics that have potential implications for future research. The efficacy of instrumental versus normative strategies to achieve compliance is potentially very interesting if they are examined in relation to fraud as a *light blue-collar* crime.

While reflecting on the lessons learned in this study, I made notes about how I would propose to design future research on claimant fraud investigation programmes to explore topics or themes such as those referenced above. The notes I took throughout Phase Two and Phase Three of this study suggested this study was exploratory with real possibilities to use the emerging topics for future research. These notes led to my suggestion that a longitudinal, mixed-methods, multi-site case

study that follows groups of claimants, employers, and investigators over a three year period and prospectively plots their co-journey through the workers' compensation system would be fascinating. The study would address 'how' and 'why' research questions related to compliance. This research design, however, assumes there would be many more human and financial resources to conduct this study that has the potential to fill-in the gaps forced on this research by resource-framed research choices. I further propose the collection and analysis of both qualitative and quantitative data with a particular focus on the claimant's perspective of being on a workers' compensation claim. The main gap identified in this research was the absence of the claimant's perspective. The employer's perspective was evident, represented by the employer advisor, and investigators were interviewed as well. In future research, it should be considered essential to have specific claimants from specific sites included, as well as more investigators and employers. The study can evaluate the effectiveness of the different programmes and policies designed to address claimant fraud that exist in Canada at different sites and provides an opportunity to consider theoretical implications in each programme as well as across programmes. The confidence in the findings from a multi-site case study are greater than the single case study and the flexibility of mixed methods research strategies makes it especially suitable for multisite case studies.

The site selection strategy should be random, selecting six sites in Canada to capture the broader context of the research, as well as any contextual nuances that shape policy implementation. The design could include interviews and surveys with claimants as well as a survey of claimants that have been investigated and

administratively sanctioned, claimants that were criminally sanctioned, and claimants investigated where there was no evidence of fraud collected. This data could then be compared to other claimants not under investigation during their time on a claim for compensation. This would require multiple researchers working across multiple sites and therefore require considerable financial resources.

7.10 Conclusion

The primary mechanisms the CFIP was using in an attempt to achieve deterrence were problematic in terms of the justice and liberty tensions they create. This study highlighted some of the issues with deploying investigators, the CFIP's over-reliance on the Fraud Tip Line and the use covert video surveillance. In addition, in strictly economic terms, the cost benefit analysis indicated the CFIP is a costly programme for the Commission to operate especially when calculating the cash recovered through restitution orders in the sentences provided by the Courts.

The imposition of harsh and excessive sanctions for deterrence purposes is not supported by the literature. A responsive regulatory approach that relies on principles of procedural justice and normative appeals may be the only effective enforcement strategy available to workers' compensation authorities who wish to prevent both widespread resistance to comply with Case Managers and future non-compliance with the rules and decisions. How claimants react to decisions about their benefits can shape their views of legitimacy, especially if the decision is to

reduce the wage-loss benefit. One could argue that the area of wage-loss benefits is very much dominated by financial self-interest concerns.

I found it surprising that a system such as workers' compensation would rely on deterrence to protect its significant financial assets. This surprise was heightened by my education and work experience in dealing with a programme based on characteristics of effective programs. The conclusion I reached is that it is critical to allow research and theory to guide policy development because without it, the consequences can be significant and costly, in both financial and human terms.

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