Chapter 6

Accounting Issues

In the production of this chapter, I wish to acknowledge the very substantial contribution of Mr. William D. Kinsey, C.A., who served as Investigative Accountant to the Commission. Mr. Kinsey, who practised for many years with a national firm of accountants, has undertaken numerous investigative assignments for professional bodies and government. Mr. Kinsey had access to Westbank Indian Band financial records as well as the benefit of discussions with past and present auditors. He spoke to the Band Administrator, Band financial staff, and Departmental officials, and attended on several Commission hearings.

It appears that members of the Westbank Indian Band and other interested people have not received a complete picture over the years concerning the Band's economic performance and the management of Band resources. While there will be differences caused by differing individual circumstances, it seems to me that similar problems are likely to arise in other bands as their asset base grows and they become more actively involved in business ventures. I believe that the process of informing Westbank Band members in a meaningful way can be improved by alterations in financial reporting, including greater disclosure of material transactions.

The Westbank Band is a relatively sophisticated band in terms of economic progress and administrative structure. The Band is located in a favourable area for expansion and Band members have been active in the leasing field. There are existing leases for recreational, industrial, and residential use. The latter is the most substantial, encompassing a number of mobile home park operations. Additionally, Westbank has a Band development company which has undertaken, and continues to undertake, subdivision work. The Band development company in turn controls a contracting company which does work for the Band and also seeks additional sources of work beyond Westbank. The Band has built a large new office building on Tsinstikeptum Reserve 10, and is thus in the commercial office leasing business as well. The early 1980's saw a great deal of economic activity on the Reserves. But Band members were not always kept up to date on financial matters — indeed, at times the Department of Indian Affairs and Northern Development found itself less than perfectly informed concerning Band finances.

The Commission has made some comprehensive suggestions with respect to the financial reporting practice of Indian bands in general in Section II of this Report. With respect to the financial reporting of the Westbank Band, the Commission has the following observations:

1) There is a method of accounting in place which is not simple to follow. I believe greater clarity can be achieved.
2) There has been a failure to adequately inform the Band members about the activities of incorporated companies and unincorporated enterprises controlled by the Band.
3) There has been a failure to recognize or deal with apparent problems or inconsistencies disclosed or hinted at in the financial statements. An example is the "minors' trust fund" matter.
4) There has been in a number of instances a failure to inform Band members about significant transactions involving members of the Band government.

While there are some elements of criticism in what follows, I hope that it will be appreciated that it is intended to be constructive criticism directed to areas that could be improved. This improvement is in the interest of more effective management of Band finances and better appreciation by Band members of the economic state of the Band and Band enterprises.

1) Clarity in Accounting

Compliance with the rules of the Department appears to be no guarantee of easy comprehension of financial matters by Westbank Band members. The accounting guides supplied by the Department have been, perhaps understandably, directed mainly toward matters the Department has a direct responsibility for, namely payments made pursuant to agreements with bands. It follows that Band financial statement standards have been heavily focused on satisfying Departmental requirements. For example, when the Department provided money for a particular purpose, the Band's financial statements often disclosed that contribution, and perhaps a number of related contributions, on separate Statements of Revenue and Expenditure. In recent years, the Westbank Band's financial statements have typically contained 28 such schedules.

The Commission has seen, in edited form, some instances of financial statements for other bands where the number of schedules has far exceeded that number. The proliferation of many separate statements may simplify matters for the Department, but it seems to me that it tends to make the series of statements as a whole more difficult for the individual band member to understand. While the problem of multiplicity of statements seems greater in some other bands, this does not mean that the Westbank manner of financial reporting should not change in favour of greater simplicity.

As a general criticism of the Westbank financial statements, and particularly of those statements available to its members, it could be said that the Statements of Revenue and Expenditure contained an overabundance of detail for the Band operating as a Band. However,

information about the incorporated and unincorporated operations of the Band was quite sparse. Neither the Band nor its auditors are necessarily to be criticized for the considerable detail contained in the Band's financial statements because the Department requested it. The Department had a legitimate need for information on funds provided. The ideal would be to supply sufficient detail to allow the Department to fulfil its mandate, but not to include such detail that the average Band member is unable to comprehend the overall picture.

I found one feature of the accounting of the Westbank Indian Band to be quite misleading. This feature showed up when certain sums were described as "revenue" when they were not, in fact, "revenue". As related elsewhere in this Report, Indian bands, like government bodies and non-profit organizations, report financial transactions or account for monies received on a "fund" or "modified fund" basis. Such financial reporting usually consists of a number of individual Statements of Revenue and Expenditure, one for each activity or group of activities plus a combined Statement of Revenue and Expenditures embodying the individual statements. In the Westbank Statements of Revenue and Expenditure, surplus and deficit figures for related activity in the prior year are shown. If an activity has realized a surplus in the prior year, the surplus is carried forward and treated as "revenue". If an activity has suffered a deficit in the prior year, the deficit is treated as an expenditure in the current year.

It appears sensible to work on the assumption that the primary purpose of individual revenue and expenditure statements is to indicate how a band has fared in a particular fund for the year in question. The reader of the financial statements is also concerned with the activity of the fund for the year in question, and the method used by the Westbank Indian Band does not reflect a truly accurate picture of that year because activity in previous years is mixed with the current year's activities.

A serious instance of improperly described revenue has been to classify as "revenue" monies received by the Band on behalf of third parties for immediate payment to those third parties. For example, lease payments received on behalf of locatees are included as Band revenue. The reader of the financial statement would assume that those monies belonged to the Band. Another example of improper description is monies funnelled through the "Distributor's Account". That account is a Band account used for money received and disbursed to pay for tax-free purchases by the Band and its members. There is no intention that any profit be made or any loss be incurred on the transactions. In both of the above instances, the Band functions simply as a trustee of the funds. The receipts are not Band revenue, nor are they intended to be Band revenue. In both instances, monies are merely paid through the Band account. The Band can be seen as simply a temporary holder of

these funds for other parties and thus the transactions should be kept separate from any report on general Band financial operations.

When transactions are improperly included in revenue, the result has been double counting, and sometimes multiple counting. In such circumstances, the resultant figures can be quite meaningless. In effect, there are greatly overstated revenues and expenditures. This sort of recording can indicate that there is a great deal of activity occurring in certain areas, when in fact nothing that concerns Band finances is occurring.

A reader of Band statements may mistakenly consider as the year's revenue the reported revenue figures which include opening surplus, internal transfers, and monies received in trust or as an agent. This tends to confuse matters and could be taken to indicate, for instance, that the Band had substantial independent means aside from Department funding. Eliminating the irrelevant figures from the financial statements would minimize the likelihood of any such misapprehensions.

I set out hereafter three examples where there was what I would call "double counting", to illustrate the points made above.

a) The first example is a concrete plant which the the Westbank Band operated for a number of years. The plant furnished concrete products required during the development of, among other things, the Lakeridge subdivision. It provided some Band employment, but as market activity decreased it became so uneconomic that it was deemed necessary to close it.

The following is a simplified summary of the Statement of Revenue and Expenditure for the concrete plant in 1983.

Statement of Revenue and Expenditure for the Year 1983

Revenue	$
Sales	4,233
Internal transfers from other Band funds	24,564
Total Revenue	28,797
Expenditures	
Deficit at end of prior year	17,137
Actual (true) expenditures (total)	14,625
Total expenditures	31,762
Operating loss	
(excess of expenditures over revenue)	2,965

1971–72 to 1980–81. Mr. Fred Walchli, the former Regional Director General, said this report was requested because of the concerns that were being voiced about problems, or alleged problems, at Westbank.

The report contained a reference to, and some analysis of, the 1980–81 Band revenues. I quote from page 16 of Exhibit 113, document 72.

Westbank Band Budget

	1971/72	1980/81	1982/83
Band	5,160	1,999,815	3,788,517
Departmental contribution	13,850	900,763	990,586
Total	19,010	1,900,578	4,779,102

(sic; the author is out $1 million in his addition here)

While the table was said to come from the Westbank Band budget, it appears that the 1980/81 figures were drawn from the 1981 Band financial statements rather than from the budget. Leaving aside the inaccuracy of the source and the addition, the report asserts that the Westbank Band was becoming financially independent of the Department. The report indicated that 69% of the total revenue for the year came from non-Departmental sources.

The "Band" revenue figure of $1,999,815 is erroneous. Proper analysis of the financial statements should have revealed to the writer that the money attributed to revenue earned by the Band was overstated. To arrive at the number $1,999,815, there were included such items as opening surpluses, transfers between funds, monies received by the Band as an agent on behalf of locatees, monies received by the Band as agents for other purposes, and inexplicably, the $900,763 figure, which represented the contributions from the Department of Indian Affairs.

After eliminating the above-mentioned items, a closer look at the financial statements would show that the revenue which could be ascribed to the Band was $386,193 and was about 20 per cent of the Band's total revenue rather than 69 per cent, as stated in the report from the Director of Economic Development. I have no reason to believe that he was endeavouring to mislead anyone, but he appears to have been greatly confused about the true state of financial affairs.

c) Another instance of misunderstanding of the Band revenue figures appeared in Mr. Walchli's testimony. He appears to have let the misleading style of financial reporting creep into his thinking. In the course of giving testimony as to the ability of the Westbank Indian Band to support itself from its own revenues, he said: "the intent here

This simplification shows transfers from other funds as part of revenue, and a deficit from the prior year as part of expenditures. But such figures are not needed, nor are they at all useful in giving the true picture of 1983 activities.

I think the appropriate method of handling this Statement of Revenue and Expenditure would be as follows.

Revenue	$
Sales	4,233
Expenditures (summarized)	14,625
Excess of expenditures over revenue (i.e. operating loss)	10,392

As suggested in Section II, the other data can be shown "below the line" but should not affect the year's operating statement.

It can be seen from this example that the stated revenue for the year 1983 was greatly exaggerated and that the expenditures and operating loss were also distorted. This observation should not be taken to be directed at the Band or its auditors. The format used by the Band appears consistent with the format supplied in the Department's 1980 Accounting Guide (Exhibit 43, Section 5). That guide shows incoming inter-fund transfers as "revenue" and outgoing inter-fund transfers as "expenditures". It also shows the prior year's surpluses and deficits as part of revenue. It is apparent to me that this approach to financial reporting is not particularly illuminating and I think the Department guide should be changed so that clarity is enhanced. I expand on these comments in Section II, Part C.

It should be noted that the former Westbank Indian Band auditor actively pressed for clearer standards in Indian band accounting and financial statements. He said in his testimony that he has been frustrated by the lack of progress to date. Individual bands and their auditors must not be left to establish accounting standards wholly on their own. I am heartened to see that there does seem to be some definite impetus from the Department for improvement in standards of accounting, which hopefully will result in improved clarity and ease of comprehension. We are in a transitional period, and methods that were formerly appropriate are becoming less satisfactory for more economically advanced bands such as the Westbank Indian Band.

b) I would like to deal next with an example of the confusion that can be engendered in individuals by such multiple counting as noted above. I had before me in evidence a report made on November 9, 1982 by the then Director of Economic Development for the British Columbia Region of the Department. It was entitled "Some Indicators of Change — Westbank Indian Band" and related to the decade from

was that as bands developed economically and start to generate their own revenue, that they would start taking on paying some of the cost of services. There is a couple of examples I could give you". (Here he dealt with the finances of another band) and then he continued with regard to Westbank: "In terms of Westbank, it went up from somewhere from around, and I think these figures are correct — the Band was contributing back in '75 about $39,000, and at the end of the ten-year period, they were around $3.2 million or somewhere around that, and paying for a lot of their own programs. . . ."

The figure of $3.2 million does not appear in the financial statements for 1985 as revenue. However, assuming that the figure Mr. Walchli gave in evidence was a ballpark figure, he could only get there by the process of double counting previously referred to or by including non-recurring items, such as the proceeds of cut-off claims.

It appears to me that if the Department's Director of Economic Development and the Regional Director General can be led into this state of confusion by the financial statements, there is little, if any, hope that an individual Band member could obtain a true and accurate picture of what was occurring concerning Band finances. This sort of accounting is not helpful in providing information with respect to the real state of affairs of the Band and Band-related entities, and it can, as we have seen, result in serious misapprehension about the actual state of affairs.

2) Failure to Provide Financial Statements and Information about Band Enterprises and Activities

Although there appeared to be excessive detail in some areas, there was a dearth of information in others. The Westbank Band has displayed considerable initiative in undertaking new business ventures. Those initiatives have not always been successful. That is not necessarily to be criticized because the time period examined by the Commission covered some relatively difficult times for the Okanagan area. As stated elsewhere in this Report, the Band was the owner of the Westbank Indian Band Development Company Ltd. (DevCo). The shares in the company were held in trust for the Band. The directors of the company included the Chief and councillors of the Band, and other Band members were also appointed. The Development Company in turn controlled a number of companies which carried on different enterprises for the Band.

There were a number of instances of lendings and borrowings among subsidiaries, the parent company, and the Band. A retrospective look at those transactions does not always provide a logical explanation for them, but presumably those transfers of monies were made on a needs basis. Band members do not appear to have had ready access to the financial statements of DevCo, or to the financial statements of its subsidiaries. This lack of financial information with regard to the Band's business activities may have had a disquieting effect upon those who were not supporters of the Band government of the day. As the

dealings of the subsidiaries sometimes involved members of the Band government or their families, the perception of conflict of interest often occurred. More complete standards of disclosure might have cooled some of the rumours. As well, fuller disclosure would ensure that conflict of interest situations would be addressed at the outset.

The statements of the Band itself cannot adequately reflect the corporate activity of its subsidiaries. Band financial statements in later years bordered on the obscure when it came to the activities of businesses owned and operated by the Band. For the year ending March 31, 1985, the sole information in the Band statements was the entry on the balance sheet of:

Investments (Note 4)	$1,227,729

Note 4 is reproduced here in its entirety:

4. Investment	$
Westbank Indian Band Development Company Limited (wholly owned subsidiary)	
Shares at cost	5
Advances	(454,892)
Westbank Indian Band Nonprofit Housing Project	
Advances	11,826
Westbank Indian Band Pine Acres Home (formerly Intermediate Care Facility)	
Advances	24,861
W I B CO Construction Ltd.	
Advances	320,019
Lakeridge Realty Ltd.	
Advances	48,831
Northland Bank	
Shares at cost	1,277,079
	1,227,729

The Westbank Indian Band Development Company Limited is wholly owned by the Westbank Indian Band. The shares are held in trust by the directors for the Westbank Indian Band.

In corporate accounting, investments are generally shown on a cost basis or an equity basis. Essentially the former ascribes to an investment its acquisition cost and the latter takes into account in addition a pro rata share of the subsequent earnings or losses. Note 4 is something different. Investments, properly so-called, confer upon the investor some form of property interest. Except for the $5 ascribed for shares in the Westbank Indian Band Development Company and the $1,277,079

ascribed for the Northland Bank shares at cost, the monies listed in Note 4 are not investments. These other amounts apparently represent accounts receivable which were unsecured in any manner, and for which there were no agreed terms of repayment. In some instances repayment was (and is) problematical.

Describing the $454,892 as an advance to the Westbank Indian Band Development Company Ltd. is an unorthodox way to portray the value of an investment and obscures a complicated story. As pointed out elsewhere in the Report, the Westbank Indian Band entered into a 99-year lease arrangement with DevCo. DevCo undertook development of the residential subdivision on Reserve 10 known as "Lakeridge". There remained a large amount of money owing to the Band from DevCo under the head lease. That debt continued to show on the financial statements of DevCo, but was not correspondingly reflected on the statements of the Band. Sometimes it received monies from DevCo and credited them to the lease payments, but the account receivable from DevCo was not shown as such on the Band's financial statements. The $454,892 advance referred to under Note 4 is thought to reflect monies borrowed by DevCo from the Northland Bank, and in turn passed on to the Band and used for erection of the Band office building. The monies owed to the Band under the lease exceeded the monies advanced by DevCo to the Band, so the bracketed numbers are not a true reflection of the state of accounts between those two entities. It seems that even if the approach used in valuing the investment in DevCo were acceptable, the number would not be right.

The value ascribed to the Band-owned corporations appears to be an exercise in netting out the various advances between those corporations. If that was the case, it was both misleading and unorthodox. A different firm of auditors prepared the Band's financial statements for the year ending March 31, 1986. They showed Band investments in a more orthodox way and added an appropriate note to reflect the fact that the Northland Bank shares appeared to be worthless. But a tangled web of intercorporate loans and advances was obscurely portrayed in a single amount on the liabilities side of the Band Balance Sheet, which showed:

"Advances from related entities"	$41,285

The audit working papers reflected the following picture:

Amounts payable by the Band:	$	$
DevCo (presumably this debt was created by the borrowing of monies by DevCo from the Northland Bank and the use thereof in the construction of the office building)	653,938	

Amounts payable by the Band (cont.):		$	$
Westbank Indian Band Nonprofit Housing Project		47,110	701,048
Amounts receivable by the Band:	**$**		
Hyde Park Image Creators Inc.	59,002		
Toussowasket Custom Framers Ltd.	15,751		
Lakeridge Realty Ltd. (net)	68,848		
Lakeridge Insurance Services Ltd.	5,000		
Pine Acres Home (a Society)	70,218		
Sookinchute Utility Corp.	1,035		
WIBCO Construction Ltd.	337,992		
Wild'N'Wet Amusement Park Ltd.	101,917		659,763
Advances from related entities, per Balance Sheet			41,285

Source: Auditors' working papers.

These figures were not carried through to the financial statements. The reader of the financial statements would be limited to learning that the Band owed $41,285 to related entities. The reader would not know that DevCo had been borrowing from the Northland Bank and passing those borrowings to the Band for erection of its office building or that there were significant debts owing by the subsidiary to the Band. No ordinary reader would have any inkling of the amounts of money that came from (or went to) the Band entities. Legitimate questions about the appropriateness of making those advances could not be raised because adequate facts were not disclosed.

3) The Failure to Deal with the Apparent Problems or Inconsistencies in the Financial Statements

Since 1980, the Band has made annual per capita payments to individual Band members. The Band and Band Council Resolutions have stated that the per capita payment to underaged members of the Band shall be "credited to a trust account". Generally, the Band has required that parents or guardians of infant Band members apply on their behalf. The application forms included the wording: "I agree that these monies will be deposited in a trust account in the name of the Westbank Indian Band. . .".

From time to time, concerned Band members, particularly those living away from the Reserve, have made inquiries on behalf of their children. Correspondence from the former Chief and the Band Administrator appeared to suggest that some separate fund was in existence.

In a letter sent to a Band member in April 1985, then Chief Ronald Derrickson wrote: "You keep writing about your childrens' Band Grant. We have told you time and time again, the payment of the Grant is not awarded to minors' parents. It is placed in the trust account until the age of nineteen and given only to the children themselves." That letter was copied to the Minister and several senior officials of the Department. In fact, the monies voted for the minors have not been set aside in any specific trust fund.

After 1984, the discerning reader would have seen that the item on the balance sheet titled "Funds Held in Trust for Band Members" was far less than the item on the liability side of the Balance Sheet entitled "Trust Liability". Those items should have been equal. The balance sheet showed the following discrepancies:

Per Balance Sheets

As at March 31	Funds held in trust for Band members	Trust Liability	Shortfall
	A	B	B-A
	$	$	$
1984	372,096	648,833	276,737
1985	275,169	639,123	363,954
1986	27,880	648,155	620,275

There has been some confusion among the Band members as to what became of the minors' trust monies. The simple answer appears to be that they were never set apart in a trust fund. Just after the collapse of the Northland Bank in late 1985, the Westbank Chief and councillors received a letter quoted hereafter in part:

> I read the newsletter of October 2/85 regarding the monies in Northland Bank, Edmonton, Alta. I want to know if my son's grant monies were in that Bank when it collapsed. If not, I would like to know where there [sic] situated. . .

The Band Administrator, Mr. Schwartz, answered that letter on November 4, 1985:

> Dear Band member:
>
> Your letter of no date, received on October 31 1985, was referred to Council. . . .
>
> The grant monies held on behalf of the minors (19 and under) had nothing to do with the bank so indicated in your letter. All payments

> have been made and will continue to be made as a minor reaches the age of 19.
>
> We do not issue statements from any bank showing calculated interest for any individual minor until the minor reaches the age of 19, when we get approval to make a pay out.

Counsel for the former Band executive, who also acted for Mr. Schwartz, made the following submission with regard to the minors' trust fund:

> The evidence of Mr. Schwartz and the former Chief Ron Derrickson was that as these commitments came due, they were met and paid by the Band, although a special account was never set up. This problem became known to both the Administrator, Mr. Schwartz, and to the former Chief and councillors at an early stage and was brought to their attention by the auditors. Once this problem became known, there were steps taken to create and fund this special trust account. These monies were to come from the cut-off settlement. These funds have since been approved by the Band and deposited in the Northland Bank. However, these funds were tied up in the Northland Bank negotiations on loans, and these funds have not been released.

It is difficult to reconcile that submission with the assertion of Mr. Schwartz in his 1985 letter that the "grant monies. . .had nothing to do with the bank" (Northland). After hearing from various witnesses concerning the "minors' trust fund", I had the impression that it might be more appropriately termed the "mystery fund". It had a singularly elusive quality and its locus was never fixed, the reason being that the fund never existed. As I said to counsel during the hearings, I was not convinced that there had to be monies placed in trust as a matter of law, but it seems to me quite misleading to describe the future liability as a "trust fund" when in fact it is simply an unfunded liability.

The gist of the evidence of the Administrator and of the former Chief was that although there was no special trust account set aside, it was intended that the liability to minors would be funded from highway monies on deposit with the Northland Bank. This may be difficult to achieve because of the complex nature of the obligations existing between the failed Bank and the Westbank Band and companies. Mr. Schwartz's testimony was that the trust liability now owing is around $700,000 (Transcripts: Volume LIII, p. 7667). The Commission is aware that negotiations have been carried on between the Receivers of the Northland Bank and officials of the Band to resolve outstanding issues. Funds will be available to satisfy this unfunded liability to the extent that former deposits in the Bank can be recovered. Had the Band members been aware that no monies voted for the benefit of minors were being set aside in a separate fund, it might well have affected their decisions on other matters. The use of the term "minors' trust fund" was unfortunate in that it implied such a thing existed.

At a Band general meeting held on December 12, 1983, Band members voted to authorize payment to locatees of the amounts they had agreed to accept in the highway settlement. The money to pay the locatees was drawn, not from the Ministry of Transportation and Highways of British Columbia, but from the proceeds of the cut-off settlement provided by the federal government. Of $3,211,711 paid to locatees, the then Chief's immediate family received $2,139,959 (67%). At this same meeting, the Band members voted a $3,000 per capita distribution to each Band member. The monies for the infant children were to be put in a "special trust account". That was not done and the liability to the minors remains unfunded. Would Band members have taken the same course if they had realized that no separate trust fund existed? Or would they have insisted that the interests of the minors be protected before full payment of large amounts was made to individual adults? These questions can never be answered because disclosure of who was getting what was not made. This was a failure of the then executive.

The financial statements of the Band are provided annually to the Department. Department officials must have reviewed the Band's balance sheet each year. However, no initiative seems to have been taken to notify Band members of the lack of trust funding, or to require or request the Band to describe the grants differently so that the Band members would not be misled. As of August 1987, when the hearings concluded, the unfunded liability still existed. I know that this is a grave concern to the present Band administration.

The Department has recognized that this area of minor trust funds is a concern throughout the country — it is a matter that can arise from time to time in many bands. Counsel for the Department said:

> It is here suggested that a recommendation be made that the Indian Act be amended so as to require that when a band with Section 69 authority is making a distribution of revenue funds to its members, it be required to place in a trust account that portion of the funds attributable to the underage members of the band so that it will be available to them as they reach their majority.

This submission seems sensible to me and I endorse it. I think it would produce great controversy to have a repetition of the Westbank Band's situation, where there is a large unfunded liability and no designated fund to satisfy it. Expectations were created but no adequate steps were taken to ensure that they could be realized.

4) Failure to Disclose Significant Transactions between Members of the Band Government and the Band Itself

As related in other chapters of this Report, there were a number of transactions which could hardly be said to have been conducted on an

arm's length basis. In the governance of Indian bands, it would seem virtually impossible to avoid transactions between the band and individuals (and their direct relations) involved in band government. In orthodox accounting, transactions that involve "related parties" are subject to disclosure. The Westbank matters noted below are instances where such disclosure would be called for.

- the purchase of Chancery Hair Design Ltd. (later renamed Hyde Park Image Creators Inc.);
- the purchase of Toussowasket Custom Framers Ltd.;
- the conveyance of a Vancouver condominium from Noll Derriksan to the Band;
- the payment to Chief Derrickson and to Noll Derriksan of substantial sums of money for "severances" arising from the Highway 97 construction;
- truck and other equipment rentals paid to Chief Derrickson and councillor Brian Eli. Evidence was given that Councillor Eli, during the financial years 1982 to 1986, was paid rentals of about $73,000 for the rental of a 1976 three-ton truck. Those payments were made by the Band-owned construction company. It was not clear whether Councillor Eli paid the driver, but the Band appears to have bought the truck several times over;
- payment by the Band to Waterslide Campground Ltd. of $100,000. Those monies were provided by the Ministry of Highways in payment of the McDougall Creek contract and Ronald Derrickson is a principal of Waterslide Campground Ltd.;
- payment by the Band of funds to Chief Derrickson in exchange for land required as initial payment on the Band purchase of Wild'N'Wet waterslide.

The Role of the Department

The Department exercises great influence over band accounting matters and standards of disclosure in financial statements. This influence is exercised through the various editions of *Accounting Guidelines for Indian Bands* in Canada, through Department staff dealing with band staff, and the provision of courses sponsored by the Department. The Department's approach has been heavily focused on information required or desired by the Department. There is little to indicate that the Department has been "watching out" for band members, ensuring that they have been adequately informed about the government of their band and the conduct of band business ventures.

The Department seems to be gradually assuming a less prominent role in the administration of band finances. The newly developed Alternative Funding Arrangements (AFA) will give bands more flexibility to determine the best use of monies and will allow them to

plan for periods of up to five years. Obviously, once an Arrangement is in place, less Departmental input will be required. It seems desirable that a way be found to offer non-AFA bands greater flexibility as well. Given such flexibility, adequate and timely disclosure to band members will be increasingly necessary.

The current restructuring of the Department's role already recognizes the new reality. The Departmental people who previously dealt with bands were called "Band Financial Advisers". Today the Departmental people, who have a less active role than their predecessors, are called "Fund Management Officers". This seems to be a recognition that the Department usually cannot provide all the advice bands require because:

- financial statements of band enterprises, incorporated or not, may not be included with the financial information supplied to the Department. That approach is understandable; if there is no Departmental funding involved, there is no "need to know". But without such information any advice may be faulty;
- advising band management in certain areas, especially band enterprises, is likely far beyond the training and experience of many Departmental people, whose required skills are different;
- Departmental staff time may be inadequate to provide the appropriate assistance;
- there is, or could be, concern about civil liability for what is later determined to be "bad" advice;
- there is no guarantee that a band would take the Department's advice.

In earlier days, the Department had very extensive authority over band finances. Today, much greater responsibility and authority is being exercised by band councils. Band members will have to be more vigilant about band affairs. They can only exercise vigilance if they have the means of finding out the facts. Clearer financial reporting is vital for effective self-government.

Chapter 7

Mobile Home Parks

During the period of almost 11 years referred to in the Commission's Terms of Reference, a burgeoning of mobile home parks took place on Westbank Reserve 9. Wisely, the planning and policy of the Band and of the Department of Indian Affairs precluded the development of mobile home parks on Reserve 10.

Reserve 9 is located immediately northeast of the village of Westbank, and before it was augmented by lands acquired in a cut-off settlement, it was a reserve of some 1540 acres.

Both Reserves 9 and 10 were the subject of a planning study by Interform Planning and Design Ltd. in 1973. The plan proposed the development of a model community on Reserve 10, but had more prosaic aspirations for Reserve 9. It described the uses of Reserve 9 at that time as follows:

> Present uses on the land include housing sites, a small amount of farming, some grape production on leased parcels, a mobile home park, a stock car race track at the north end, and a mobile home park and picnic area in the lakeshore area.

The mobile home park at the north end of the Reserve was operated by Park Mobile Homes Sales Ltd., a company owned by the Yorks. The stock car race track was to become the site of the Mt. Boucherie (Toussowasket) mobile home park of Noll Derriksan. The 1973 study described the site on the lakeshore as follows:

> The lakeshore site is presently in use as a mobile home park and campsite. The quality of the park is sub-standard and should be improved as much as possible. However, it should not be expanded beyond present lease limits. Over the coming years, the site will substantially appreciate in value, and the option for better economic use of the general site should be kept open.

The Interform report did not fully anticipate the tremendous growth of the non-Indian population on Reserve 9. It was in 1976 and the immediately ensuing years that the acceleration of mobile home park development took place. That development brought with it many of the political problems that beset Westbank in the period under review (1975–86). The Commission heard that whereas there were about 250 members of the Westbank Indian Band, some 3000 to 5000 non-Indians also resided on Reserves 9 and 10 during this period.

By 1976, the mobile home park was an idea whose time had come for the Okanagan region. A number of parks were developed on lands owned by Chief Ron Derrickson, his brother Noll (a former Chief), and his father Theodore. The lands on the southern lakeshore flats were lands of the Tomat family which were to be divided into three parks and part of a fourth.

A Mr. Schlief commenced the development of a mobile home park on Reserve 10 on lands occupied by Henry and Millie Jack as locatees. It appears that the then Regional Director General of Indian Affairs, Mr. Fred Walchli, and Chief Derrickson moved quickly, if not somewhat arbitrarily, to stop that development.

Save for the York family, the mobile home park operators had few apparent problems with the Band or with the Department of Indian Affairs during the 1970's. The problems that beset the mobile home park operators in the early 1980's could have been foreseen by anyone who was aware of the Yorks' situation, but that knowledge was not widespread.

As noted elsewhere in this Report, the relationship between the Yorks, on the one hand, and Noll Derriksan and the Westbank Indian Band on the other, had become confrontational and antagonistic by 1977. In 1977, the Department confirmed the allotment of a Band road to Noll Derriksan, which had the potential effect of barring legal access to a substantial portion of the Yorks' (Park Mobile) mobile home park. The strip of land which was an unused Band road was allotted to Noll Derriksan. He, in turn, took legal proceedings against Park Mobile Home Sales Ltd. to remove encroachments from the road and to effect cancellation of the lease alleging purported lease violations. Having permitted the allotment of the roadway to Noll Derriksan, the Department was quick to support Noll Derriksan and the Band government in negotiating a higher rent, using the roadway as a bargaining feature.

Otherwise, however, mobile home park operators developed and operated their businesses in fairly stable circumstances. In late 1976, when Ronald Derrickson became Chief, a major expansion of mobile home parks on Reserve 9 was under way. Mr. Derrickson himself was the locatee of lands that had been leased to (1) Golden Acres Ltd., a company of the Crosby family, (2) Mr. and Mrs. Jack Alexander, who developed a mobile home park by the name of Pineridge Estates, and (3) part of a development by Westgate Developments Ltd., a company of the late Mr. Ted Zelmer. Elsewhere on the Reserve, Noll Derriksan was the locatee for Park Mobile Homes Ltd. and for Toussowasket Enterprises Ltd.

When Ronald Derrickson came to power in 1976, the terms of most of the leases had been agreed upon earlier. It appears that the new

Chief thought the rents being paid by the park operators were too low, but it was several years before the mechanisms in place would permit rents to be raised.

A feature of the mobile park scene at that time was the assertion of jurisdiction over mobile home parks on Indian reserves by the British Columbia Rentalsman. Rent controls had been imposed at Westbank and the Rentalsman's jurisdiction had been affirmed by the British Columbia Court of Appeal in the case of Park Mobile Home Sales Ltd. v. LeGreely, a decision of the B.C. Court of Appeal reported at (1978) 85 D.L.R. (3rd) 618. That decision was reaffirmed by Mr. Justice Locke in March 1982 in a case involving the Mt. Boucherie Park.

The former Chief's view of the fairness of the rents was cogently stated in testimony he gave before the Commission. He said:

> . . .one of my concerns has always been that we have many Band members who are in effect millionaires, if you look at their land holdings. Many Band members are millionaires, yet they're on welfare.
>
> That's a crime. That's a damn crime, that people with that kind of land holdings and that kind of potential should be on welfare. It is a worse crime when some trailer park operator has these and is using these to his advantage and not returning a fair rental.

Chief Derrickson recounted in evidence how the Band had dealt with the so-called Voth lease (the lease by the lakeshore on Reserve 9). Mr. Voth apparently held a head lease and had two sub-lessees, with all three parties operating mobile home parks. Mr. Derrickson gave testimony that rents for the locatees were increased substantially. When asked by his counsel about this matter, he gave the following answer:

> Q Now when you say substantially increased, you're not talking in terms of 10 or 20 per cent or 25 per cent. You're talking about 3 or 4 times or perhaps even higher than what they were paying previously. Is that correct?
> A Maybe even 5 or 6 times.

When the time came to review the rents, the methods used by Mr. Derrickson to increase them were ingenious and bold. Mr. Derrickson relied, to some extent, on the patina of authority conferred upon the Chief and council by the Department of Indian Affairs. In most instances, he purported to act under the "1977 Agreement". He also relied to some extent upon what some operators perceived as discriminatory use of by-laws and he was not above using hyperbole. To some people, he seemed omnipotent. The former Regional Director General, Fred Walchli, gave evidence with respect to powers conferred upon the Chief and council:

> Any activities the Westbank Band undertook by way of land administration were controlled by the Department, and they did not

> have authority under this agreement to execute or cancel any agreements. That remained with the Department.

At the Commission hearings, the Department took the position that authority was never given to the Westbank Band under the 1977 Agreement to do anything but administer leases, and while they could discuss rent, they did not have rent fixing authority.

That position was belied by the conduct of the Department, which at times acted to create the impression that the Chief had the power, while at the same time it consciously withheld such power. In any event, Chief Derrickson asserted decision-making powers. The Chief was of the view that the mobile home park operators had signed their leases of their own free will with legal advice.

His major move towards rent increases occurred in late 1981 and early 1982. Notices were sent to all the mobile home park operators in 1981 and ultimately a meeting was held between the Chief and the operators in early October 1981. At that time the usual monthly rents charged were in the vicinity of $90–120 per mobile home pad. To some extent the level of rents depended upon the rules and practices of the British Columbia Rentalsman. The lessors had to limit rental increases to a maximum percentage unless they received approval from the Rentalsman for a larger increase. As previously mentioned, the B.C. Rentalsman had been successful in asserting his jurisdiction when challenged. As long as that jurisdiction was maintained, rental increases would be limited.

Among those present at the meeting convened by the Chief were the Yorks, Ted Zelmer, Leonard Crosby, the Lauriaults, the Lidsters, Val Spring and Councillor Brian Eli. Those assembled were told that the Band had passed its own Rentalsman by-law and that the B.C. Rentalsman had no jurisdiction on Band land. According to Mr. Lauriault, the Chief explained at the meeting:

> that they now had their own powers and that they could set the rents on Indian land. The Chief said that part of the rent increase was to upgrade that area of the Reserve, in other words, sewer and water, etc. . . .

The Chief announced that pad rents for all mobile home parks would be increased to $150 a month. At the same time he said that the leases with the mobile home operators would be modified so that in lieu of the fixed rent, there would be an alternative rental of 20 per cent of the gross receipts, whichever was greater.

The mobile home park operators were supplied with notices to be forwarded to all their tenants to the effect that the rents were to be raised to $150 per month. These notices contained a note at the bottom of the page:

> The Westbank Indian Band Council under by-law 1981–03 have established by Resolution that mobile home park owners who are situated on Reserve property are to increase pad fees to a minimum of $150 per month.

Not only was the power of the Band Council to pass such a resolution legally non-existent, there also was no by-law 1981–03. Such a by-law had been passed by the Council on July 28, 1981, but it apparently had been disallowed by the Department. However, it appears that the rejected by-law was distributed as though it was in force. The by-law recited in its preamble that the Band had been granted Section 60(1) powers under the Indian Act, which was not the fact. It called for the appointment of a "Band Rentalsman". It gave the Rentalsman wide powers of investigation, including the powers and privileges, of a Commissioner under the Inquiries Act. This by-law also gave the Band Rentalsman jurisdiction to make orders in a wide variety of circumstances. It empowered him to establish maximum percentage rent increases and to "review, exclude or declare unenforceable any covenant in a lease permit or agreement, which he finds to be unreasonable in the circumstances".

At the meeting, Mr. Crosby requested an authenticated copy of the by-law and received it. This document, which was entered in evidence, was purportedly passed by Council and was signed by the Chief and the then councillors. Mr. Crosby, at the meeting, persisted and asked for some indication of approval by the Department. According to Mr. Crosby, the Chief said "no, they didn't have it right now because the by-law had to be sent back to change one or two words. . .". Mr. Crosby was left with the impression, however, that the by-law had been approved or authenticated in Ottawa.

Some park operators distributed the notices of rental increases which resulted in considerable turmoil. The tenants of the parks did not welcome this initiative of the Chief. It appears the measure was largely effective in establishing a temporary increase in rents in the various parks. The results were not quite what the Chief may have envisioned. The British Columbia Rentalsman continued to assert his jurisdiction and certain rollbacks were made. The B.C. Rentalsman continued to impede efforts to increase rents at the parks.

The tactics used by the Chief in 1981 and 1982 resulted in significant increases in the rent paid by such operators as the Alexanders, the Zelmers, and the Lidsters, all of whom came to terms with the Band about that time. It might be said that in achieving those rent increases, the Chief played hard ball. The Alexander example is illustrative.

The Alexanders

Mr. Alexander and his wife Barbara are the operators of Pineridge Estates. The Alexanders negotiated with Ronald Derrickson in 1976 to lease some 21 acres of land on which Mr. Derrickson was locatee. The lease was dated June 21, 1976, and the rental for the first five-year period was set at $9,654.30 per annum. The lease contained a further provision that the rent would be revised every five years. Specifically, the lease stated that "the Minister or his authorized representative may determine and fix the yearly rent for the second or any subsequent five-year period". The rent was to be "the amount which is, on the 90 days before the five-year period begins, in the opinion of the Minister a fair market rent for the land leased, on the terms and conditions contained in this lease, and enjoying all the services and amenities then existing, but ignoring the value of any permanent improvements made on the land by the tenant". The lease document provided for an appeal to the Federal Court within 60 days after a rental determination.

The lease contained a provision which allowed the lessee to take water from McDougall Creek. There was inadequate water supply for this area, which poses an ongoing problem for the Alexanders. I comment on possible action to alleviate such problems in Appendix C of this Report.

The Alexanders operated the park without serious problems for some time. In 1980, they received a letter from the Chief, with a *Vancouver Sun* article entitled "B.C. Rentalsman Scalped by Indian Act" enclosed. An arrow was opposite a paragraph which read:

> A section of the century old Federal Indian Act allows Indian Bands to ignore provincial, residential tenancy laws and treat non-Indian tenants on their land any way they please.

In February 1981, the Alexanders received the following letter:

February 12, 1981

"DOUBLE REGISTERED"

Jack Ellis Alexander and
Barbara Alexander
RR #1 Boucherie Rd.
Westbank, B.C.
V0H 2A0

Dear Sir:

Re: Rent Review
Lease No. 49610
Portion of Lot 45, Indian Reserve No. 9

This is to advise that the subject leasehold property rental is to be reviewed on May 1, 1981.

The new rental has been set on behalf of the Minister at Forty two thousand nine hundred eight ($42,908.00) Dollars per annum for the next five year term.

If you should disagree with the amount set please refer to Page 4(i) wherein you may refer this matter to the Federal Court of Canada under Section 17 of the Federal Court Act. This may not be referred to the Federal Court unless the new amount requested by the Minister is paid first.

Should you agree with the amount set, please make an appointment with this office and a modification agreement to the lease will be drafted.

Yours very truly.

WESTBANK INDIAN COUNCIL

"Ronald M. Derrickson"

Chief Ronald M. Derrickson.

The letter was sent double registered and was copied to Mr. S. McCullough, a member of the Lands, Reserves and Trusts Directorate at Indian Affairs. The letter did not say who had set the rent on behalf of the Minister. It would seem it was Ronald Derrickson. Nothing in Mr. Alexander's 1976 lease required that the new rental be embodied in a modification agreement. Modification agreements became the mechanism for achieving a percentage rental as an alternative to a fixed rental.

Mr. Alexander took the letter of February 12, 1981 to the Kelowna law firm of Salloum, Doak. Mr. Welder, who was then an articled student, handled this matter. The Alexanders next received this letter:

March 27, 1981

"DOUBLE REGISTERED"

Jack Ellis & Barbara Alexander
RR # 1, Boucherie Rd.
Westbank, B.C.
V0H 2A0

Dear Sir:

Reference is made to our letter to you dated Feb. 12, 1981, suggesting the new rental figure for the next five year period of your lease and also to our recent telephone conversation wherein you promised to speak to me within three (3) days of our conversation.

As three weeks have now passed and we have not heard from you, we are withdrawing our offer of rental to you but not our notice of rental increase.

I am therefore instructing the Band Appraiser, Robert Dephyffer to do an appraisal of the entire property as per the conditions of the lease. This appraisal is to be done solely for the purpose of establishing a rent in the Federal Court of Canada. We are now at the stage of negotiating rents in amounts up to $2,500.00 per acre per annum or 25% of the gross receipts whichever is the greater.

Because of the extreme cost of a Federal Court appraisal the Westbank Indian Council cannot consider our previous offer. I would advise you to get legal advice and supply the name of your legal Counsel to the Westbank Indian Band so we can have the Dept. of Justice make contact with them as to the court date and to advise you of the conditions you must meet before you take this matter to the Federal Court if this is indeed your choice.

Yours very truly,

WESTBANK INDIAN COUNCIL

"Barbara DeSchutter"
"for" Chief Ronald M. Derrickson

RMD/bdes

Mr. Welder made a counter-offer which was ultimately rejected. Before it was rejected, the Alexanders received a barrage of correspondence calling for approvals from the Dominion Fire Marshall and the Department of Health and Welfare, asking for soil tests, insurance policies, surveys, and plans. Correspondence was copied to the FBDB, the Band solicitor, and officials in the Department, and was to continue until the rent issue was settled. It seemed unusual that these issues were raised five years after the mobile home park was in place, and terminated when the rent issue was settled. During the course of this correspondence the Alexanders complied with each request, only to be met with requests for further information. Another letter was sent to Mr. Alexander asking that he evict certain tenants whose children had allegedly damaged fourplex buildings near the Alexanders' mobile home park. Those fourplexes were owned by the Chief.

An interesting aspect of the settlement of the Alexanders' rent was the role played by the Regional Director General of Indian Affairs.

In a letter dated May 22, 1981, Mr. Welder (by then having been called to the bar) wrote:

> You refer in your letter of May 21 to your letter of February 12, 1981. In that letter you stated that you would be setting the rent on behalf of the Ministry at $42,908. Under the terms of the lease the Minister or his authorized representative may determine and fix the yearly rent for the second or any subsequent five year period, either before or after the five year period has begun. In this regard we would request that you provide us with written authorization from the Minister that appoints you his representative to fix the yearly rent on this lease.

Evidence of the authority was soon forthcoming. The Regional Director General wrote a letter as follows:

"VIA LOOMIS"

May 26th, 1981

Westbank Indian Band Council,
Box 850,
Westbank, B.C.
V0H 2A0

Attention: Chief R. Derrickson

Dear Chief Derrickson:

Questions continue to be raised by several leasehold occupiers of your reserve lands as to the authority provided to your Band through the Band Council to manage and control alienated lands.

Your Band has been declared as having reached an advanced stage of development and has subsequently been granted certain authorities and responsibilities by both the Minister and the Regional Director General. These authorities include the responsibility of managing and controlling revenue monies, including the collection of rentals due to the Band and Band Members; the responsibility for managing, negotiating and enforcing lease and permit agreements entered into by the Crown for the direct benefit of the Band and Band Members; and the responsibility for managing and administering all surrendered reserve lands through the Band Council on behalf of the Department.

It is intended that this letter be used in those instances where the authority and responsibilities of the Westbank Indian Band Council might be questioned.

Yours truly,

"F. J. Walchli"

F. J. Walchli,
Regional Director General,
British Columbia Region

By letter dated May 28, 1981 Chief Derrickson sent a copy of Mr. Walchli's letter to the Alexanders' solicitors, and the Band solicitor Mr. Graham Allen wrote to the Alexanders' solicitors on June 2 in part as follows:

> The Westbank Indian Council has referred to my attention its file concerning the May 1, 1981 rental review for Lease No. 49610, held by your clients Mr. and Mrs. J. Alexander.
>
> My understanding of the situation is that, by rent notice dated February 12, 1981 received by Mr. and Mrs. Alexander on February 18th, Chief R.M. Derrickson gave notice that the yearly rent for the five year period commencing from May 1, 1981 had been determined and fixed at $42,908.00 pursuant to the provisions of subsections 1(e) and 1(f) of the Lease. Chief Derrickson's authority to give such notice is clearly acknowledged in the attached letter of May 26, 1981 from Mr. F. J. Walchli, Regional Director General of the B.C. Region, Department of Indian Affairs.

Mr. Allen went on to take the position that the time within which an appeal should have been taken was 60 days after February 18 and that the payment of $42,908 was a prerequisite to the taking of the appeal. He concluded:

> It is my opinion that Mr. and Mrs. Alexander have failed to pay rent as required by the terms and conditions of lease No. 49610. I have accordingly advised my client, the Westbank Indian Council, that, if it so wished, it is now in a position to seek immediate cancellation of this Lease.

When carefully perused, Mr. Walchli's letter does not clearly acknowledge the Band's authority to set the rent under the Alexander lease. It is easy to see, however, that the letter could create such an impression. I cannot help thinking that it was intended to give an impression that the Chief had quite wide- ranging authority.

It is a fact that the Band had been declared "as having reached an advanced state of development". That declaration was made in accordance with Section 83(1) of the Indian Act, which provides that where such a declaration is made by the Governor in Council, a band may make and pass by-laws on certain subjects. The Band had been granted certain authorities and responsibilities in the "1977 Agreement" executed by the Regional Director General on behalf of the Government of Canada. The Band also had been granted, under Section 53(1) of the Indian Act, powers which authorized it to manage and administer surrendered lands. The Band also had authority to manage and control their revenue monies under Section 69 of the Indian Act.

The question of fixing rents was not addressed in the 1977 Agreement and I do not believe it was intended to transfer this function. The power to fix rents under the Alexander lease and other Westbank leases does

not appear to have been expressly delegated by the Minister or the Department to the Band executive or Band. The authority to determine the rent for ensuing five-year periods under the Westbank leases arose from the contract documents and, in the terms of most leases, it was given to "the Minister or his authorized representative". That phrase could mean several things. It could mean the Minister or someone designated by him specifically for that purpose; or it could mean an appropriate official within the Department. If it means the former, the Minister never authorized anyone to exercise the power. If it means the second, it is not clear that the power could be delegated to someone outside the Department. I think the general intention of the agreements was to have this function reside in a Departmental official. I incline to the view that it would be possible under such phraseology to give to an outsider the power to fix rents. I would think that the Department would want to carefully consider any such appointment or delegation. In any event, not even a purported delegation was made. What did happen was that the Department stood idly by watching Chief Derrickson purport to exercise rent-fixing authority. The Alexanders' solicitors did commence action in Federal Court, but did not carry it to a conclusion. Ultimately, the Alexanders succumbed to the negotiation techniques of Chief Derrickson. Mr. Alexander gave evidence of a meeting between himself and Chief Derrickson:

> Q Will you tell us what you remember of that meeting?
> A Well, I was at the Band office, and we were talking about taking it to Federal Court, and Ron Derrickson said I can break you because. . . .
> Q Pardon me?
> A Ron Derrickson said I can break you because it doesn't cost me anything in court and it's costing you $1,000 a day. He just came right out and said he could break me.

Mr. Alexander said in evidence: "I didn't have any money to carry on, and I knew what it was going to cost me per day in court, and I couldn't afford to take the chance." He agreed to pay the $42,908 per annum, or 20 per cent of his gross receipts, whichever was greater. As it happens, he has only had to pay the $42,908 per year. In the ensuing five years, Mr. Alexander managed to pay the rent (with some difficulty). He encountered some problems with the supply of water and he has suffered some ill health. Not the least of his problems in obtaining water was the shift of McDougall Creek, referred to in Appendix C of this Report. The shift appears to have deprived him of water he was expecting to receive under his lease.

In 1985, the Band was granted certain management powers regarding Band lands under Section 60 of the Indian Act. There was no specific reference in the powers conferred to fix rents under leases of Band lands. On April 1, 1986, Mr. Alexander received a letter which included the following paragraph:

> This letter will serve as your official notice under the terms and conditions of your lease, that your rent will be reviewed for the next five-year term. Without formal appraisal, but in line with negotiated settlements with other leases in the area, the new rental for the period May 1, 1986 to April 30, 1991 has been set on behalf of the Minister at $69,712.50 or 25% of the gross annual receipts, whichever is the greater.

That letter was brought to the attention of David Crombie, the then Minister of Indian Affairs, who in a letter to the Chief asked him to revoke the letter of April 1. Since that time, the question of Mr. Alexander's rent appears to have been on hold. Given the background, it is not difficult to foresee future problems.

Leonard Crosby

The antagonism between former Chief Derrickson and some operators of mobile home parks was most notably displayed in the case of Mr. Derrickson and Mr. Leonard Crosby.

As noted in the Introduction to this Report, Mr. Crosby entered into his first lease on Westbank Reserve 9 in 1969. He was then serving in the R.C.M.P. and stationed in Kelowna. At the time Mr. Crosby obtained his first lease on Reserve 9, the Band had surrendered both Reserves to the federal government for leasing. Strictly speaking, there were no locatees. However, it appears that individual Indians were recognized as having possessory rights over specific parcels of land. Departmental correspondence at the time refers to equitable rights, which I take to be a recognition that certain Indians were entitled to the use of, or revenue from, certain properties. Mr. Crosby negotiated with Ronald Derrickson for a lease on a 3.5-acre parcel for which Mr. Derrickson had only recently acquired "equitable rights" from his father, Theodore Derrickson. The first lease on the property was dated August 25, 1969, and was for 50 years. About a year later, Mr. Crosby assigned that lease to a company called Golden Acres Ltd.

Initially, Mr. Crosby pursued his original intention, which was to build a retirement village. But that purpose had altered by the mid-1970's, when the original concept did not appear economically feasible. He maintained the concept of a retirement village, but opted for the then popular idea of developing a mobile home park. He decided to develop such a park, limiting it to double-wide mobile homes and an adult clientele. It today appears to be a well-planned and well-run operation.

Mr. Crosby negotiated a new lease with Ron Derrickson for an expanded area of 7.5 acres and installed 35 mobile home pads. The site work was done in 1976, at which time the market appears to have been improving. This continued until 1977 and then the market dropped off

dramatically. In about 1979, the market became better again and, in fact, 1980–81 was very good indeed for park operators. The years thereafter have been considerably more wintry on the economic front.

In good times, the mobile home park business was a good one. Mobile home dealers would pay "patch fees", i.e., cash payments to a developer to encourage him to have more lots available. Whether they were occupied by a tenant or not, dealers would pay rents on the pads from the day those pads were created. In 1980 and 1981, developers were being paid premiums of $1000–4000 per pad by mobile home producers and distributors.

When the market again "took off", Mr. Crosby negotiated a lease for an additional 15.5 acres adjacent to his existing park (the "B" lease). He negotiated with Ron Derrickson, who acted on behalf of his father, Theodore Derrickson, the locatee of the land involved. The Crown, on behalf of the locatee, entered into a lease which was dated June 15, 1980 and which ran for a period of 45 years and 7 months from February 1, 1976. It contained a feature which, with variations, was incorporated into a number of Westbank leases thereafter. In that lease, Mr. Crosby agreed to pay an "annual base ground rent" or 20 per cent of the gross receipts, whichever was greater. The lease went into effect without any hitches and Mr. Crosby embarked on a major expansion of his park. He borrowed a substantial amount of money for development from the Royal Bank of Canada.

While he was negotiating the lease for the new land with Chief Derrickson, discussions apparently occurred about incorporating an alternative rental based on a percentage of gross receipts into his earlier lease (the "A" lease). It seems, however, that Mr. Crosby would not agree to apply a percentage rental to the permanent buildings he had built on the land covered by the "A" lease.

Mr. Crosby received a letter which purported to set the rental for the ensuing five-year period.

June 17, 1981

DOUBLE REGISTERED

Golden Acres Ltd.
RR # 1, Boucherie Rd.
Westbank, B.C.
V0H 2A0

Attention: L. Crosby

Dear Sir:

Re: Lease No. 47959

This is to advise the subject lease is now due for review and the new rent for the second five year period has been set on behalf of the Minister at Sixteen Thousand Eight Hundred Ninety Eight ($16,898.00) Dollars per annum or 20% of the gross receipts earned in that year, whichever is the greater.

Accordingly, we enclose a set of modification agreements which we will require that you execute and return to this office within seven (7) days of receipt.

If you have any questions herein, please do not hesitate to contact the writer.

Yours very truly,

WESTBANK INDIAN COUNCIL

"Ronald M. Derrickson"

Chief Ronald M. Derrickson

RMD/bdes
encl.

Accompanying the letter was a short agreement entitled "Modification Agreement". After reciting the description of the lease and the power of the Minister to set the annual rent payable during the second five-year period, the operative part of the agreement read:

> For the term commencing September 1, 1981 and terminating August 31, 1986, the rental of Sixteen Thousand Eight Hundred and Ninety Eight Dollars ($16,898.00) per annum or 20 per cent of gross receipts earned in that year, whichever is greater.

It should be noted that while the lease in question authorized the Minister to set a new rent at five-year intervals using a criterion for valuation set out in the lease, nothing in the lease contemplated the imposition of a percentage rent.

In July, a letter was delivered to Mr. Crosby:

July 16, 1981

BY HAND
Golden Acres Ltd.
R.R. #1
Westbank, B.C.

Dear Sirs:

Re: Lease No. 47959
Lot 24–2-1 to 24–2-7 I.R. 9

This letter is to advise you that the above lease is due and payable on September 1, 1981 in the amount of $16,898.00.

Please have your certified cheque made payable to the Westbank Indian Council.

Thank you

Yours very truly,

WESTBANK INDIAN COUNCIL

"Ronald M. Derrickson"

RMD/hd
C.C. Ronald M. Derrickson

RECEIPT ACKNOWLEDGED
"Leonard Crosby"
"24 July 81"

Sometime in late summer, Mr. Crosby was requested to go to the Band office. When he arrived, Mr. Sheldon McCullough of the Department of Indian Affairs was there. The Chief presented Mr. Crosby with a new lease for signature, which incorporated provisions setting the base rent of $16,898 or 20 per cent of the gross annual receipts, whichever was the greater. He spoke with the Chief and then separately with Mr. McCullough. Mr. McCullough tried to prevail upon Mr. Crosby to sign the lease. However, Mr. Crosby did not, and left the meeting. Mr. Crosby's objection to the percentage rent appears to have been more a question of the basis upon which it would be calculated, rather than on the principle of a percentage rent itself. It appears that he might have agreed to pay a percentage of the gross in his "A" lease if the permanent buildings had been excluded from the computation of rent.

In early October 1981, the Chief convened the meeting of the mobile home park operators noted earlier. While at that meeting, Mr. Crosby raised a question about the authenticity of the Band's "Rentalsman by-law". The break between Mr. Crosby and Chief Derrickson was yet to occur. The break came later that month.

On approximately October 22, the Chief and Mr. Crosby met to discuss a number of issues that required resolution. While the meeting started on a cordial enough basis, it did not continue that way.

Mr. Crosby made notes of the meeting. He testified that the Chief said in the course of the meeting:

> I find it necessary to threaten, bully, lie, and cheat, and do many other things to get my own way. . .I manage all right. Nothing is done around here without my okay. I run the whole show, including the Council, Vancouver or the Minister, and you know that too.

They discussed the 20 per cent of gross receipts proposed for the rental under the "A" lease. It was apparent that Chief Derrickson felt that the buildings were to be included in such an agreement. Mr. Crosby asserted that he had never agreed to their inclusion. As reported by Mr. Crosby, the conversation continued as follows:

> Ron: Yes you did, I'll prove it. Barb, bring me the new lease on Golden Acres.
>
> Barbara: Here are the leases, but they were never signed.
>
> Ron: Well, God damn here, throw these in the garbage. You know what this means, don't you? You are going to be God damn sorry if you don't sign that lease, you're the one that's going to have to take the consequences and live with that. If you don't sign, we have nothing to discuss.

Not only was that the end of the discussion, the two men have not talked to each other since. They have communicated in writing, and Mr. Crosby has communicated continuously with the Department of Indian Affairs, the Minister of Indian Affairs, and with a number of Members of Parliament. The former Chief has communicated through the same avenues, and through the media. As I observed the two individuals during the hearings, it seemed to me that here were two people born to ruffle each other's feelings. Mr. Crosby is a man who likes order and careful procedure. Mr. Derrickson is a "let's get it done" type, much less interested in procedure. Mr. Crosby once wrote to Mr. Derrickson suggesting some third party might intervene, such as Mr. Theodore Derrickson or Mr. Noll Derriksan. I think it close to impossible for these two strong-willed individuals to sort things out directly between themselves. They were born to clash.

In December 1981, the Chief took an unusual step and wrote Mr. Crosby's banker, the Royal Bank, which held security by way of mortgages and a debenture on Mr. Crosby's property. The letter read as follows:

December 4, 1981

Royal Bank of Canada
#30 Orchard Park Shopping Centre
Highway 97.
North Kelowna, British Columbia

Dear Sirs:

Re: Golden Acres Ltd.
Lease No. 47959
Lots 24-2–1, 24-2–2, 25-2–3, 24-2–4, 24-2–5,
24-2–6 and 24-2–7, Tsinstikeptum I.R. No. 9

As you are the mortgagor of the subject lease, we are hereby advising you the lease between the Crown and Golden Acres is no longer in good standing because Golden Acres Ltd. have not signed the renewal of the lease.

Yours very truly,

WESTBANK INDIAN COUNCIL

"Ronald M. Derrickson"

It was copied to Golden Acres Ltd. and to Mr. McCullough of Indian Affairs.

A reading of the Golden Acres lease in question would have disclosed that there was no obligation upon Golden Acres Ltd. to sign any "renewal" of the lease, but the Royal Bank took the statement seriously and replied in part: "In view of the seriousness of your letter, we have frozen our client's credit lines until this matter is resolved and hopefully an agreement can be reached shortly."

This exchange of correspondence took place while Mr. Crosby was developing his new mobile home park, and was substantially reliant on bank credit. Mr. Crosby travelled to Vancouver and met with Mr. McCullough and then with Mr. Peter Clark, who at that time held the position of Acting Director, Lands, Reserves and Trusts, B.C. Region. Mr. Clark wrote to the Westbank Indian Council on December 17, 1981:

> On checking our files and the Land Registry in Ottawa it is apparent that the above-noted lease is in good standing and is fully paid. No steps have been taken or any actions requested that would lead us to believe that grounds were available to consider termination.
>
> It may be that your observations were based on wrong information. We are not aware of any subsequent agreement that would lead to a revised lease agreement.

That letter was copied to the Royal Bank and to Golden Acres Ltd.

At that time, the source of the Chief's authority was the 1977 Agreement. In effect, the Chief and Council were acting as agents for the Crown. The Chief's letter to the Bank alleging default apparently caused some difficulty to Mr. Crosby and his company. The comments contained in the letter of December 17, 1981 was the only rebuke the Department administered, and the Bank would advance Mr. Crosby no further monies until late in February. Mr. Crosby wrote a lengthy letter dated February 17, 1982 to the Minister of Indian Affairs, a copy of which is set out at the end of this chapter. I will comment upon this letter further when I deal with the Westside Mobile Home Park Owners' Association.

Mr. Crosby paid his rental instalment on the "A" lease on the September 1, 1982. Chief Derrickson accepted the cheque, but wrote:

> perusal of this lease agreement does not reflect this amount, therefore we are accepting this rent on account pending resolution of your five-year review of rent by respective solicitors.

It would appear that Mr. Crosby was acting on the Chief's letters of June and July 1981 and that the Chief considered the determination of the rent still an open question.

Another year passed. On August 31, 1983, Chief Derrickson wrote to Golden Acres Ltd., enclosing an appraisal done by a Mr. Harck and saying:

> In view of the fact that we have been unable to come to an agreement on the rent for the five-year period commencing September 1, 1981, we completed this certified appraisal, and now formally advise you that the rent for the five-year period commencing September 1, 1981 has been determined on behalf of Her Majesty the Queen at $28,500 per annum.

The same day, Mr. Clark, as Director of Lands, Reserves and Trusts, sent a telex to Golden Acres Ltd. saying inter alia:

> On behalf of the Minister, the rental is hereby established at $28,500 per annum. Please provide a cheque for the outstanding amount of dollars. . .

Mr. Clark confirmed the telex by a letter of September 1, reasserting the establishment of the rental at $28,500 per annum and asking for the arrears for the past several years.

The rentals on the "A" lease were the subject of a trial in Federal Court in the fall of 1987. As of the date of writing, no decision has been handed down. I understand that in addition to what rental should be fixed for the five years following September 1, 1981, the rentals for the five-year period following September 1, 1986 were also in issue. Regardless of the eventual result of court proceedings, it must be said that it is almost impossible to run a business where the owner's profit, if any, lies in the spread between the rentals he receives and the rentals he pays when the amounts are determined some six or seven years after the effective date of the rental increase.

Under the "B" lease, questions arose as to the method and timing of payments of the anticipated 20 per cent of gross revenues. Perhaps because of those problems, Mr. Crosby chose to send instalments to the Department rather than to the Band Council. Letters were sent to the Department in an attempt to reach an agreement as to the time and manner in which those monies were to be paid. Mr. Crosby received unhelpful replies. Then, without any forewarning, the Department sent a letter signed by Mr. John Evans dated December 22, 1983 cancelling the "B" lease for failure to pay the rent and demanding possession of the lands and premises. The letter was meant to be a formal termination of the lease and copies were sent to the Royal Bank and other interested parties. It seems the Chief was upset because the rentals were being forwarded to the Department and not to the Band. It also seems the Department would do his bidding without reflection.

The lease was probably cancelled because Mr. Crosby chose to make his payments to the Department. That may have been petulance on his

part, but it should be remembered that the Department itself was not clear about the limits of the authority it had conferred. That renders it difficult to criticize people for their actions in dealing with the Department and the Band. The cancellation of the lease, albeit without legal justification, caused a flurry of solicitors' letters. Ultimately Mr. Crosby's solicitors received a letter from the Department of Justice which confirmed that the notice of cancellation had been withdrawn. With the series of investigations into Westbank affairs that were then in train, the high degree of publicity of Westbank matters, and the interest taken by parliamentarians, it is surprising that the Department would make such an error. Such action could only deepen Mr. Crosby's suspicions concerning the Department.

As I said, the rental for the Crosby lease was the subject of court proceedings in the fall of 1987. There have been remarkably few court references, but it is hoped that if they are necessary in the future, they will be tried more expeditiously.

The Commission heard evidence on the progress to effect rent revisions under the mobile home park leases. Commission Counsel intentionally did not delve into the merits of the individual revisions. There is litigation pending and some negotiations are always taking place. It was felt that examination of the merits of the individual rent increases would have extended the hearings of the Commission unreasonably into the future on issues that must be resolved either by agreement of the parties or by third party (court) intervention.

However, in its submission, the Department of Indian Affairs ventured into the subject of rental increases and was highly critical of the mobile home park operators. The Department took the position that the park operators, while complaining of extortionate rent increases, were themselves "ripping off" their own tenants. The Department's written submission said in part:

> One observation must be made about the trailer park operators who, through Mr. Len Crosby, complained to Members of Parliament about the lease rental increases imposed by Chief Derrickson. From the statements they gave to Mr. Crosby which he passed on to the Members of Parliament, and from Mr. Crosby's own statements, the obvious inference was that Chief Derrickson was demanding extortionate rental increases. A desperate picture of trailer park operators being put out of business by these increases was painted by Mr. Crosby and his fellow operators. What they did not tell the Members of Parliament was that they were using these rent increases to justify to the Rentalsman applications for additional rent increases to the residents of their trailer parks. They also kept silent the fact they were pocketing the increased rentals from their residents, while at the same time refusing to pay the increases on their own leases.

In the course of the cross-examination of one of the mobile home park operators, Mr. Val Spring, counsel for the Department took the position

that Mr. Spring was withholding information or had withheld information about applications that he had made to the Rentalsman for rent increases. Counsel for the former Band executive, in cross-examining the same witness, took the position that there was some obligation on Mr. Spring to set apart rental monies he had collected from his tenants and accused him of "ripping off" his tenants. Similar suggestions were given some currency in the press at the time of the controversy and were not justified.

The suggestions made in the Department's submission and the tenor of the cross-examinations showed a limited understanding of the rental control system that was in effect at the material time. They overlooked the primary problem, which was the failure of the Department to set rents, as it was obliged to do under certain leases.

Until 1984, a system of rent control was in force in British Columbia. The system governed both the amount of rental increases that could be made and timing of those increases. Landlords, without approval, were entitled to a general, flat percentage increase once a year, and a provision existed for exceeding the prescribed percentage with the approval of the Rentalsman in unusual circumstances. Those circumstances included any unusual increase in the landlord's costs.

Two of the persons who applied for such increases were Mr. Don Lauriault, the operator of the Billabong Mobile Home Park, and Mr. Val Spring, the operator of the Jubilee Mobile Home Park through his company, Acres Holdings Limited.

Donald Lauriault

Mr. Lauriault purchased the company that operates the Billabong Mobile Home in 1980 after he had retired from the RCAF. The Billabong Park occupies close to thirteen acres. It has seventy-seven pads, an office, and a sixty-five-site campground. The property is charged with a first mortgage in favour of RoyNat and a second mortgage in favour of the vendor of the park. The purchase price was $400,000, with Mr. Lauriault having made a $65,000 cash down payment.

Mr. Lauriault attended the meeting between mobile home park operators and the Chief in early October 1981, where operators were told that pad rents were to be increased to $150 per month. This posed a dilemma for them indeed, because they felt constrained by the rules of the British Columbia Rentalsman even though Chief Derrickson was asserting his jurisdiction to have a Band Rentalsman increase rents.

Mr. Lauriault issued Notices of Rental Increase in February 1982, but his rental increases were disallowed or rolled back by the B.C.

Rentalsman. As noted earlier, the decision of Mr. Justice Locke in March 1982 confirmed the B.C. Rentalsman's jurisdiction.

In 1984, the lease under which Mr. Lauriault operated Billabong Mobile Home Park was due for a rent revision effective September 1, 1984. In August, Mr. Lauriault spoke with Chief Derrickson who proposed a new lease at $3,250 per month per acre (which would have amounted to $41,600 per annum) or 25 per cent of the gross, whichever was the greater. It appears that Mr. Lauriault's anniversary date for rental increases under the B.C. Rentalsman's jurisdiction was July 1 of each year and September 1, 1984 was the date on which the new rental for the park itself was to be fixed. In anticipation of the eventuality he might have to pay $41,600 per annum, Mr. Lauriault sought and obtained a rental increase. The Rentalsman's Order approving the increase contemplated a rollback in the event Mr. Lauriault succeeded in paying less money for rent.

One thing changed and another never happened. The B.C. Rentalsman's jurisdiction over rents throughout the province was withdrawn and the Minister or the Department never fixed the rent to be paid in accordance with the terms of Mr. Lauriault's lease. Some time later, and well beyond the 180 day limit in the lease within which rental increases were to be imposed, Chief Derrickson wrote to Mr. Lauriault's solicitors, purportedly fixing the new rental at $41,781 per annum or 25 per cent of the gross annual receipts, whichever was the greater as at September 1, 1984.

This apparent determination of the rent by Chief Derrickson may be subject to several defects which are yet to be resolved, namely:

1. Chief Derrickson's authority to determine rents is doubtful, as there does not appear to have been a legal delegation of the power to set rent.
2. The time within which the rent should have been determined had expired by the time Chief Derrickson asserted what the rent would be.
3. The lease does not appear to contemplate the imposition of a percentage of gross receipts as a rental.

What at first blush may appear to be a windfall to Mr. Lauriault is not perceived as such by him. He continues to be in a state of grave uncertainty as to what figure his rent will ultimately be set at. In the meantime, Mr. Lauriault's financing has expired and he has been called upon by RoyNat, the lender under the first charge against the property, as well as by the vendor who holds the second mortgage. He cannot secure refinancing while the question of his rental remains unresolved and it would be advantageous to have that matter settled. This does not appear to be one of those problems which time improves.

Val Spring

As noted above, Mr. Spring was subject to accusations of "rip off" and the suggestion that he should be holding monies received from rent increases in a trust account. The accusation of a "rip off" is unfair, as the main problem lies with the Minister and the Department. As to the suggestion that monies should be isolated in anticipation of a rent increase, there is no legal obligation to do so, even though commercial prudence might recommend it.

Mr. Spring is the proprietor of the Jubilee Mobile Home Estates through Acres Holdings Limited. The park is on lands registered in the name of the estate of Band member Ellen Tomat, and her heirs are entitled to the revenue from the park. Mr. Spring bought the operation for $385,000 and gave back a $300,000 mortgage. The property was not fully developed; there was room for a substantial number of additional mobile home pads. The unoccupied part of the leased lot contains 7.29 acres.

When Mr. Spring bought the park, the annual rental charged to the operator was $17,720 per annum subject to revision every five years. The lease was due for revision on September 1, 1984.

Expecting to be able to put mobile home pads on the unoccupied land, Mr. Spring went to OPEC Engineering Limited in 1981 to request them to draw up a plan for a park extension. OPEC Engineering was a Kelowna firm which was often engaged by the Band and sometimes acted for people dealing with the Band. OPEC informed Mr. Spring that the Westbank Indian Band wanted $1,500 per pad for "future fire protection". At that point, Mr. Spring had hoped to put in forty more pads and this change would have cost him about $60,000. The OPEC letter said:

> As was discussed with you previously, the Westbank Indian Band required that all new developments on the Reserve provide a minimum fire protection as outlined in their Development By-law.

It is not unreasonable to impose such a cost upon a developer, but in the welter of by-laws passed by the Band, there does not appear to be a by-law that would authorize such a charge. The parties assumed there was a by-law that authorized the imposition of a $1,500 per pad charge. The only by-law that comes close was By-law 1979–12, the Band's subdivision by-law. It provided that a subdivider "shall provide water distribution. . .to serve all parcels created by a subdivision".

However, Mr. Spring was not developing a subdivision as that term is usually understood, and it appears that By-law 1979–12 did not apply. The Commission was not informed of any other by-law that could apply. In any event, Mr. Spring's proposed additions to his park did not proceed.

Like Mr. Lauriault, Mr. Spring attempted to raise the rents for his mobile home pads to $150 per month after the October 1981 meeting with Chief Derrickson. However, the B.C. Rentalsman's office rolled back the rents and Mr. Spring said he was left with "an accountant's nightmare". Some tenants had refused to pay the increase and those who had paid were entitled to have the increases returned.

Mr. Spring had additional reasons than the demands for fire protection not to proceed with his development in 1981. Shortly thereafter, there was a downturn in the economy and difficulties were encountered in securing financing for developments on Indian lands.

In 1983, Mr. Spring proposed to Chief Derrickson that he develop his vacant land into a par three golf course. The Chief suggested that he enter into two new leases, one for the existing mobile home park, and the other for the proposed golf course. Both leases were to be $3,000 per acre or 25 per cent of the gross, but Chief Derrickson was prepared to allow an abatement for the first two years on the par three golf course. He and Mr. Spring did not come to terms, however, so that development did not take place.

The first time Mr. Spring applied to the Rentalsman for a rental increase, it was in anticipation of paying higher rents under a revised lease and charging the higher pad rents Chief Derrickson called for at the meeting in October 1981. When the time came for the rent revision due on September 1, 1984, Mr. Spring gave a Notice of Rental Increase in anticipation of the Minister fixing the rent in accordance with the lease. Under Mr. Spring's lease, the rent is to be reviewed by the Minister or his authorized representative within 180 days of the rent renewal date. Prior to September 1, 1984, there was a relatively continuous exchange of correspondence — much of which pertained to who should negotiate the rent on behalf of the landlord.

Mr. Crosby, on behalf of Mr. Spring and as President of the Mobile Home Park Owners' Association, wrote a letter dated July 20, 1984 to the Department in Ottawa. That letter is reproduced at the end of this chapter. In the letter, he puts the position of the park operators as follows:

> In our opinion the problems we are facing have arisen simply because the Department has not in the past lived up to their undertaking to 'set the rent'.

Mr. Crosby went on to argue that the rent proposed by the Band would amount to something well in excess of Mr. Spring's previous year's total net income and concluded:

> These matters are related only to give you some indication as to the gravity and extreme urgency of the situation and that the Department

> address the problem on a 'most urgent' basis. Please wire your response.

Mr. Crosby's letter was answered by a letter dated August 14, 1984 and signed by Mr. F. Singleton for Mr. J. Leask, the Director General of Reserves and Trusts, which said, in part:

> It is also the practice of the Department to encourage the Band Council and/or the locatee to negotiate with the lessee in order to arrive at a mutually agreeable rent. I therefore urge the lessee to continue to negotiate with Chief Derrickson and the Westbank Band. In the event that no agreement is reached, then this Department has the responsibility to review the rent determined to be acceptable to the Band, in order to see that it is generally in accordance with the terms of the lease.

It would seem that the Department confused its good intentions with its legal obligations. Those legal obligations called for it to set the rent within 180 days of September 1, 1984, and the Department failed to do so.

On June 6, 1985, an Order-in-Council was passed conferring certain land management authorities upon the Band pursuant to Section 60 of the Indian Act. On September 5, 1985, Chief Derrickson wrote to the solicitors for Mr. Spring and Acres Holdings Limited, purporting to set the rent on behalf of the Minister at $57,274 per annum or 25 per cent of the gross annual receipts — whichever was the greater as at September 1, 1984. That declaration on behalf of the Minister suffered from the same infirmities that I have pointed out with regard to the Billabong-Lauriault lease.

In his testimony before the Commission, Mr. Spring did not appear to take the position that the time had expired for a rental increase. The five-year period to which such a rent increase would apply is now more than half over and the matter is still to be resolved. A fair measure of uncertainty shrouds this matter. I could not perceive that Mr. Spring was attempting to "rip off" anyone. He was castigated as a poor operator by Mr. Derrickson. His park did not appear to be as conspicuously well run as the Crosby operation. But whether he is a good or bad operator is aside altogether from allegations that he was acting dishonestly. I believe he was doing his best to attempt to survive as an independent operator in the midst of a welter of confusing and confused directives from a number of sources, including the Department, the B.C. Rentalsman, and the Chief. As I said, to this day it is impossible for him to know precisely what his rent bill ultimately will amount to.

In 1985, a study was made of the Westbank Band's problems by Mr. Singleton of the Department, assisted by Mr. Preston and Mr. Reecke, both lawyers practising in British Columbia. From that study came a suggestion that the Band might purchase all mobile home parks on

Reserve 9. That suggestion did not proceed to implementation. I have said elsewhere in this Report that such a course of action might resolve some local grievances, but it would raise grave policy questions for government.

The Westside Mobile Home Park Owners' Association

Until 1981, the operators of the mobile home parks were not a cohesive group and to some extent, they regarded themselves as competitors. Certain events in late 1981 and 1982 on the Westbank Reserves created quite a flurry of media coverage, coupled with representations to civil servants, Members of Parliament, and Cabinet Ministers. The park operators who followed Chief Derrickson's program of increasing the pad rental to $150 per month were to encounter B.C. Rentalsman-ordered rollbacks of those increases. Towards the end of February 1982, the park operators met and decided to form an association. A solicitor was hired and the Association was incorporated on July 19, 1982. The original members appear to have been Leonard Crosby, Donald Lauriault, Ted Zelmer, Jack Alexander, Bruce York, James Lidster, and Val Spring. James Lidster later resigned, as did Bruce York when he was charged in connection with an assault on Chief Derrickson.

As noted elsewhere, the early months of 1982 were turbulent times at Westbank. The local press often reported on tenants' complaints and related matters concerning the Band and park operators. A decision in the case of Mathews and Toussowasket Enterprises Ltd. was rendered in early March 1982. The Judge found substantially in the B.C. Rentalsman's (tenants') favour. The question of the surrender of the Toussowasket lease and the resultant defeat of the claim of Donaldson Engineering Ltd. (described in the Toussowasket chapter) was agitating the Department. Members of Parliament were raising Westbank issues with the Minister of Indian Affairs. In May 1982, the Parliamentary Standing Committee on Indian Affairs held several hearings which touched upon British Columbia and the Westbank Band in particular.

Against this background, Mr. Peter Clark, the Regional Director of Lands, Revenues and Trusts, was sent from Vancouver to meet with certain persons concerned with Westbank issues. On May 17, 1982, he met with Mr. Crosby and Mr. and Mrs. York, representing the Mobile Home Park Owners' Association. Mr. Crosby had written a letter to the Minister dated May 14, 1982 which had not yet been dispatched. (A copy of that letter is reproduced at the end of this chapter.) Mr. Crosby gave evidence that he reviewed the letter and its contents with Mr. Clark. The letter contained a number of allegations on which I heard evidence and some on which I did not. I do not consider the letter as any evidence in itself of the truth of the allegations made therein. However, it gives some idea of the matters that concerned the park operators at the time. In that letter, Mr. Crosby dealt with the complaints of Jack

Alexander, Val Spring, and another operator with regard to impost fees for "future fire protection". Mr. Crosby reviewed several problems concerning the Yorks, which included delay in securing approvals and interference with installation of public utilities. He also adverted to complaints of people who had begun to install mobile home parks but had failed to complete them. As a conclusion to this lengthy letter, he wrote:

> There is already some evidence to support the view that the overall circumstances may, if properly investigated, disclose a conspiracy to defraud. Park owners feel unable to make a direct criminal complaint at this time without the knowledge that an investigation might provide. It will not assist us if criminal action is taken and in fact such action could result in the often-used excuse for the lack of any official action in the interim, this is something we cannot abide with. We require action to resolve past injustice and hopefully prevent the current and future continuation of civil wrong.

Mr. Clark gave evidence about the meeting, saying:

> I was surprised that there were so few of the mobile home park owners that were in attendance at that meeting. . .and that the concerns that were expressed then were all concerns that had been previously expressed or provided through other letters to the Department or other channels, and that there was really nothing that was new.

When questioned by counsel for the Department, Mr. Clark answered:

> Q Using your best judgement, can you please advise the Commissioner as to your impression of the claims of the Yorks and Mr. Crosby at that.
> A I wasn't, as I said, I wasn't impressed by them at all, and felt that the great majority of the claims were. . .or concerns were the type that were of a niggling nature that you quite often get between landlord and tenant, but nothing of any sort or great substance at all.

In the spring and summer of 1982, representations by the park operators and tenants were forwarded to the Minister, officials of the Department, the press, and whoever would listen. It is fair to say that the Regional Director of Lands, Revenues and Trusts was then, and remained, impervious to the complaints of the park operators. The situation at Westbank continued to be an unhappy one and controversy continued. Although I think it unfortunate if Mr. Clark left the operators with the impression that their complaints were "niggling", I have some sympathy for the position he found himself in. The problem that the Department often faces is the fact that it is a department of government. Therefore people assume it is a representative of all citizens. In the case of the Department of Indian Affairs, its first and

foremost duty is to Indian people. Mr. Crosby was in error if he viewed it as having the same obligations to him and his group as it had to Indian people. In Appendix B of my Report I make some comments about a possible approach to dispute resolution relative to Indian affairs. This approach may lighten the conflict burden that Departmental officials in the position of Mr. Clark often face.

The Park Owners' Association, with Mr. Crosby acting as spokesman, engaged in continuous correspondence on various matters of concern. It queried the validity and application of by-laws on the Reserve as well as the licence fees and charges set by the Band, and it brought to the attention of the appropriate authorities such matters as encroachments by the Department of Highways on the leased land of the park operators. Most of all, however, it queried the process of rent review and determination.

In the letter referred to above, Mr. Leask expressed the view that rents should be the subject of negotiation and agreement with the assistance of the Department, but that was not the way things happened. In practice, negotiations began with the issuance of a Rent Notice which was put forward as the Minister's determination. Any negotiations took place thereafter. With the rent having already been set, the park operators felt they were negotiating from a very difficult position.

In 1985, Mr. Singleton of the Department in Ottawa, came to Kelowna several times and met with the park opertors. Mr. Crosby also met with Messrs. Preston and Reecke, who were assisting Mr. Singleton in the aforementioned study. This study culminated in the recommendation that the mobile home parks be purchased by the Band. Appraisals were done to lay the groundwork, but no further actions appear to have occurred towards implementation of this recommendation.

I cannot leave the question of the Park Owners' Association and the park operators without criticism of one aspect of their activity. I have appended to this chapter several letters from Mr. Crosby to the Minister of Indian Affairs. It will be seen that some of the correspondence is strongly worded. Mr. Crosby's letter of February 17, 1982, which was the first of many letters, contained the following passage on the first page:

> I have personal knowledge of the following allegations:
>
> (1) Attempted extortion.
> (2) He [Chief Ron Derrickson] is attempting to use the minister's appointment as an Agent of the Crown for personal gain.
> (3) By printing known lies while ostensibly performing duties as an Agent of the Crown he has committed a civil wrong for which the Crown could be held liable.

(4) He is causing the Crown to be in violation of a lease which was entered into.
(5) By unethical conduct of breach of trust he is causing his own people and the Crown to be held in disrepute.

The full letter is set out at the end of this chapter.

Counsel for the former Band executive cross-examined Mr. Crosby on this letter in an attempt to ascertain what was referred to in those five allegations. Apparently the attempted extortion referred to discriminatory application of permit fees called for under the by-law. Mr. Crosby referred to the different amounts charged to Mr. Zelmer, to himself, and to the Yorks — all of whom were engaged in comparable developments. Under the heading of attempted extortion, Mr. Crosby also pointed to the allegedly false representations made by Chief Derrickson when he said that powers under Section 60(1) of the Indian Act had been conferred upon the Band. As to the use of the Minister's appointment as agent of the Crown for personal gain, Mr. Crosby pointed to Chief Derrickson's setting of rent for leases of land of which the Chief himself was the locatee. The "printing of known lies" referred to claims made by the Chief that the Band had Section 60 authority when it did not. The "causing of the Crown to be in violation of a lease" was the purported breach of the lessor's covenant for quiet enjoyment when the Department allowed the allocation to Noll Derriksan of the Band road, causing potential access difficulty to some of the York property. The "unethical conduct" and "breach of trust" referred to the representation made by the Chief that the Band Rentalsman by-law was in effect when, in fact, it had not been approved by the Department. In the body of the letter, Mr. Crosby expressed the opinion that the letter written by Chief Derrickson to the Manager of the Royal Bank of Canada stating that his (Crosby's) lease was in default could be a "civil or criminal wrong".

These allegations, which raised the spectre of crime, were reckless when cast in this manner. Such allegations should not be made lightly, particularly by a former senior NCO of the R.C.M.P. While questions could be raised about the ethics of the conduct referred to, the instances do not seem to merit the allegations of criminal conduct. A little knowledge can be a dangerous thing. Mr. Crosby had some knowledge of the Criminal Code. I felt he was taking phraseology from the Code and endeavouring to elevate the activities he accused Chief Derrickson of into breaches of the Code. The Chief may have been overly aggressive at times (as I said, he and Mr. Crosby seemed destined to clash with each other), but it was unfair of Mr. Crosby to suggest that the Chief was carrying on in a criminal fashion.

Another letter on which Mr. Crosby was cross-examined extensively was one he wrote to the Minister on May 6, 1986. Included in that letter was this strongly worded passage:

> We are concerned that inquiries to examine abuse of power to identify responsibility for actions or inactions of personnel within your Department (DIAND) will of necessity, identify circumstances of suspected criminal opportunity to cover evidence or establish alibis. I feel that criminal investigation is warranted and that it should occur before or at least at the same time as any other inquiry.

These words again imply that the Band administration or the Department was wallowing in a quagmire of crime. The facts were otherwise.

The letter of May 6, 1986 and its appendix are reproduced at the end of this chapter. The allegations of criminality in that letter and appendix can be summarized. The "false representations of fact" referred to Chief Derrickson's letter to the Royal Bank alleging that Mr. Crosby's lease was in default; "false documents" referred to the circulation of the non-existent Band Rentalsman by-law and the zoning by-law relating to mobile home parks; and the "attempt to defeat the course of justice" referred to the surrender of the Toussowasket lease. Mr. Crosby referred to the seeking of an impost fee from Acres Holdings Ltd. for future fire protection as a possible conspiracy to attempt to obtain funds by fraud. No evidence was tendered before me of any fraud involving the collection of rentals.

The demanding or receiving of a benefit under Section 383 of the Criminal Code refers to the offence sometimes termed "secret commissions" or "commercial bribery". I heard from Mr. Andrew Archondous, who could not give first hand evidence on that subject, and Mr. Ward Kiehlbauch's evidence would not sustain such a charge against any member of the Band administration or government. The proposed invocation of the mischief and criminal breach of contract sections referred to in Mr. Crosby's appendix represents imaginative application of the criminal law. No criminal lawyer of any experience would have any difficulty in exploding the notion that the facts supported any such charges.

Criminal interpretations placed upon events did not assist in shedding light on anything, but they escalated the temperature. It is clear that the events cited in Mr. Crosby's correspondence could only marginally be considered crimes, and in the event that criminal proceedings were ever instituted, a conviction for any of the above allegations would be highly improbable. To say this is not to overlook that there were ethical questions raised by those events. It will be appreciated that there were things that were wrong at Westbank, and some people feared that even worse things were happening. Mr. Crosby explained his allegations in cross-examination as follows:

> What we were trying to get throughout this whole matter is for someone from the Department, not necessarily to take what I say to

be true or false, but to come out and at least look into the matter and find out what in heaven's name has happened.

The difficulty that arose, however, was that some persons may have read the material supplied without the caveats to which they should have been subject.

Counsel for the former Band executive was highly critical of Mr. Crosby's correspondence. I think the criticism was warranted. The letters contained a substratum of fact but superimposed thereon was a compendium of accusations that suggested Chief Derrickson was conducting a concerted campaign of lawlessness. While the former Chief may well finish dead last in a diplomacy stakes race, it was unfair to him to suggest that he was continually in breach of some of the more arcane sections of the Criminal Code. As a former law enforcement officer, Mr. Crosby should have been more careful in his use of language to Members of Parliament and others. Not only was this unfair to Chief Derrickson, it was unfair to those parliamentarians who were apprised of the allegations. They have a duty to heed the concerns of constituents and where there was such a pall of verbal smoke they would be led, naturally, to fear that there was a large fire indeed. I was not persuaded that Chief Derrickson had infringed the Criminal Code as alleged. The use of such inflammatory language by Mr. Crosby was not supported by the facts.

The Crosby-Derrickson confrontation seemed to arise out of the very different perspectives of the two men. Mr. Crosby appeared greatly attached to procedure. His method of expression tended to circumlocution and the ornate. Mr. Derrickson was inclined to be a verbal bully in his correspondence. He was not one to stand on ceremony. Putting Mr. Crosby and Mr. Derrickson together was like combining flame and gas. There were many other factors listed elsewhere in this Report that led to troubles at Westbank, but clearly the severe clash of personalities between these two men was at the heart of much controversy. It is unlikely they will ever be able to co-exist peacefully. Their view of how things should be done diverge so far that it is nearly impossible for them to communicate. Both appear to have a grudging respect for the other. Mr. Derrickson views Mr. Crosby's operation as a credit to the Reserve. Mr. Crosby doubtless views the former Chief as a person who has sought to advance the fortunes of the Westbank Band. But it seems likely that their differences will have to be sorted out by third parties — for instance, the rent review matter has been the subject of a hearing in Federal Court. The history of their relationship leads me to believe that any direct dealing between them will tend to generate friction and controversy. Both are too rigid in their thinking to accommodate the other and I do not foresee that they will be able to adjust their differences on their own.

20 July 84

Dept. of Indian & Northern Affairs
Ottawa, Ont.
Att; Mr. J. Leask

Dear Sir; Acres Holding Ltd. Lease # 69732
I.R. # 9, Westbank, B.C.

1. This is in respect to the matter of a Rent Review of the above noted lease which is due 1 Sept 1984.

2. The lessee has received correspondence from the band which has been replied to. Copies of the correspondence to date are attached.

3. The lessee has forwarded correspondence to your Dept in Ottawa on this matter some time ago but has not received a reply. I have discussed it with Mr. Doug MacKay at your Vancouver Office but he would not commit himself to make any direct response as to what your Department is going to do or refrain from doing and told me that he would refer the matter to yourself. Mr. MacKay did tell me that the Departments position now is that the Band does not have authority under Section 60 of the Act in respect to unsurrendered lands. I understood this to mean that the Band does not have the authority to set the rents. Is that correct? You will appreciate that this would be a very great change as to what has been allowed to be practiced on this reserve for the past number of years.

4. You will appreciate from the correspondence that the band does not agree to that interpertation and proposes to set the rent unilaterally, as they have been allowed to do in the past. In view of the Ministers contractual obligation to "set the rent" would you please clarify as to who is to perform this duty.

5. We fully expect and encourage the band to make a written submission to the Department concerning the rent and the reasons in support thereof. All the park owners are asking for is that the rent be set by the Department and not the Band because the latter gives rise to a direct "conflict of interest". We expect that the person assigned this task is a qualified licensed appraiser who is instructed to make an "arms length" determination of "fair rent" without being influenced by the desires of either party and that he follows the policy guidelines of the department in respect to rent renewals.

6. In our opinion the problems we are having have arisen simply because the department has not in the past lived up to their undertaking to "set the rent". It will now require an on site examination of the facts. The park owners are prepared to open their books and make full

disclosure of all of the circumstances, which effect value, in order to assist your department.

7. The Band by previous correspondence and recently by direct statement to Mr. Perry have said that the new rent will be 3200. per acre per year. If applied to Acres Holdings Ltd then that will increase their lease rental fee from 17 to 77 thousand dollars. Even if you take the position that the owner should not receive any benefits whatever in respect to his investment, we can prove that such rent would amount to something in excess of 20 thousand dollars of his previous years total Net Income.

Not only that — but the terms of the lease would require that such sum be paid in full prior to being able to refer the matter to the Federal Court. What financial institution would loan funds which would enable him to appeal to the courts?

These matters are related only to give you some indication as to the gravity and extreme urgency of the situation and that the Department address the problem on a "Most Urgent" basis.

Please wire your response.

L.R. Crosby — President
Mobile Park Owners Assoc.
S-17, C-1, Westbank, B.C. V0H 2A0
Phone; 768–4222

14/5/82

The Minister
Indian and Northern Affairs
Les Terrasses de la Chaudiere
Ottawa, Ontario
K1A 0H4

Attention: Roy T. Jacobs — Special Assistance — Portfolio.

Re: Golden Acres Ltd. — L.R. Crosby
I.R. #9, Westbank, B.C.

1. Further to my letter of 17 Feb 82 and to your replies of 1 Mar and 19 April. Also please refer to the letter of Mr. J.D. Leask dated 30 Mar which was sent to Mr. Fred King MP with a copy to yourself.

2. Sir: The principal facts of my complaint are that an agent of the Minister is committing a civil or criminal wrong in respect to administering I.R. #9. This was brought to the attention of your department in Vancouver in Dec 81 and to the Minister himself in Feb 82. The urgency of the matter has been repeatedly stressed and is acknowledged by yourself. Nothing substantive has been done. This is an ongoing matter with damages being incurred daily and after months of waiting I believe it is fair comment to observe that some persons apparently are not interested if taxpayers funds are needlessly spent to defend or compensate. It is highly probable that some affected persons will seek civil redress against the Crown. This could have been easily avoided in the first place with a little common sense and prompt attention to the departments responsibilities. Some letters have been sent but no one to date has addressed himself to the principals of the complaint. Mr. King MP has attempted to assist but meetings are cancelled or attendance is not forthcoming. Mr. Clarke DIAND Vancouver has been here in the interim and also cancelled out an arranged meeting.

3. I and Mr. King have repeatedly pressed for an investigation to no avail. As a citizen I cannot do it. "Investigation" to me means to obtain all of the information from all sources and in particular to question the complainants simply because not everything can be imparted by way of correspondence. In your letter of 19 April you state "our field officers are investigation the matter again with the band council". It is very nieve for anyone to think they are going to get the facts from them. "Again" denotes to me that it has been alleged that the matter has been investigated — this simply is not so in my opinion as no-one has come to see me or any other persons who have complained. A "review" of these matters from an office desk is simply not sufficient and will accomplish nothing.

4. Prior to recent weeks Mobile Park Owners acted individually and did not necessarily have knowledge of what was happening to others. We now have an association registered Provincially. An exchange of information, since my last writing, discloses many irregularities and circumstances which appear to be unlawful. To relate them in detail is too demanding and I will only outline the principal facts. Each of the parties concerned have told me they are prepared to substantiate these matters to any official person or body who may attend.

5. Paradise Mobile Park — Clint Miller — Previous Owner. Now in bankruptcy not available for interview. The Chief demanded and received $18000. from him for "future fire protection" as a condition to granting him permission to utilize the remaining land he had under lease for an extension of a mobile park. Such Band action is not authorized by any existing By-Law or regulation. OPEC Engineering assisted the Chief in this action by claiming that this was necessary due to provisions of a Band By-Law. A fraudulent misrepresentation of fact. This can be confirmed partially be copies of correspondence and by interviewing Darcy O'Keefe an agent for the receiver.

6. Jubilee Mobile Park — Val Spring — owner. Has an unused portion of land under lease. When he enquiried from the Chief about getting their approval to expand his park he was tolda he would have to pay $60,000. to the band "for future fire protection" in order to get such permission. He did not do so. The chief attempted to get him to agree to a new lease partly by indicating by-law 1981–03 was operative.

7. Pine-Ridge Estates — Jack Alexander — Owner. This park was built some 5 years ago. When the rental review came about in spring of 1981 the owner voiced objections to the huge increase and indicated an appeal to the court. Up until that time no requests had been made of him — however as soon as he commenced the appeal he began receiving letters from the Building Inspector, Health Dept and OPEC Engineering requiring such things as prior engineering plans, as-built plans, re-survey etc etc. As soon as he abandoned his appeal all enquiries ceased. Circumstances where alledged administrative requirement and threats are used as a means to force agreement to terms of a new lease. Also in part by pretending that By-Law 1981–03 was in effect he obtained a new lease with this party. This man also received a letter from the Royal Bank asking him to pay his 1982 rent direct to the Band who enclosed a document signed by the Chief whereby he assigned these rents to the Bank prior to the time that they were due and payable to the Crown under the lease.

8. Westgate Mobile Park — Ted Zellmar — Owner. The Chief induced him to enter into a new lease partly on the strength of the fact that By-Law 1981–03 was operative. The Band received $590. as a development fee from him. He was not required to pay for "future fire

protection", to provide large water storage, to keep a green park area, or to make his paved roads wider than 20 feet.

9. Billabong Mobile Park — Don Lauriault — Owner. The Chief attempted to get him to agree to a new lease partly on the strength of the fact that by-law 1981–03 was in force.

10. Westview Village Park — Park Mobile Home Sales Ltd., Bruce York — Owner.

Mr. King MP has given particulars of this complaint to your department. It is a lengthy and involved matter but some of the points are as follows; By delaying approvals for development plans he attempted to cause the owner to be in default of the terms of his sub-lease which had a time limit. It would then have reverted to the Chiefs brother. Failing in that regard he attempted to buy it for $1,400,000. far below fair value and threatens to cause his lease rent on the next review (1982) to be set so high that it couldnt be afforded if he refused to sell. When this failed he ignores the fact that the band has accepted a $500.00 "development permit" fee and says a mistake was made and the total fees in respect to the 80 some lot extension to his park is now $31,000. The owner disputes these fees so the Chief caused a Band Council Resolution to be sent to B.C. Hydro and B.C. Telephone denying them the right to enter band property to serve this development. Up to the present time he has been successful in this ploy. The owner offered to put the disputed fees in trust to await the outcome of a hearing in respect to these fees which are demanded pursuant to By-Law 1979–15. This is refused. The Band will not alledge a By-Law violation in court simply I suggest because they are aware that the By-Law is worthless. The by-law was never approved by the Minister and by default therefor falls under Section 81 of the act which does not authorize such a By-Law. He has effectively prevented this man from carrying on his normal business since Nov 1981 and it continues to this day. All of this conveniently at a time when the Band itself is attempting to obtain customers for their own park next door. Recently also the Band offers customers a $2000. rebate on anyone locating a mobile home in their park or Westbrook Estates park located on each side of Mr. Yorks park. Such rebate of course does not apply to any other parks. This is only a small part of his complaint. Call it attempted extortion or whatever you like but it is clearly, in my opinion, unlawful.

11. Westbrook Mobile Park — Tomasina Invest. Co — Owner Gary Hsu is one of a number of the directors. Before Chief Ron Derrickson would submit this lease application he personally demanded and received a benefit of $11,000 as a condition thereof. This was done by way of the fact that HSU owned a house which he had a buyers offer on for $151,000. The Chief wanted this house for his enstranged wife and family. HSU sold it to him for $140,000. on the strength of the fact that

this was required of him in order to obtain the lease for this park area. Andrew Archondoas was a partner of HSU at that time and is a witness. The lease was obtained by HSU and Archondoas was active in the matter until the Chief demanded a $50,000. deposit prior to the lease having been signed. Archondoas would not agree to this and became cautious and backed out of his part in the deal and quit his interest and funds expended in favour of HSU. The terms of the lease had all been agreed to and HSU was deeply involved financially — he formed a company which is the present owner — when the lease was finally presented to him it contained a condition that the company had to pay the band 20% of gross sales profits — a matter which he had previously understood was not required. He received an ultimatum to sign it or else. Because of his deep involvement he was coerced into signing or loosing everything. A person may say this was a misunderstanding or a mistake but I now know of at least four occasions when this same "mistake" had been made. It is part of the scam and the "similar Acts" are evidence of intent as opposed to mistake. Another "benefit" received by the Chief dealing with this park is that the directors provided him and his lady friend with an expense paid trip to Hawian Islands. It is because of this benefit and the 20% of sales that this park was included in the $2000. so called rebate scheme.

12. Edmundo Barone and Tosh Naka in 1981 were interested in building a mobile park. The chief showed them a site owned by Harry Derrickson. Terms and conditions were discussed and agreed. They proceeded with planning and engineering and when this was completed they were assured that all was in order and a deposit of $10,000. was insisted on. Then they were offered a further five acres adjoining to make a larger park. The same terms and conditions were agreed to. There was an old house on the property and it was agreed between the parties that it had no value over and above the agreed lease costs. When the lease was presented to Barone for signature it was not as agreed in fact it required that he pay an additional $20,000. for the old house. Barone would not sign the lease. The ultimatum was sign it or loose your deposit. He did not sign it and none of the funds have been returned. Exaggerated and untruthful matters were alluded to by the Chief in selling this proposal.

13. Golden Acres Ltd — L.R. Crosby — Owner. My complaint has been previously outlined to you. Further to the matter of "consent" in selling my holdings. I asked Mr. Clark, DIAND about this matter and he replied that it Quote "cannot be denied without good reason so long as it is consistent with the covenants of the head lease" unquote. I take this as "policy". This policy is being refused here by the chief and he is using it as another tool to obtain personal financial benefit. Who is right. One the matter of park area to be retained in a mobile park. On 17 June 1980 I received a copy of the By-Law # 1979/80–11 from the bank with covering correspondence signed by the Chief. Among other things it requires Mobile Home Parks to retain 7.5% of the total area to

be retained as an open area. In my planning I followed this rule. Now I find out that such a By-Law was never passed nor was it ever approved by the Minister and to my knowledge simply does not exist. I also find that the adjoining park expanded during the same period was not required to keep any open area whatever. A similar situation exists in respect to the water fire storage I was required to build and the width of the roads etc. These discrepancies are directly attributable to the Chief and council and resulted in about 50,000. unnecessary construction costs plus depriving me of an additional monthly income of about 1000. per month for the remaining 40 years of the lease.

14. The Band By-Laws are being used as the means or justification for collecting large sums of moiney from developers and mobile park residents as evidenced in previous paragraphs. Where is the authority for fees for "future fire protection", park areas etc etc. If they do exist why are they not applied the same to everyone? The band demands building permits for all additions to mobile homes and quotes by-Law 1979–15 as the authority. Again as per para 10 — there is no such authority. DIAND have advised that quote "Although the Minister may dissallow a By-Law, he seldom does, leaving it to the court to decide whether or not a by-law is intra-vires of the Act" Unquote. Please re-examine that policy in the light of the facts outlined herein. What would really assist would be for your legal department to examine all By-Laws originating from this band and provide an opinion to the Band and the park Owners Association as to what if any are applicable to Mobile Home Parks and our tenants.

15. Mr. Clarks letter of 16 Feb 82 stated quote "By certain authorities the Westbank Band was advised that it should undertake the administration of leases and other land agreements so long as the general terms and policy of the Government under the Indian Act was adhered to. In the Absence of an Official Departmental Officer the Band has undertaken to assume Departmental Responsibilities in return for funding and training." Unquote. Enquiries from the band as to their authority resulted in the following; Quote "the Westbank Indian Band is delegated to act on behalf of the Minister in certain instances so the band is an agent of the Minister". Unquote. It would assist us if we were advised precisely what authority has been assigned to them.

16. Mr. King MP informed me that the Minister enquired as why his department should be concerned or involved in the matter of my complaint. I could only reply that the contents of this letter will vividly display facts which I trust are not the general terms and policy of his department. Nor, I trust, is he likely to condone unlawful behaviour on the part of someone acting as his agent.

17. There is already some evidence to support the view that the overall circumstance may, if properly investigated, disclose a conspiracy

to defraud. Park Owners feel unable to make such a direct criminal complaint at this time without the knowledge that an investigation may provide. It will not assist us if Criminal action is taken and in fact such action could result in the often used excuse for the lack of any official action in the interim, this is something we cannot abide with. We require action to resolve past injustice and hopefully prevent the current and future continuation of civil wrong.

18. Could you please assist my by providing the names and mailing addresses of all members of the House Standing Committee on Indian Affairs. Thank you.

L. R. Crosby

17 Feb 82

The Minister of Indian Affairs
Ottawa, Ontario.

Dear Sir: Re: Golden Acres Ltd.
I.R. #9, Westbank, B.C.

After much thought I reluctantly wish to bring to your attention an intolerable situation which has arisen as a result of the administration on this reserve. The reputation of your department and the Crown has been and is presently being severely damaged principaly because of the actions of one person Chief Ronald Derrickson hereafter called the "chief". He may purport to be trying to help his people but the methods used are doing much more harm to the reputation of Indian people in general and this reserve in particular. Much more could be written that would be hearsay on my part so I will refrain from those items other than to say that I believe an investigation would find many of them to be true and I can refer you to a number of sources.

I have personal knowledge of the following allegations;

(1) Attempted extortion
(2) He is attempting to use the ministers appointment as an Agent of the Crown for personal gain.
(3) By printing known lies while ostensibly performing duties as an Agent of the Crown he has committed a civil wrong for which the Crown could be held liable.
(4) He is causing the Crown to be in violation of a lease which was entered into.
(5) By unethical conduct or breach of trust he is causing his own people and the Crown to be held in disrepute.

(2) In 1969–70 I leased 3.5 acres from the Crown — the chief was locatee. I started to build permanent buildings thereon — some were completed. For a number of reasons I sought and obtained permission to convert to a mobile home park. In 1976 I wanted to expand — his father owned the adjoining land but instead of leasing it from him the chief bought it from him and leased it to me. This was a further 4 acres making a total of 7.5 acres. I developed this and as long as the lease was being administered by your department (DIAND) there were no problems, there was a good working relationship, without conflict of any description. In 1979 his father Ted Derrickson started to develop adjoining land but for some reason did not pursue it and asked me if I wanted to lease an additional 6.27 hectares. There were many negotiations but it is suffice to say I leased the land and during 1981 I embarked on a park extension costing some $300,000.

3. During these negotiations the possibility of changing the existing lease #47959 from a straight land rental basis to one of shared rental

income. I indicated I would give this consideration provided it did not entail giving away the rental income from two duplexes I had built or effecting my brothers home. Lease #47959 came up for rental review 1 Sept 86 — In July I received a letter from the band setting the rent for that lease at $16898.per year. I considered it to be fair and in line with other mobile parks so I paid it without comment or discussion. Prior to 1 Sept I was asked to come to the band office — I did — and met with the chief and Mr. McCullough. At that time the new proposed lease was first presented to me and I was expected to sign it right away. I was surprised to find that even a cursory examination revealed that it required me to give away a 20% interest in all buildings including my brothers home and also to share any income the buildings produced. I said I could not sign it — they were very busy with a number of leases — so Mr. McCullough and I had a seperate discussion about the matter out in the entrance foyer. He can confirm that I did not agree to the new lease.

4. I next had contact with the Chief on 22 Oct 81 when I went to his office to get clarification on some other matters — during the conversation I observed that he had become very arrogant. He said "I make all the decisions originating from the band, Vancouver or the Department of Indian Affairs," also "I run the whole show around here" and he has "found it necessary to threaten, bully, lie and cheat and to anything else necessary to get my own way". I was alarmed and disappointed in these statements and immediately resolved to make notes of this conversation and to thereafter require confirmation in writing in respect to anything he told me.

5. Also on 22 Oct 81 he said something about the effect of the new lease — I told him again that I could not and had not signed the new lease he proposed. He at first argued that I had signed the new lease — I told him I had not. He became angry and called his secretary to check the file — when she confirmed that it had not been signed he said — "you are going to be dam sorry if you dont sign that lease", also "you are going to have to take the consequences and live with it" and to his secretary "here Barb throw these dam things in the wastepaper basket". I say those are threats made in an attempt to acquire personal gain — this is borne out by his subsequent letters of the 4th and 17th Dec 81 which were sent out without notice to or any further contact with me whatsoever after the 22 Oct 81 conversation.

6. During the summer the chief was aware that I was relying somewhat on the sub-leasing the two duplexes I had built in order to have sufficient development capital. Also that people by the name of Windsor had given the company funds which would be used towards the costs of a sub-lease. Under the head lease I must have "Consent" to sublease so in dealing with the Windsors it was made clear that unless and until the "consent" was satisfied and the sub-lease actually

registered as such then the funds were to be a direct demand loan to the company. I have on three occasions in the past sub-leased other parcels of land within the head lease with the consent of your department and I anticipated no undue problems. I asked my counsel to draft the sub-lease but he exprienced difficulty and delay in getting the chiefs approval. Finally the Windsor's became upset at the delays and other unfavorable publicity arising from the administration of the band and they asked for the return of their loan — it was paid. The chief is not aware of this latter fact.

7. Therefor the situation prior to 4 Dec 81 is that the chief is aware I had encountered expenses and circumstances which would make me financially vulnerable. He was aware I had not signed the new lease and that I had paid the rent on lease #47959 because as locatee he had received it himself. Despite these facts he wrote a letter to the Royal Bank in Kelowna at the Branch I deal with and therein made the known false statement —

> "Lease #47959" "between the Crown and Golden Acres is no longer in good standing because Golden Acres Ltd., have not signed the renewal of the lease".

The letter indicated thereon that a copy was sent to Vancouver DIAND Att. Mr. McCullough. The Band being notified by an agent of the Crown took this matter very seriously. They are aware of my lease and in fact have a copy of it. The bank replied to the letter as follows; "It has been our opinion that the captioned client hald a long term lease and no renewals were necessary. Please provide us with a copy of the renewal lease at your earliest opportunity, pointing out, if any, the changes it will make to the lease now in effect." also "In view of the seriousness of your letter, we have frozen our clients credit lines until this matter is resolved". The chief did not reply in writing to the bank but he did phone and I am told he had some excuse but in fact he did not send a copy of the "renewal of lease". I suggest this was because there simply is no such form required and he didnt want to show the bank that the form he referred to was in fact a new lease.

To make certain there was no mistake about what he wanted signed — I went to see him — he was present but would not see me nor could I make an appointment. I phoned his secretary Barb — I wasnt allowed to speak to the Chief so I told her I wanted to be certain in my own mind that there was no mistake about what he wanted signed — I asked if it was a renewal of lease or some other form or whether or not it was the new lease that I had already refused to sign. She said just a minute — she spoke to someone near at hand and told me "no — it is the new lease he is talking about." I wrote a letter to the band stating that their letter of 4 Dec — "is neither technically or legally correct. In my opinion the letter and the circumstances leading up to it may be a civil or criminal wrong A CIVIL OR CRIMINAL WRONG and one that

may bring into serious question the business ethics of the band chief and council.

On the 17 Dec 81 I made a special trip to Vancouver DIAND. I spoke to Mr. McCullough — there was no copy of the letter on file so I gave him one. He didnt want to talk to me on the matter saying he was assigned to some other department. In answer to my problem it was indicated to me that I could seek civil redress. I was referred to Mr. Clark — I told him about my problems and received gaurded sympathy but no indication of action. I finally requested that in view of the urgency it would assist if he wrote a letter to my bank indicating the status of the lease. I called back later to pick it up since copies were for me and the bank — it was addressed to the band.

8. On 22 Dec 81 I received a letter from the band dated 17 Dec 81 and again a copy sent to my bank and DIAND Vancouver Att. S. McCullough. It was full of false statements some being:

"any debenture requires the Westbank Indian Band to give notice to the bank if problems arise concerning the lease"

"you agreed to a new lease"

"Your questionable sale to the Windsor's"

**"Under the lease you have 60 days to refer the matter to the Federal Court if you disagree with the rent. You have failed to give this notice"

"you have built and sold illegal duplexes and have accepted money from the Windsors when you cannot convey title and the lease prevents you from subleasing without ministerial consent."

"we can in effect cancel your lease for the above illegal infractions and we therefor suggest you execute the lease as previous agreed".

** while the statement itself is true it conveys to my bank that there was some disagreement over the rent which is false. It artfully neglects to say it was in fact paid.

9. I did not answer to the band on their letter of 17 Dec as it appeared obvious that such action would only result in a further tirade of lies. I wrote to DIAND Vancouver outlining the allegations and reasons why they were false — this was on the 18 Jan 82 I indicated in that letter some of the problems we face on this reserve — when I didnt get an answer by the 10 Feb I phoned and Mr. Clark disclaimed any knowledge of the letter but promised to look into it. On 17th Feb I phoned again and was told a reply had been prepared that day. Mr. Clark is coming to Kelowna on the 24 Feb and I have made arrangements to pick him up at the Airport. I will give him a copy of this letter and make myself available to answer any questions he may have. I'm sorry — I should have added to para 7 that the letter from Mr. Clark to the Band et al states in part "It is apparent that the above-noted lease is in good standing".

10. The lease states that before I can deal with it I must first have "consent first sought and obtained". Because of my predicament I asked the band in a letter of 4 Jan 82 for consent to sell. In his reply of 14 Jan the chief says;

> "if the lease is in good standing consent is standard procedure. The property may be listed and an agreement for sale signed before obtaining a consent ".

I'm not going to be held to ransom over the matter of consent. I asked for consent and it has not been granted. Also it would be highly unfair if not illegal for the locatee to insist in changing the conditions of lease before agreeing to consent to a new lease for a new owner. I predict this will happen. The chief also says in the letter;

> "We are still waiting for you to come to the band office to sign the agreement to put your lease in good standing. The rental review is not complete and therefor I will have no opiton but to refer the entire lease to the Federal Court of Canada and the band solicitor if this is not cleared up completely within seven days of receipt of this letter. Many steps have been taken by your company which are not consistent with the lease clauses and we feel this new lease will solve all of these problems".

That sure isnt saying much for the ethics or integrity of an agent of the Minister but it does further clarify his intent and purpose. All of this is written long after he has been told by DIAND in Vancouver that the lease is in good standing. The reference to "rental review" is in respect to lease #47959 with the implied threat that it can THAT IT CAN be re-opened again and a higher rent demanded. I am not concerned about the other threat simply because I have abided by the lease. But it appears likely that he intends to further harass me at every opportunity in an attempt to find something wrong with the development.

11. In response to his letter I asked my solicitor to arrange for a meeting in the hope that perhaps he could better explain my inability to conform to his wishes — I am told he refused to meet with us saying he didnt need any advise on how to run his business and words to the effect that while we might win this round he would get even when the next rent review comes up. Throughout this matter I have been unable to satisfy myself that the remainder of the band council are aware and condone what has been done. All of the letters are signed by the chiefallegedly on behalf of the Council. I did ask him in a previous letter whether he was writing as locatee or on behalf of council but he did not answer. In view of this I have again on 17 Feb 82 sent a letter requesting a meeting with council. My previous similar request of 11 Dec 81 has not been granted.

12. So that is the situation in chronological order as of this date. My bank is still withholding my credit even though there is a debenture in place for security and I cannot at this moment meet my committments. Perhaps a complete retraction of the false statements, an apology and some assurance to my bank that adequate supervision will return to this reserve might assist the present situation, however, I am satisfied their decision arises from the general reliability of the band administration and from more than this single occurrence. To suggest, as before, that I take civil action is really an abrogation of the departments undertaking to me.

13. The chief has misled or lied to me in the past but I have known him long enough to evaluate what he says. New developers, if what they relate is true, have been subjected to what may amount to fraudulent misrepresentation of facts to entice them to invest. Other investors, like myself relied more on the conditions of lease and the fact that I was leasing it from the Crown and not the band or chief. I was totally unaware until Dec 81 that DIAND had in fact began to divest themselves of their undertakings in the leases by passing the administration of the leases over to the local band council. This may not mean much to your department and you may have a legal right to appoint whoever you wish to act as an agent of the Crown but to me and other investors this was a very serious step to take without first advising the other party to our agreements. Could we not, at the very least, have been advised of your intentions? I for one would never have leased the lands If I had prior knowledge of that fact. On this reserve alone there must be 40 millions of dollars invested largely on the basis of our reliance on the integrity of your department. The band are not required to consider our interests as they are not elected by or required in any manner to hear our submissions. In a development they put up their land but experience has taught them they will never loose their land — in fact I and other taxpayers will pay to ensure that fact. They may sign the leases to indicate agreement but they give no covenant nor is their any penalty to require them to live up to the lease. When they administer it they have nothing to loose and some will always be inclined to do anything legal or otherwise to enhance their income and power. They are well aware and rely on the fact that it usually will cost an individual lessee more to appeal to the court than what is at stake realizing as they do that in doing so they will incur the rath of the locatee and council.

In all sincerity I must submit that it is morally wrong for your department to act as a leasing agent for the Indians if you dont intend to administer the leases. This is directly misleading investors. Where a band administration demonstrates an abuse of authority or a lack of integrity to administer the leases then their appointment to act as an agent of the crown should be immediately suspended pending an investigation. To do otherwise is to invite public criticism of your department and the Crown.

14. The Queen gave a covenant to the company that "it will peaceably hold the land without unlawful interruption by the Crown ". I will concede that the "unlawful interruption" is yet to be established before the courts but perhaps what is of equal importance is whether or not the Minister, now being aware of the facts, intends to wait until the irrevocable damage is done. I cannot overstate the urgent need to immediately resolve this matter. What is at stake, in my situation alone, is the nearly one million dollar replacement value of my development and the revenue therefrom which I might normally expect over the remaining 40 years of the lease.

15. The chief openly states that he makes all band decisions and I believe this to be the truth. There are very few voting band members — I have been told fifty some — I believe council members are simply overwhelmed by the chiefs methods and are totally incapable to oppose him. Also between relatives, friends and those band members who have benefitted financially during his tenure he has little to fear about any re-election. He is totally blind to the damage he is causing. Even his father has expressed concern to me about what he is doing.

16. In addition to the above matters — What is he doing?

Practically daily there is a press release, T.V. interview, court appearance, newspaper interview etc in a running fued between anyone or anything which he doesnt agree with. Particularily involving the mobile home and park industry which ironically supplies the majority of the bands income. Media comments atributed to him or the band council include;

"the mobile tenants are going to live by our rules"
"we are going to form our own local government and have complete control over everything"
"all non-band members on the reserve are here illegally and must get a license to remain"
"We are going to control all the rents on the reserve" "have our own rentalsman"

and on and on almost daily until it has reached the point where potential residents in a mobile park have as a first question? Is this on Westbank Indian Land? and they do not locate because of that fact. How much fiscal damage has been done — it is impossible to estimate. Many residents are pensioners who become very upset because of the uncertainty etc. Some claim this has caused a heart attack and other illnesses. Names can be provided. This is not surprising when the band lawyer stated in public —

"four thousand Westside residents could be forced to leave their homes because their occupancy of 17 mobile home parks on the Westbank Indian Band Reserve is illegal"

according to the press.

Mobile parks on the reserve are decorated with "For Sale" signs wherever they signs are not prohibited by previously agreed to park rules. One park reports 32 signs out of a total of 72 units. Many parks themselves are for sale but no buyers simply because no financial institution will loan risk capital on this reserve.

17. Adding to the above problems is the following;

None band members resident are being subjected to an array of By-Laws etc purported to be for one purpose or another but in fact they are being used almost exclusively to produce band revenue and nothing else; Examples

In expanding my park a lease was agreed upon but no advice given in respect to a development permit until you are too far along to back out then a fee of $2600. demanded.

Building Permits: likewise no prior notice then a fee of $25.00 average each for "inspection fees". Last year 25 of my new tenants obtained the permits but to my knowledge not a single inspection was carried out by the band.

By-Law 1981–02 — Land is leased for a purpose and a fee — occupancy allowed and encouraged then after tenants are located they propose this by-law to require $10. per person per year for a license for something previously agreed to. Thus creating a tidy, after the fact, annual land income of some $40,000. The chief also told me that it would apply to mobile parks but not to other non-band residents elsewhere on the reserve.

Registering Debenture: A by-law requiring a registration fee five times greater than a similar fee required Provincially and this for a service provided by your own Government department. Resulting in my case to being billed for $1000. for the band to act as a totally unnecessary forwarding agent.

18. Despite the length of this letter I trust you will appreciate that I have not included all of the facts or circumstances but I trust there is sufficient for you to make a decision. Also please appreciate my position that as long as the chief remains in his present position it will, during or after any investigation, be an impossible situation for me to be subject to his administration because despite the request hereby made for confidentiallity any enquiries will in time indicate the source. I request that Vancouver DIAND re-assume the administration of my lease as originally undertaken.

19. I feel that I have been very badly dealt with during this matter including the departments total inaction to date — some two months after first notified. I would like to think there is a means open for a reasonable person to seek redress without having to rely on public opinion or expose. My immediate problem is a $35000. paving bill received 21 Dec 81 (after credit freeze). It is two months overdue and the firm are pressing. Since the delay is not of my doing is there any manner you could assist me to meet this committment and ensure solvency until this matter is resolved?

Yours Truly,

L.R. Crosby — President
Golden Acres Ltd.,
R.R. # 1, S-17 C-1
Westbank, B.C.

Before finishing this letter and having reference to para.9. Mr. CLARK'S secretary phoned to tell me that he was too busy to meet with me on the 24 Feb. I indicated the urgent nature of this matter to no avail.

The Hon. David Crombie
Minister of Indian Affairs
Parliament Buildings
Ottawa, Ontario. K1A OH4. 6 May 86

Sir; Re: I.R. #9, Westbank, B.C.

1. We are concerned that enquiries to examine abuse of power or to identify responsibility for actions or inactions of personnel within your department (DIA) will, of necessity, identify circumstances of suspected criminal offences. Those suspected are thereby provided an opportunity to cover evidence or establish alibis. I feel a criminal investigation is warranted and that it should occur before or at least at the same time as any other enquiry.

2. Other reports previously supplied to DIA include an opinion by Dept. of Justice — " (T.Marsh) is of the opinion that the B.C. Region could be seen as conspiring with it's tenant — — " While neither may be a person, the principals involved can be parties to the offence or an accessory after the fact.

Other suspicious circumstances were identified. Despite these facts, no investigation, worthy of the name, was ever done. This led to, and continues to cause, accusations of "cover-up" and the DIA "peek-a-boo" look at events does not deal with the situation. It appears to be that whenever enquiries are made the person assigned is not from given the necessary authority to do the job, is prevented from completing the job or if the results are unfavorable, then nothing is done and the matter is approached by some other manner when the issue isn't abandoned.

I will attempt to briefly correlate some of the suspected criminal offences arising from circumstances reported to or known by our association members.

Using the brief provided to your office on 1 Oct 84, as a reference the attached summary is provided.

3. Surely DIA must be responsible for the protection of public funds both in direct expenditure and/or liabilities incurred. These simply are not met if DIA fail to cause an investigation in circumstances where there is reasonable grounds to suspect that an offence, civil or criminal, was committed by an employee, agent or appointee. All matters reported arise directly from the Band being allowed or authorized to assume certain administration duties and they, to my knowledge, still possess this authority. This authority should be cancelled forthwith and then the investigation and/or enquiry, done. There is a fine line between suspicion and belief which can only be dealt with after a genuine investigation. An independent investigation is necessary in order to provide credence to any subsequent decision — Without it — indeci-

sion, distrust and accusations prevail. I believe the issue must be faced squarely in order to best serve the interests of the band, the department and others.

4. Much of the evidence avilable now may lack the clarity that was available initially. The unreasonable delays already experienced severely hamper the quality of justice.

Since the suspicions are primarily directed toward persons connected, directly or indirectly with your department I consider it appropriate to refer the matter directly to you. Please advise me if, in your opinion, these matters should, more properly, be directed to the Provincial Attorney General's Department.

Yours Truly

(L. R. Crosby) President
Westbank Mobile Park Owners Association.

SUMMARY — REFERENCE 1 OCT 84 — BRIEF TO MINISTER

(1) Person(s) comprising the Band Council or the principals of related firms are hereafter referred to as "Band" — made a false misrepresentation of fact (Exh A-4 & A-5) as to the status of the Golden Acres Lease for the apparent purpose of acquiring a new lease which could provide greater personal benefits. This causes suspicions that the offence of attempted fraud may have been committed. There may also be a defamatory libel or an attempt to extort by that means.

(2) The Band appears to have published and distributed an apparent false document (Exh A-22) and caused or attempted to cause other persons to act upon it. This is suspect to be Forgery or Uttering. (Golden Acres et al)

(3) The Band apparently published a false document (by-Law 1979–80–11) (Exh A-20) and cause or attempted to cause persons to act on it. (Park Mobile)

(4) The Band may have conspired with DIA or other persons in an attempt to defeat the course of justice in circumventing a BC Supreme Court ruling — "Rentalsman issue" and/or a creditor, Dondaldson Engineering Ltd. (Hobbs)

(5) The Band appears to have attempted to obtain money from Thomasina Investments Ltd., by falsely pretending that a debenture registration fee was payable pursuant to by-law when it appears that such a by-law is non-existent. (Hsu et al).

(6) The Band apparently attempted to obtain $60,000 (later reduced to $40,000) from Acres Holdings Ltd by reason of a development by-law — an examination of all purported By-Laws fails to disclose such a particular requirement. This demand originates in part from Okanagan Planning & Engineering Co. Ltd (OPEC) or at least from a principal or employee of that firm — which incidentally the Band insisted that developers use for planning etc. Later there is reason to believe an employee of OPEC also worked with the Band. This and other circumstances gives rise to the suspicion that the latter persons may be part of a conspiracy to attempt to obtain such funds by fraud. (Acres Holdings — also Exh A-19)

(7) A welfare fraud suspicion is reported to Mr. Leask, DIA on 17 Sept 84 — by way of a letter — a copy of which is attached. There is suspicion of Conspiracy between the Band welfare person and/or Mr. Monti who reportedly collects rents etc., on behalf of the Band Chief. The Band Chief owns or has an interest in the firm which possess the building concerned. The matter is not investigated.

(8) The Band is suspected of demanding or receiving a benefit relating to the affairs or business of his principal, namely; the Crown. (S.383) DIA officials were made aware of these suspicions and are privy to the offence. (Thomasina — HSU, ARCHONDOAS, KIEHL-BAUCH).

(9) The Band is suspected of numerous incidents of what may be Mischief — in respect to the lawful use, enjoyment or operation of property. There is also the suggestion or suspicion that DIA person(s) by ommitting to do an act that was their duty to do — may be deemed to have caused the occurrence of the event. (S.386) — Example; DIA allow or cause a Band road (governed by Sec. 34 of Indian Act) to be transferred by the Band Chief, from Band Road Lands, to Band Chief as locatee. This allowed the locatee to claim a right of possession of property which disected and landlocked a portion of an existing mobile home park which had previously been sub-leased by the locatee's company to Park Mobile Home Sales Ltd. DIA then actively assist the Band in demanding fees for the right to use such road. The time element and other factors suggest these occurrences may have been part of a pre-conceived plan which was successfully used in the sense that large sums of money were directly or indirectly obtained by this means. (Park Mobile — YORK).

(10) The Band appears to bear responsibility for what may be a Criminal Breach of Contract (S.380) when they as an employee or agent of the Minister of the Crown deprived to a great extent some inhabitants of a mobile park of their supply of electical power or water. (Park Mobile — York, Alexander).

These are only a part of what can be suspected from the information contained in the reference brief. There are reasonable grounds for these suspicions which are in part documented. No one knows, at this point in time, if an investigation will provide sufficient evidence on which to base any charges, however, I believe that justice and fairness to both the Band and others concerned requires a complete investigation.

Other members of Parliament who have personally interviewed some of the complainants in this matter are: John Frazer, Lorne McCuish and Fred King. Other members who have some personal knowledge of portions of the circumstances are Frank Oberle and Dr. Lorne Greenaway.

Chapter 8

Departmental Responses to Westbank Matters

This Commission was asked to ascertain whether there were any improprieties on the part of members of the Department of Indian Affairs. Counsel were of the view that the word improprieties referred to major transgressions such as criminal acts, acts of deliberate cover-up or perhaps acts which would justify the dismissal of a civil servant. In those senses, I cannot say that improprieties occurred.

Another question posed in the terms of reference was whether the Department's responsibilities and functions were carried out in accordance with law, established policy or generally accepted standards of competence and fairness.

The failures of the Department, if they could be summarized, were not those of malevolence, but rather failures to fully perceive responsibilities. On occasion the Department or its members suffered impaired vision in the good cause of devolution. Sometimes problems arose from the Department's failure to make timely adjustments when the implementation of devolution took unforeseen turns. I felt that at times the Department allowed its judgement to be influenced by a strong and aggressive chief who came to power after the wave of unrest that swept through British Columbia in 1975.

In 1975, an event occurred that was central to the problems at Westbank. That year the Vernon office of the Kootenay-Okanagan District was occupied by Indian bands and organizations and shortly thereafter the office was closed down permanently. The events at Westbank in the years following 1975 took place against a background of change in Indian politics, in governmental policy, and in the organization of the Department of Indian Affairs.

Governmental Policy — The Change from Paternalism

In 1963, the federal government introduced a welfare program for Native Indians at rates comparable to the provinces. This was perhaps the beginning of greater assistance to Indian people. The federal government also made commitments to provide other social programs and economic development and assistance. Funds were provided for education, and some steps were taken towards remedying the poor conditions that prevailed on many reserves.

In 1969, the federal government issued a White Paper entitled "Statement of the Government of Canada on Indian Policy, 1969". The

ideal championed in that White Paper was the removal of the legislative and constitutional basis of discrimination. The Paper proposed the abolition of the Indian Act and that Indians should own their own lands. One feature of the Paper that provoked controversy was a proposal that services provided for Indians should be provided through the same channels as services provided to all other Canadians. For example, welfare and education would be channelled through provincial governments. The Paper promised funds for economic development and it promised special help for those who were most disadvantaged.

The Indian community was quick to condemn the White Paper. It was construed by many to point towards integration and assimilation. The strong reaction led to a shift in government direction that sought to achieve, as one witness described it, "the preservation of a separate Indian identity within Canadian society".

At the same time, Indian people were becoming increasingly aware of their ability to manage their own affairs and to govern themselves. Indian people sought self-government and governmental policy moved to accommodate those desires to some extent.

Witnesses at the Commission hearings referred to a Treasury Board Minute of 1974 which authorized the Department to transfer the administration of many programs from the Department itself to Indian organizations. Perhaps that Treasury Board Minute was a watershed, for prior to that time the Department of Indian Affairs was primarily responsible for the delivery of services to Indian bands. After that time, more and more program delivery was carried out by Indian bands and organizations.

The organization of the Department of Indian Affairs went through a number of changes in the 1960's and 1970's. Prior to those years, the Department operated on the concept of the Indian agency. In British Columbia (and elsewhere), the province was divided into districts; the District Manager had complete responsibility and virtually controlled what went on among Indian bands and their members. Authority was centralized in Ottawa. In the 1960's and 1970's, there was a significant reallocation of authority which gave greater authority to the regions.

In the mid-1970's, the B.C. Region was organized into the following significant sections: Reserves and Trusts, Economic Development, Local Government, Education and Engineering. The names of the sections were to change from time to time, often according to Departmental policy changes and shifts in headquarters (Ottawa) organization. The Regional Director General was responsible for matters beyond the daily functions of the Regional office, while the Director of Operations looked after the internal management of the Regional office.

With the Vernon district office closed, the district functions were transferred to Vancouver. There is now a "Central District" office in Vancouver which administers the day-to-day affairs of Okanagan bands where the administration has not devolved upon the bands themselves. Many Indians appear satisfied that the District office be so far away. Perhaps they perceive they have greater control over their own destiny under this arrangement.

The shift in governmental policy towards transferring programs to Indian control has been accompanied by a significant decrease in the number of employees of the Department. Mr. Fred Walchli, former Regional Director General, said:

> During that period, we moved to complete, to the extent possible, the transfer of all programs. When I left the Department [1983], there were. . .only about 13% of the budget which could be transferred. . .all 194 bands were now operating programs. . .At that time, there were 23 tribal councils. . .

He summarized the period of change as follows:

> . . .over the last eighteen years, we had moved from a position where we were in confrontation with the Indian people on virtually everything, to a point where we were in harmony, at least with their goals. To illustrate what I mean; initially, back in the '60's and '70's we were moving along, integrating Indian children into provincial schools. The Indian objective was control of Indian education. So, we were on a collision course.
>
> Prior to 1973, the Government of Canada refused to recognize land claims. In 1973 the government brought in a policy to support the resolution of land claims. Prior — in the early '60's, or rather late '60's and early '70's, Indian self-government was no more than a dream by some Indian people. The Department had virtual control over the lives of the Indian people.
>
> By the end of the era, what happened was that the Indian direction and the Department's direction were in harmony to the extent that they at least agreed on the objectives. We agree on the objectives of Indian self-government. We agree on the objectives of improved socio-economic conditions for reserves. We agree on the settlement of land claims. We agree on the need for an economic basis for reserves. There are still a lot of disagreement as to how these are to be accomplished, but those are issues which are currently being negotiated, either in the Constitutional forum or in the — through other policy discussions.

The Westbank Indian Band

In many respects, the Westbank Band was on the cutting edge of the new developments. As noted elsewhere in the Report, it moved forward more quickly than many bands. It is a band which, according to the evidence, contains some 250 band members. There are two occupied

reserves, Reserves 9 and 10, with some 3000–5000 people who are non-Native living on the Reserves. Some reside in a number of mobile home parks on Reserve 9 and others live in an attractive subdivision on Reserve 10. To some extent, Westbank issues have developed because of the Band's semi-urban location and because of initiatives taken by the Band government. Many of the problems found at Westbank may well be indicators of issues that will arise in other places. Mr. Walchli adverted to this when he said:

> The problems in Westbank have been highlighted primarily because they have moved faster and further than most other band councils.

As narrated in the Introduction to this Report, the Westbank Band has only existed as a separate band of Indians since 1962, when it separated from the Okanagan Band. Two persons participating in the initiative for separation were the parents of Ronald Derrickson and Noll Derriksan. The two sons have been chiefs for significant periods since the Band's inception. The family appears to be capable and intelligent. By 1970, a large amount of valuable land on the two Reserves had been acquired by one or other members of the family. Resentments were kindled because of this.

The Thornton Report

Allegations of undue acquisitions of land by Noll Derriksan, Ronald Derrickson and other family members were being made as early as 1970. Those allegations became the subject of an investigation and report by Mr. Herb Thornton of the Department of Justice.

Mr. Thornton looked at the acquisition of a number of parcels of land by members of the Derrickson family to determine whether any impropriety had occurred. He looked at a number of transactions where land had been obtained by the Derricksons through allotment. With respect to those allotments he said:

> It will be seen that several of the above 20 parcels of land were allocated to the Derricksons by the Westbank Council, and that the Derricksons have always been members of the Council. In spite of this, I am unable to find any impropriety in the allocations, because the regulations under the Indian Act regulating procedure at Band Council meetings do not prevent a council member from acting, even when he has a direct interest in the subject-matter.

Section 19 of the Regulations (B.C. 1953–1313) reads:

> 19. Every member present when a question is put shall vote thereon unless the council shall excuse them, or unless he is personally interested in the question, in which case he shall not be obligated to vote.

The regulation in question has yet to be changed. It is doubtful that anyone today would view that regulation as a satisfactory guideline concerning conflict of interest. While policy circulars impose higher obligations upon the band, the regulation as such remains. Hopefully, the experience of this Commission and certain of the recommendations I make will tend to sensitize bands and the Department to this problem. As lands become more valuable, the loose practices of the past in this area are no longer to be tolerated.

The Regional Director General and the Westbank Band

Mr. Fred Walchli had been with the Department of Indian Affairs for ten years when he returned to Vancouver in 1976. He had spent the previous several years as Regional Director General in Alberta. Mr. Walchli's advancement in the Department had been rapid and he had dealt with some significant matters in Alberta. Prior to becoming Regional Director General in Alberta, he had been with the Department as a Land Use Officer in British Columbia. In that time, he had become cognizant of many of the problems peculiar to British Columbia.

The period he had spent in Alberta was a period of turbulence which was, to some extent, paralleled in British Columbia. After the closing of the Vernon district office in 1975, the functions of that office were not quickly absorbed by the Vancouver office. It seems there was something of a bureaucratic void and a backlog of work tended to accumulate.

Mr. Walchli returned to Vancouver in 1976. In the fall of 1976, Ronald Derrickson was elected Chief of the Westbank Band. Shortly thereafter Mr. Walchli met with Noll Derriksan, the former Chief, and Ron Derrickson, the newly elected Chief.

Mr. Walchli gave evidence of the meeting between himself and the two brothers:

> Q Maybe you could just carry on with that thought, Mr. Walchli, and tell the Commissioner about some early meetings that you had with Mr. Derrickson shortly after he took over his new responsibilities as Chief?
>
> A Yes. In the fall sometime, I don't recall the date. I think it was in October; it may have been in November, but one day I got a call from Noll Derriksan who I actually knew better than Ron, and he phoned me up and asked if they could meet with me. I said yes. They came to Vancouver equipped with a number of financial statements, and Ron, as Chief, told me that he had reviewed the state of the Westbank Band, had looked at the development company; found they were $1.3 million in the hole; looked at the state of the housing program; had looked at the welfare administration, and that had been the subject of an investigation in 1975.

> After having looked at it, he said to me, "Had I known that the situation was this bad, I would not have run for Chief". He said, "I could better deploy my time elsewhere", pursuing his own business interests. We talked about what had to be done on the Reserves; what had to be done to rescue the development company, to set up the new administration.
>
> I encouraged him to stay on and I committed the Department to do whatever we could to help him straighten up the mess he found in Westbank. (My underlining)
>
> (Transcripts: Volume XXXII, pp. 4417–4418)

The problems Mr. Walchli discovered and continued to have with regard to Toussowasket, Noll Derriksan's mobile home park, are dealt with in Chapter 2.

The Westbank Indian Band Development Company debt of $1.3 million was incurred during the development of Lakeridge Park, sometimes called the "Sookinchute" property development. Lakeridge Park subdivision is a quality housing subdivision on Reserve 10, located on a ridge overlooking Okanagan Lake. Subdivision work had been started and much work had been done prior to 1976. A large amount of money had been borrowed by the Development Company, the Band subsidiary that leased the land from the Band under a long-term lease for the purpose of development. According to contemporary financial statements, the federal government was obliged under a guarantee to the extent of three quarters of the $1.3 million debt.

There were cost over-runs on the subdivision and allegations of faulty work were made against the engineers. These allegations became the subject of litigation. The late 1970's saw several years of economic down turn that caused problems in selling the development. Money had been spent in anticipation of lot sales, but sales were anything but robust.

The decision to continue with the subdivision turned out to be justified. Lakeridge Park became a successful and attractive subdivision. As an economic venture it was not an unqualified success as the Band did not realize all the lease payments owed to it, but it would seem that funds acquired by the Westbank Indian Band Development Company were used in business ventures operated by the Band. Those ventures have provided employment for and developed entrepreneurial skills in some Band members.

The 1977 Agreement

On April 1, 1977, Mr. Walchli, on behalf of the Department of Indian Affairs, entered into an agreement with the Westbank Indian Band which allowed the Westbank Indian Band Council to perform certain functions pertaining to land management, band membership, and estate administration. Under the Agreement, the Band Council undertook to

perform specified duties, which duties had formerly been administered through the Department. The Department agreed to provide the funding, training and technical support necessary for the performance of the duties. The Agreement expressly stipulated that the Minister was to retain the responsibilities assigned to him under law regarding the administration of lands, membership and estates.

The 1977 Agreement reflected a general Departmental policy of transferring the administration of government services and programs to local Indian governments (band or tribal councils). The implementation of that policy was somewhat hastened following the closure of many district offices as a consequence of the 1975 controversies. The Vernon office, for instance, served twelve bands, including the Westbank Band, in the Kootenay-Okanagan District. It was closed in the summer of 1975 in the wake of the province-wide demonstrations by Indian bands and organizations protesting inter alia, government funding policies. The District office in Vernon was one of several that was occupied by protesters. It was never re-opened due to widespread opposition in the Kootenay-Okanagan area bands who were seeking greater degrees of autonomy.

The Vernon office had employed a staff to administer land matters but certain bands in the district felt that the level of service was poor. They preferred to administer their own affairs, provided sufficient funds were made available to them. The Department was faced with a choice. It could re-open the office over the protests of the clients it was to serve or it could accede to the request that many functions formerly performed by that office be transferred to Indian administration. The Department chose to follow the latter course. I heard evidence during the course of the Inquiry that the Westbank Band was virtually the only band in the district that favoured the retention of the Vernon office.

The foundation for the transfer of land management responsibilities had been laid before 1977. In the late 1960's, the Department of Indian Affairs had embarked on a policy designed to promote greater Indian participation in the governance of their own affairs. The transfer of the administration of some programs and services from the Department to band councils was seen as an initial step towards accomplishing this goal. In order to transfer the program administration and provide related funding to Indian bands, it was necessary to obtain the approval of Treasury Board. Prior to 1974, Treasury Board approval had been obtained on an ad hoc basis, but in about 1974 the Department put forward an expanded proposal to transfer more programs to band administration. The Department obtained approval from Treasury Board to transfer the requisite funds to band councils. The programs and functions that the Department proposed to transfer comprised a long list of services of the sort commonly provided by local governments. However, due to statutory responsibilities imposed upon the Minister, certain functions had to be retained by the Department.

Having obtained approval in principle to transfer federal funds to bands in order that they might take on additional administrative functions, the Department proceeded to identify which matters were appropriate for transfer and to decide on the format for devolution. In response to the protests of 1975, the then Minister, Hon. Judd Buchanan, prepared a general policy statement which was endorsed by Cabinet. This statement set forth the changing direction of government-Indian relations. Because it is an important and seminal statement for all Indian bands and councils in Canada, I set it out at the end of this chapter. It represented a sea change in the relation between the federal government and Indian people and was as well a portent of the changing relationship between Indian people and non-Indian people in Canada. It was a marker on the road to "self-government". It contains the considerable amount of general expressions of goodwill commonly found in governmental policy documents, but it does in its essential lineaments outline the new order to be followed vis-à-vis Indian people. Stripped of circumlocution, it proposes a move away from a too paternalistic approach (the bad past) to a realization of self-determination status (the good future).

While the Minister's statement has useful features as a statement of broad policy, it obviously is of limited practical use in guiding the people in the field as to what precisely is to be done. The Department could not, nor could it be expected to, change direction immediately. Organizations are people and relationships take time to accommodate any new direction of such a fundamental nature. Today, over ten years later debate continues to reverberate about the pace of change and the role of the Department. It is of interest to note that Mr. Fred Walchli arrived on the B.C. scene as Regional Director General almost at the very moment that the new order was being announced. He was expected to lead the Department and the various groups for which it had responsibility to the promised land — it would not always be clear, however, in just which direction lay that land!

The Minister, in the policy paper, prescribed generally greater participation by Indians in decisions affecting their lives at the national, provincial, and band levels. The proposed policy called for a continuing transfer of programs and resources to band councils and envisaged an enlargement of band powers in conjunction with revisions to the Indian Act. The Department was to be transformed in such a way that it would become an enabling or supportive body rather than a direct provider of services. Although the contemplated revision of the Act has not yet occurred, devolution continued to be a major emphasis of the Department. Departmental officials sought to devise methods by which the responsibilities of band councils could be expanded under the existing legislation. In 1976, a series of policy guidelines or "circulars" were published. These prescribed methods for the devolution of programs and funds to "Indian local governments" (the "D Circulars"). Program Circular D-1 expressed, inter alia, the basic policy that:

> Indian Bands have the right to exercise the fullest degree of responsibility for local government that is consistent both with law, and the customs and traditions of the Band, (para. 3.1)

And further that:

> Indian Bands can exercise this right and its related obligation without: . . .relieving the Federal Government of its responsibilities to meet commitments under law or various treaties . . . (para. 3.2 (b))

The policy thrust was that Indian bands should be encouraged to manage their own affairs. The granting of increased autonomy was, however, subject to continuing federal responsibility for existing commitments. Further, the Department would retain ultimate responsibility under law for certain programs despite portions of program administration being transferred to local government. Related policy guidelines prescribed which functions could be transferred and how appropriate funding was to be provided and accounted for. Program Circular D-4 stipulated that whenever the Department contributed to the cost of local services administered by a band, a "local service agreement" was to be entered into. The local service agreements were to define specific duties and obligations to be performed, financial controls, and any other necessary terms and conditions related to specific programs. The agreements might be recorded by way of formal agreement or by a Band Council Resolution.

Counsel for the Department said in his submission:

> As a result of the (1975) uprising, several District Offices including the Central District Office were closed. This had a serious effect on all of the Bands serviced by the District offices. It meant that the services which were originally performed out of District offices such as estates and land matters were being neglected. Although there had been discussions regarding transferring those services over to the Bands, it was not until early 1977 that anything was accomplished. This left a vacuum for approximately two years.
>
> It is necessary to appreciate this atmosphere within the Indian community and the dramatic changes that were occurring in government policy in order to fully understand the actions of departmental employees throughout this era and the years following. The following factors need to be kept in mind.
>
> 1. The structure of the Department was such that its personnel within the Department were much more familiar with providing rather than transferring, services to Indian people.
> 2. The Indian Act was enacted during an era when paternalism governed the relationship between Indians and non-Indians, and therefore the move to devolution meant that policy guidelines and departmental directives became the "guiding light" for the departmental employees carrying out the Department's role in the devolution process.

3. The changeover in the basic policy regulating Indian peoples was not only dramatic but it happened over a relatively short period of time.
4. The Indian community was becoming a significant political force which continually applied pressure on the politicians and departmental employees to quicken the devolution process.
5. With the changeover in policy, departmental employees were sailing into uncharted waters where trial by error became the norm rather than the exception.

THE 1977 AGREEMENT

A. Background

With particular reference to the British Columbia region of the Department, significant factors from a regional perspective at the time the 1977 Agreement was negotiated and entered into included the following:

1. The region was under pressure from Ottawa to implement the devolution process as quickly as possible;
2. There were important and necessary services which were originally provided to the Westbank Indian Band through the Central District Office which were being negotiated as a result of the closure of the Central District Office;
3. There had been a commitment made to Bands in the Central District that the services originally performed by the District Office would be transferred to those Bands;
4. The atmosphere between the Department of Indian Affairs and the Indian community in British Columbia was tense and there were factions within many Bands including the Westbank Band which were pushing for the dismantling of the Department of Indian Affairs;
5. The region was faced with an aggressive and intelligent Chief of the Westbank Indian Band whose priority was the development of the reserve lands.

The 1977 Agreement was a "local service agreement" which specifically governed the transfer of certain lands, membership and estates functions to the Westbank Band. It was a formal written agreement. Similar local service agreements were concluded with some other bands in the Kootenay-Okanagan District by less formal means through a Band Council Resolution. This Agreement really confirmed and formalized the de facto situation that had evolved consequent upon the closure of the Vernon office. The Regional Director for British Columbia, Mr. Wight, had informed the bands in the Kootenay-Okanagan District shortly after the closure that they would have to take on certain land management functions previously provided by the District Office. The Regional Office lacked sufficient resources to perform all services previously done at the district level. After the bands in the District complained that they were not receiving any funds for this extra responsibility, the local service agreements provided the basis for Departmental funding. In this fashion, the Kootenay-Okanagan

bands were among the earliest bands in Canada to participate in the transfer of responsibility relating to land management and administration.

The Westbank 1977 Agreement was largely drafted by Mr. Peter Clark, then employed by the Department as a "special project officer". A short time after, he became Director of Lands, Membership and Estates for the B.C. Region. Included in the specific duties that the Band Council was to perform were various administrative functions associated with land management — record keeping, rental notices, rental collection and the like. Also the Band Council was authorized to "negotiate with lessees and permittees as to revision of rentals, new rentals, and enforcement of terms and conditions in agreements." This language has been the subject of considerable controversy as to just who had the power to finally determine rents payable under leases and to undertake enforcement procedures for alleged breaches of covenants in leases.

The Agreement contained the following clause:

> NOTWITHSTANDING any clause in this Agreement, the Minister must maintain his responsibility for the administration of lands, estates and membership within the statutory provisions of the Indian Act and the practices which have been introduced subsequent to the passing of the Indian Act but which have received Treasury Board approval and take whatever action he deems necessary to carry out this responsibility.

This clause may have been intended to specify that the Department was not transferring any Ministerial authorities to the Band Council. In 1977, Mr. Walchli advised Mr. Mackie, the Assistant Deputy Minister, on the issue as follows:

> In August of 1975 the District Office for the Kootenay-Okanagan Band was closed. At the time of closure no suitable arrangements were developed to provide for administration of lands, estates and memberships. Consequently much of the work was done by the Band Councils and their administration without being compensated for . . . the failure to come to grips with this issue is a major stumbling block to the Department establishing effective working relationships with the Bands. In addition the Land Administration for which the Department has the obligation is not being carried out. I therefore agreed with the District Council that we would compensate the Bands for the work that they have done to date and that we would enter into an agreement with them to provide District-type land administration services starting April 1, 1977. . .
>
> It should be clearly understood that the proposed arrangement does not constitute a transfer of the Minister's authority to carry out his responsibilities for land administration. It in fact is a service agreement for the Bands to provide the same level of services previously carried out by our District Office. (Exhibit 113, Document 30)

There are specific mechanisms in the Indian Act which allow for the transfer of control and management over reserve lands to a band. Under Section 60, the Governor in Council may grant a band the right to control and manage its reserve lands. This allows a band to exercise certain powers formerly reserved to the Minister. In addition, Section 53 of the Act allows the Minister to appoint a person (often the Chief and/or councillors of the band) to "manage, sell, lease, or otherwise dispose of surrendered lands". These statutory authorities are distinct from a local service agreement, such as the 1977 Agreement. As indicated by Mr. Walchli in the aforementioned letter, the 1977 Agreement did not constitute a transfer of Ministerial authority. The Westbank Band eventually received authority pursuant to Section 53 to manage their surrendered lands (primarily the Lakeridge Park subdivision) in October 1980. They did not receive authority pursuant to Section 60 of the Act until June 1985.

The Westbank Band had applied for Section 53 and 60 authority as early as 1978. While they waited for the granting of these authorities, the Chief and Council undertook certain land administration functions under the authority of the 1977 Agreement. Chief Derrickson sought to interpret the transfer of administrative functions under that agreement as the grant of quite extensive authority over lands at Westbank. In his evidence before the Commission, he said that the Band had more power under the 1977 Agreement than they had under Section 60. If that be so, one might ask, why proceed to ask for Section 60 authority? I think Mr. Derrickson was indulging in wishful thinking if he was serious in his assertion concerning the 1977 Agreement and the breadth of authority granted thereunder.

Mr. Clark, who drafted the 1977 Agreement and who served as the Director of Lands, Membership and Estates (now Lands, Revenues and Trusts) in the B.C. Region from 1977 until 1983, gave evidence before the Commission. He was asked to explain the intention and operation of the Agreement with respect to, inter alia, cancellation of leases. After referring to the notwithstanding clause, noted above, Commission Counsel put the following questions and received the following answers from Mr. Clark:

> Q I take it then, when you drafted this document, it was your intention that the Department maintain all of the statutory responsibilities and not devolve any of those statutory responsibilities upon the Band other than duties of an administrative type; is that a fair statement of the theme of this document?
>
> A Yes, I think the Treasury Board authority clearly stated there were certain things that a Band that could not be devolved at that time, and that included, certainly, the signing of agreements on behalf of the Crown, and that's exactly what I think was envisaged in there; that those were the statutory things that had to remain with the Department.

Q The signing of agreements on behalf of the Crown?
A Yes.
Q Was not given to the Band under this agreement?
A That's right.
Q And were there any other significant functions that were withheld?
A Not that I can recall directly. Well, there was the estate program which was a little different, although there was a considerable amount of reference to it in the Appendix A. That was another part of the program that could not devolve, and so that was something that had to be maintained under those Sections of the Act to the appropriate administrators of estates.
Q All right. For the time being let's just deal with the land function, in any event, because that's what I am concerned with at this point in time.

What about giving notice of termination, or cancellation of leases, how did you view that?
A It was one that was used with a certain amount of, I suppose, discretion, or flexibility between ourselves, as to, if, in fact, rentals had not been paid properly on time, the Band who were collecting those were really the only people is a position to know of that, and we suggested that they take appropriate actions at that time to ensure that the lease was managed properly.
Q All right. What about the power if you give notice terminating a lease, how did you view that?
A That was again an area which was not that clear. We generally followed the approach that maybe the Band council, in those instances, should, if they felt it was appropriate and proper, give notice, but they should inform us at the same time, so that we could, in fact, provide a separate notice.
Q Now, which one did you consider legally effective?
A I don't know whether I consider it, really from the point of view of legally effective, I — difficult to answer that one. I suppose, you know, I found that the practice was accepted by many lessees, or not many, but certain lessees where a Band did cancel, that that was accepted, so I found that that obviously was a process which was acceptable on cancelling. On the other hand there were other lessees that, in these, and other Bands, which didn't like that process, and wrote to my office asking whether, in fact, this was proper, and we would then send out maybe a second notice.
Q Going back to this agreement, is the question of giving notice of cancellation or termination of leases addressed at all in this agreement, in any part of it?

THE COMMISSIONER: You are referring to the —

MR. ROWAN: To the 1977 —

THE COMMISSIONER: — the 1977 Agreement, is that it?
Q Yes, document 23, Exhibit 108?
A It was referred to generally, in I think, one of the subparagraphs on the — which one it was regarding enforcement in terms of leases, which was —
Q You refer perhaps to Appendix A?
A Yes, number three, I think.

Q Number three, which states: "Negotiate with lessees and permittees, as to revision of new rentals, and enforcement of terms and conditions and agreements". Now, whatever is meant by that, it doesn't expressly confer a right to terminate or cancel leases, for non-performance of covenants, you would agree with that?

A Well, the intention was that that was the — that it would provide the Band with that authority to enforce all those terms and conditions and agreements as they were managing.

Q It was your intention?

A That's right.

Q As draftsman of this agreement that the Band have the power to terminate or cancel leases, do I have that right?

A No. To enforce those terms as far as providing that to it, as I said before, if there was difficulties, they would then come back to the Department for a second letter, or reinforcement on that basis, so that, in fact, there would be no problems. We didn't cancel many leases; there weren't very many leases that were, in fact, terminated or surrendered or cancelled in the Department over the time I was there, there were maybe three or four or five, which were all with agreement, so it really was not something that was considered as a major workload of any event.

Q All right. When you used the word "enforcement" in paragraph three, what did you have in mind? What duties did you have in mind as far as the Band was concerned?

A Well, there were many clauses that were put into leases, which were certain obligations and responsibilities of parties, and because there had to be some way of insuring that, in fact, the leases were controlled. I can't remember all of the clauses, but there were clauses like in agricultural leases, not allowing you, you know, weeds to grow, and there were clauses in other leases about insurance requirements to be in place for any buildings to a certain amount of money, and liability insurance, and those were some of the enforcement that had to be done locally.

(Transcripts: Volume XLIX, pp. 7035–7039)

From Mr. Clark's evidence, it is apparent that the respective areas of authority of the Band Council and the Department under the Agreement were not fully defined. The ambiguity of the language in the 1977 Agreement eventually led to confusion over who had the authority to exercise certain decisions concerning the management of leases on Reserve 9. This uncertainty in turn gave rise to controversy, conflict and litigation over the ensuing years.

It is not particularly surprising that the Agreement would have a certain degree of imprecision. These were early days in the devolution process. It should, however, have been evident to the Department by the early 1980's that it was desirable to have the respective spheres of authority more precisely defined. This is but another example of the Department's reluctance to deal more firmly with a strong chief who was inclined to interpret and exercise his authority to the fullest. Perhaps the regional office of the Department was hoping for an earlier grant of Section 60 authority which would have legitimized the situation.

The closure of the District Office and the implementation of the 1977 Agreement created the framework for a new order but it was a new order with very sparse guidelines. One hesitates to be too critical of the local people who were in the eye of the various political storms that have revolved around Indian Affairs in the last decade. It would obviously have been preferable, however, if a more precise definition of authority had been spelled out before matters reached the stage they ultimately did at Westbank.

As noted above, the original direction of government had been to grant increased authority and to concurrently do some revision of the Indian Act. That revision has not proved to be a politically easy task — perhaps not surprisingly, there is a distinct lack of unanimity among Indian people concerning possible changes to the Act. The advent of the Charter and increasing controversy over the limits of self-government have not made the achieving of progress on revisions easier. I comment in Section II of the Report on some areas of the Indian Act that I think might usefully be examined with a view to amendment.

While I do not wish to be unduly critical of those in the Vancouver office of the Department who were faced with the many complications arising from the enhanced speed of devolution, I do think that there were warning signs that all was not well at Westbank. Mr. Crosby's correspondence is not a model of brevity or always a dispassionate recital of the facts, but clearly there was a problem of serious dimensions relating to the administration of the mobile home park leases. The evidence of Mr. Nick Dachyshyn, a proposed partner of the Yorks, concerning his frustrations with finishing additions to a mobile home park illustrates the curious lethargy of the Department in coming to grips with a situation that was far from healthy.

Self-government, to the extent that the term denotes the ordering of their own affairs within the context of Canadian society by Indian people, is a laudable aim. But government must also be responsible. The picture that emerged from the narrative of Mr. Dachyshyn appeared to be one of a rather petulant despotism on the part of the Chief which was in no whit discouraged by the supine posture of the Department. It is not to be wondered at that ill feelings continued to grow at Westbank.

The 1977 Agreement was a step on the path to giving the Westbank Indian Band greater control over its land and destiny. But it did not mean that the Department had no role to play. When a band has Section 53 and 60 authority, it can then act more or less completely as an autonomous body with respect to leasing matters. Where there is a power vacuum, a strong figure will attempt to fill that vacuum. Chief Ronald Derrickson was such a person. While his motives may have been good, his rather abrasive approach caused a great deal of friction with lessees on the Reserve. Perhaps the closure of the Vernon office contributed to difficulties. After 1975 there was not the same degree of

Departmental presence. After 1977 there was even less. Given the difficulties faced in the 1975 turbulence, I have considerable sympathy for the Department's reluctance to be embroiled in leasing controversy at Westbank. But by adopting too much of a laissez-faire attitude, the Department lost touch with what was happening. Getting no adequate response from the Department, people began to go the political route. That route is open to any citizen but when it is utilized in what should be primarily commercial issues, undesirable consequences may follow. I think we have seen the results of that at Westbank. Things can get blown out of all due proportion. Commercial disputes should be settled by commercial means — political involvement all too often involves partisan controversy that can impede any resolution of the original difficulty.

There is this consideration too. Bureaucrats are only human and if their decisions are always being questioned at the political level, morale is sapped. There is much to be said for a policy of trying to solve problems at the local rather than the national level. I comment on a possible approach to this continuing problem in Appendix B of this Report.

The Devolution of Statutory Authority

By 1978, augmentation of the Westbank Band's authority over land administration was being considered. Two sections of the Indian Act are germane. Section 53(1) touches upon the administration of surrendered lands and Section 60 upon lands on reserves occupied by the band. Section 53(1) reads:

> 53.(1) The Minister or a person appointed by him for the purpose may manage, sell, lease or otherwise dispose of surrendered land in accordance with this Act and the terms of the surrender.

Section 60 reads:

> 60.(1) The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands on the reserve occupied by that band as the Governor in Council considers desirable.

The 1977 Agreement did not, by its written terms, confer upon the Westbank Band any powers of final decision-making in land matters. As early as 1978, the question of the authority to "determine" rentals was being considered by Mr. Peter Clark, who wrote to the Chief in a letter dated March 13, 1978:

> I think, that based upon your record whilst in office since November 1976, that it would be most sensible for the Westbank Indian Band to manage and administer their reserve lands. This would immediately resolve the problems that occur regarding the authority to negotiate, renegotiate, review and determine rentals with lessees of the Crown.

His letter outlined the procedure to be followed to acquire Section 53 authority and contemplated further, the granting of Section 60 authority.

In September of 1978, the Band passed a resolution seeking authority under both Section 53 and Section 60.

It seems the Department was more inclined to grant authority under Section 53(1) than under Section 60. In 1979, Mr. Clark passed the resolutions on to Ottawa, specifically recommending that the Minister confer authority under Section 53(1) limited to Reserve 10 lands. The "surrendered land" on Reserve 9 included land on which Park Mobile Home Sales Ltd., the Yorks' company, operated a mobile home park, and doubtless Mr. Clark was keenly aware of the problems that continued to emanate from the Derrickson-York controversy. In any event, when power was devolved under Section 53(1) it was given in respect of both Reserves 9 and 10. It was contained in a Minister's letter, signed by the Honourable John Munro, dated October 6, 1980. A copy of the letter is reproduced at the end of this chapter.

A legal question was raised as to whether or not a changing group of persons such as "the Chief and Councillors, from time to time. . ." can be a "person". That may some day be litigated. It seems to me the potential problem could be cured by some legislative housekeeping to provide for devolution of the power to band councils as a council.

In 1981, controversy involving the mobile home park operators and tenants began to be visible. As related in the chapter on the mobile home parks, a number of leases were due for rent revision in 1981. Some of these revisions were achieved, but some revisions are still not resolved today.

Chief Derrickson took a very expansive view of the powers that were conferred upon him and his council. One of the exacerbating features of the devolution of powers to the Westbank Band to administer and manage its lands was the Department's failure to communicate in a complete and timely manner to the persons with whom they had contracted (lessees), the delegation of powers. The only formal notice the Westbank lessees received from the Department was a notice given in 1977 to pay their rents to the Band. On several occasions when requests were received about the Band's authority, the replies tended to be lacking in clarity. Examples include Mr. Walchli's letter to Mr. Jack Alexander's solicitors referred to in the mobile home park chapter, and Mr. Clark's letter on the Sun Country lease referred to later in this chapter. I think that in large measure the lack of clarity reflected a lack of direction at all levels of the Department. Everyone knew they were embarked on a new course, but the voyage was interspersed with frequent fog banks.

After Chief Derrickson had written to Mr. Crosby's bank wrongly stating that Mr. Crosby's lease was in default, Mr. Crosby made inquiries of the Department about the Chief's authority.

By letter dated February 16, 1982, Mr. Clark advised him:

> Since the closure of the Indian District office in Vernon, those Bands previously serviced by Federal officers have generally been allowed to undertake their own administration. By certain authorities the Westbank Band was advised that it should undertake the administration of leases and other land agreements so long as the general terms and policy of the Government under the Indian Act were adhered to.

On the subject of by-laws questioned by Mr. Crosby, Mr. Clark responded:

> Although there may be legal uncertainties, it would seem practical to either abide by the Band by-laws that have Ministerial Consent and are thus Federal law or to legally contest the by-laws.

Perhaps the Department could not give more explicit answers because it had not clearly thought out all the implications of its devolution policy, but it might be noted that the policy and its implementation had by then been in effect for some years.

The Department did not move hastily with respect to Section 60 powers. Mr. J. Leask, Director General of Reserves and Trusts in Ottawa, wrote to Mr. Walchli on April 30, 1980, setting out a comprehensive list of all the powers that they were considering transferring. A copy of the letter follows this chapter.

It is important to note, in view of the chaotic events about to take place in Westbank, that no mention was made of the power to set revised rents. It appears to have been assumed that function was covered by one of the statutory powers to be conferred. What was overlooked was that the power to revise rents in the leases was established under the contracts. The power may have originated in the legislation empowering the Minister to act, but the actual obligation or duty, of necessity, flowed from the wording of the particular lease or contract itself.

In 1985, the Governor in Council conferred Section 60 powers upon the Westbank Band. The Order-in-Council is set out fully at the end of this chapter. All parties seem to have viewed the Section 60 grant as one of almost unlimited amplitude.

The Band had first requested Section 60 powers by the vote of September 1978. Perhaps because of the multitude of problems, allegations, accusations, and counter-accusations that had occurred, the granting of Section 60 authority was delayed. There seems to have been

little doubt about the administrative ability of the government and the Westbank Band Council to handle land management, but there might have been doubts as to whether the powers would be used in a wise and restrained fashion.

Most of the leases with which the Commission was concerned contained a provision that the rent would be revised at five-year intervals. The basis on which the new rent was to be determined was spelled out (sometimes far from perfectly) in the leases themselves.

The person who was to exercise the rent revision was the "Minister" or in some cases "the Minister or his authorized representative". In the leases where the "Minister" had the power, the document was silent as to his power to delegate. The word could be interpreted to include the appropriate officer within the Department, whoever that might be, but using this definition the power was unlikely to be construed to extend to persons outside the Department. In leases where the power to revise rents was conferred on the "Minister or his representative", or the "Minister or his agent", delegation could have been effected by a simple letter of authority. The Commission saw no evidence of this having been done.

Subject to the caveat to be mentioned shortly, the powers that may be conferred under Section 60 are wide and likely would allow a delegation of power to exercise the powers and rights created under contract. However, if it was intended to convey those powers and rights to the Chief and Council, that was not done in the Order-in-Council. It was worded to limit the powers of control and management to statutory powers. Those created by contract, if they could be delegated, were not expressly delegated by any Order-in-Council.

One of the mobile home park operators raised questions concerning the extent of the authority granted under Section 60. He pointed to the wording of this section which applied to "lands in the reserve occupied by that band" and argued that the Band no longer could be said to "occupy" the mobile home park lands. This is a plausible argument, and it may prove well founded. I would not want to come to any firm conclusion on this question without full argument, but I note it to show that there can be difficult questions raised in respect of the grant of Section 60 authorities. Each Section 60 authority must fully take into consideration the particular circumstances of the Band. Some legislative housekeeping may be thought desirable to enhance the ability of the Department to grant sufficient authority to bands to minimize the opportunity for arguments such as the one noted above.

The Sun Country Lease

Few persons would quarrel with the policy of the Department and the government to confer upon Indian bands such powers as are required for

them to govern themselves. But there is a danger that existing obligations can be overlooked at the time of such transfers. I cite as an example the considerable degree of confusion that arose from a lease that was granted of certain reserve lands on Okanagan Lake just south of the Kelowna Bridge. On this site a marina was and is operated. The locatee is Ronald Derrickson. In 1972, the Crown gave a lease to a parcel designated FF-1, together with an accredited area of land designated GJ-1, to a Robert Henry Hebenton, who in turn assigned his lease to a company called Heb's Marina Limited. The Federal Business Development Bank held security over the lease of that property. The lease was later assigned to Sun Country Sports and Marine Ltd. Sun Country Sports and Marine Ltd. did not prosper, and the FBDB appointed Coopers & Lybrand Ltd. as receiver. The receiver wanted to realize on the security of the lease.

It appears that during the course of the receivership the locatee, through the Westbank Band Council, gave a notice cancelling the lease even though the rent had been paid until the following year. Coopers & Lybrand Ltd. inquired of the Department of Indian Affairs as to whether or not the Chief and Council had the power to terminate the lease. It appears that oral advice was given that the Band did have such power. On the basis of that advice, the receiver sold the chattels only of the marina to Madsen Marina Ltd., who proposed to take over and operate the marina. More could have been realized from the insolvent company if there were an existing lease to sell. After the sale of chattels was concluded, the receiver had occasion to question the oral advice it had received as to the extent of the Westbank Band's power to terminate the lease.

Mr. Peter Clark wrote to Coopers & Lybrand Ltd. on September 30, 1980, setting out his understanding of the matters to that point. He said in part:

> Our file includes a copy of letter addressed to Sun Country Sports and Marine Ltd. from the Westbank Band Council dated June 2, 1980 cancelling the lease. I understand that you were advised that this was a proper and effective notice by a member of the Department of Indian Affairs, although I'm unable to discover a letter confirming this.
>
> It is my understanding from considerable experience in handling Crown leases that only Indian Bands that have received authority by Section 53 or Section 60 of the Indian Act have such powers of cancellation. Although the Westbank Indian Band have granted approval to their council for such authority, the necessary Ministerial letters and supporting Order-in-Council have yet to be granted.

The receiver and its solicitors interpreted that letter as a statement by the Department that the Chief and Council had no such power. Their interpretation of the facts was succinctly stated in a letter of December 17, 1980 from their solicitors to the Department to the attention of Mr. Clark, saying in part:

> As you are aware, Mr. Derrickson as Locatee of the Indian Reserve Lands purported to terminate the leasehold interest of Sun Country in the said lands. We wrote to you in July of 1980, requesting you to advise us as to whether or not Mr. Derrickson had the authority to terminate the lease. You failed to respond by letter to those inquiries, however, you did advise Messrs. Powroznik and Todd of Coopers & Lybrand Limited, the Receiver-Manager of Sun Country that Derrickson had such authority. On that basis, the assets of Sun Country were disposed of and a new lease was entered into between Mr. Madsen, the purchaser of the assets of Sun Country and Chief Derrickson on behalf of the Westbank Indian Reserve. Subsequently and in particular on or about September 26, 1980, you advised that Mr. Derrickson had no authority to terminate the leasehold interest of Sun Country. You further advised, that in your view the lease between Sun Country and the Department of Indian Affairs with regard to the Indian Reserve Lands was still current and subsisting. We asked you to confirm that advice in writing. Inasmuch as you failed to confirm that advice in writing within a week's time, the writer forwarded to your offices a letter on October 3, 1980, confirming his understanding of what had been discussed at the meeting held in the offices of Coopers & Lybrand on September 26, 1980. Though no reply was received to the writer's letter of October 3, 1980, Mr. Powroznik of Coopers & Lybrand Limited received a letter from your offices dated September 30, 1980, which neither confirmed nor disaffirmed whether Mr. Derrickson had authority to terminate the leasehold interest of Sun Country. In the letter, you did indicate, however, that though the Westbank Indian Band had granted authority to their Counsel to manage Indian Lands such authority had not been supported by the necessary Ministerial letters and supporting Orders-in-Council. The suggestion in that letter is that Mr. Derrickson had no authority to terminate the leasehold interest of Sun Country.

The fat was now in the fire. The Commission heard that Chief Derrickson was highly displeased with the Department for furnishing ammunition to the receiver. Mr. Clark had to endeavour to quiet this controversy.

Mr. Clark wrote a letter to the receiver on December 23, 1980 in which he said in part:

> ...I am now at last able to clarify the position with respect to the authority of the Westbank Indian Band. As stated in the third paragraph of my letter of September 30th, 1980, it was my understanding that no Bands other than those given authority under Section 53 or 60 of the Indian Act were in any position to manage leases or other contracts on behalf of the Crown. However, I have had brought to my attention information that in the case of several Bands in the previous Okanagan District (an Administrative District of the Indian Affairs Branch) clearly establishes that the Westbank Band were provided with authority in various areas of Band management in 1976. Included in this authority were provisions to undertake other matters related to land management. In view of some difficulties

> encountered by the Westbank Council, a clearer authority is being provided to them by Order-in-Council.
>
> I am, therefore, satisfied that the Westbank Band acted properly in this case and I apologize for my lack of clarity over the past two months. . . .

The letter is a remarkable piece of bureaucratic obfuscation. It is even more remarkable when it is borne in mind that Mr. Clark was in charge of the transfer of land management to the Band, and that he was the author of the 1977 Agreement between the Westbank Band and the Department of Indian Affairs. This matter is illustrative of the somewhat elusive nature of the parameters of the 1977 Agreement. It also illustrates the fact that uncertainty can cause harm to band long-term business, for the receiver must have felt a measure of frustration from its experience here.

In time, the receiver's solicitors came to the view that the termination of the Sun Country lease was without legal authority. Litigation ensued, with Mr. John McAfee of Kelowna acting as counsel for both the federal government and the Band. Chief Ronald Derrickson was the locatee of the land in question.

On March 23, 1983, the Westbank Indian Band Council approved a settlement of the claim by Coopers & Lybrand Ltd. pursuant to which the sum of $27,500 was to be paid to the receiver. On the same day, the Regional Director General, Mr. Walchli, sent a memo to Mr. Clark. It reads as follows:

> I am told that the lease for Sun Country marina has now been settled out of court. The settlement arrived at is $27,500, and the legal costs associated with this are $17,000. As you know this action could have been continued in the Federal Court with the Department of Indian Affairs being joined, given the weak position we apparently were in over the lack of clear direction to the Chief of the Band regarding his authority to cancel such a lease. The Band lawyer felt it was better to settle out of court and we have agreed with this decision. It will now be necessary to compensate the Band in some manner for both the legal fees and the out of court settlement. I wish to discuss this with you as soon as possible.

It appears the Band was reimbursed for that settlement and for their legal fees by a contribution agreement dated July 13, 1983. One of the signatories was Fred J. Walchli, for the Minister. The contribution agreement provided the Band with a total sum of $48,000 and described the monies paid thereunder as "to manage band lands, $44,000" and "to administer the estates of deceased band members and to maintain the Indian Register for the Band, $4,000". The money was paid in part to settle the controversy that had erupted, but it must be remembered that the problems arose in large measure because of the uncertainty of the Department as to the extent of Band powers under the 1977 Agreement.

Funding of Legal Costs and Litigation

The Sun Country matter was the background for several questions as to the propriety of funding litigation for locatees. The documents provided to the Commission tended to show the federal government paid damages arising from the uncertainty of the Department and because of the Chief's unwarranted exercise of authority. Mr. Clark explained the government's payment of those damages by saying that the Department felt responsible because it had not adequately supervised a lease in which a building was erected beyond the surveyed boundaries of the lots (presumably a boathouse). That explanation did not appear in the documentation seen by the Commission. I think there was a problem with a building being located on property not held by the locatee, but the real reason for payment seems to have been to get out of the lease cancellation difficulty.

It appears from the evidence I heard that the Department of Justice will act whenever the Crown is involved in litigation, or alternatively, it will appoint an outside solicitor to act as an agent of the federal government in some cases. In the Sun Country matter, solicitors fees were paid to the Band as a contribution toward land management. Undoubtedly there will be legitimate costs from time to time for solicitors, real estate agents, real estate appraisers, accountants, and perhaps other professionals. It may be that those professional fees can be categorized as land management but it seems to me that the Department would be well advised to spell out the real purpose for which monies were paid and not hide behind a general category of land management. To categorize a damage settlement as was done in this case is to fail to give a complete picture of events.

When professional services are rendered, it is important that they be accurately described. There can be a potential problem with, for instance, full Departmental funding of locatee legal costs. On a number of occasions it has been suggested that the threat of litigation in which the locatee is supplied with a lawyer at no cost and a lessee has to pay his own full legal costs is unfair. Not only can it be unfair, it is unbusinesslike, for the usual pressures towards settlement do not exist. One party has nothing to lose by way of costs, while the other does. I think bands (and individuals) need access to professional advisers and I do not want to foreclose the ability of the Department to assist those who need it. But there is something troubling about the Department fully funding a well-off locatee who could afford to bear some of the burden. As I have said, settlements of lawsuits can be enhanced by the economic pressure of costs on both parties and I would be sorry to see the Department preventing a timely resolution of disputes. This is one of those rare areas where there should be a "means" test in the interests of equity and the efficient working of the litigation process.

Westbank Indian Band By-Laws

An example of the failure to follow through on an otherwise commendable initiative was the Department's handling of the by-law issue. To understand the issue, one should consider what was hapening in land use control in British Columbia in the year 1979 (the year the by-laws were drawn). In the years that preceded the drawing of those Westbank by-laws, British Columbia municipalities were struggling with the mechanics of recovering from developers the costs of development. Municipalities charged fees or costs which became known as "impost fees" and the fairness of those fees were called into question. Municipalities would zone land in a manner that forced developers to come to the municipality to approve any proposed use. The price of municipal approval was the imposition of significant costs upon the developer.

In 1977, a series of amendments to the British Columbia Municipal Act under Section 702AA, 702B, 702C, and Section 711 were passed to bring into effect a regime that sought to provide clarity, legitimacy and fairness for such charges. Development charges could only be levied for specific purposes. Under Section 702C(4), it was provided that such charges could be made:

> for the sole purpose of providing funds to assist the Municipality in paying the capital cost of providing, altering, or expanding sewage, water, drainage and highway facilities and public open space, or any of them in order to serve, directly or indirectly, the development in respect of which the charges are imposed.

The charges to be made were subject to the approval of a provincial official called the Inspector of Municipalities and an elaborate regime was worked out to ensure that the costs were fairly imposed and apportioned.

The Land Control By-laws drafted by the Department of Indian Affairs for the Westbank Band were based on by-laws passed by some British Columbia municipalities. To render them intelligible, one has to be cognizant of the legislation which empowered British Columbia municipalities to pass those by-laws. Only then might they have meaning.

Against that background, it is difficult to accede to the Department's position that it would approve by-laws and wait for a court challenge. It may well be that those responsible for approval did not have a full grip on the by-laws. Chief Derrickson said in his testimony he did not fully understand the by-laws and he may not have been alone.

In 1973, a firm called Interform Planning and Design Ltd. was commissioned to study the development potential of Reserves 9 and 10. At that time the provincial government was in the midst of implementing a policy to preserve agricultural land. Of course, the measures

instituted could not apply to Indian lands. One of the results of this provincial initiative was to enhance the value of Indian lands immediately adjacent to urban areas. As we have seen, the Westbank lands fell into this category, being across Okanagan Lake from Kelowna.

The Interform report was conservative in its projections for Reserve 9. It recommended a quite comprehensive scheme of urban development for Reserve 10, foreseeing a "new town". It suggested a plan for a developed town with all the functions required to serve 10,000 people. The plan called for a town centre containing shopping facilities, recreational facilities and business and personal services. There was to be an 18-hole golf course, substantial residential development, and a full infrastructure of new roads, power, water, and sewage.

The then undeveloped state of Reserve 10 presented advantages. The report said:

> One of the key advantages in this unique opportunity of community building is the inherent freedom to develop a design without the restrictions of the usual codes, regulations, and entrenched standards that can prevent innovation or simple improvement in design and economy.
>
> Normally, communities are not designed, but assembled by a process of designating land use zones, density limits, minimum lot sizes, set-backs, servicing standards, and other matters. Regulating in such a way usually precludes strong positive conceptual ideas of community design.

Only the Lakeridge subdivision was constructed; otherwise the 1973 plan has not been realized to date. A short while later it had become apparent that there was a weaker market for residential development than had been expected. Demand had apparently shifted to property for recreational development. In the late 1970's, another report was commissioned to examine the development of Reserve 10. In the new report, a change in the residential mix took into account the proposed highway development and included a site for a hotel and convention centre. This plan has not progressed to date.

A concomitant of plan development is a by-law regime. Attention was focused on this problem in 1977 when Mr. Schlief tried to develop a mobile home park on Reserve 10 lands allocated to Henry and Millie Jack. The Band Chief and the Regional Director General joined forces to prevent further development of the park, but the incident highlighted the need for effective controls.

Mr. David Sparks had become Director of Local Government in the B.C. Region in January 1977, with the responsibility "to assist Indian Bands to put together administrations that could handle programs that the federal government was transferring to the Indians to administer. . .". It fell to him to develop a by-law regime to facilitate

development on the Westbank Reserves. Mr. Sparks had a great deal of academic and practical experience to equip him for the task. Perhaps his most worthwhile experience in this regard was that acquired while working as an administrator for the Municipality of Surrey. He had worked for that municipality at a time when it was undergoing rapid growth as a suburb of Vancouver.

In early 1979, and several times throughout that year, he met with Chief Derrickson, and in the fall of 1979 certain by-laws were presented to the Band Council. In creating a set of by-laws for the projected modern, urban community, he was seriously hampered by legislation that was less than adequate to authorize their enactment. Band by-laws are enacted under the authority of Section 81 and, in the case of some bands, Section 83 of the Indian Act. Westbank is one of the bands that has power under Section 83. Mr. Sparks could have also been inhibited by Departmental doubts about the applicability of band by-laws to surrendered lands. That problem is touched upon elsewhere herein. In any event, a comprehensive group of by-laws was provided to the Band Council in the fall of 1979. The by-laws Mr. Sparks produced were enacted with the significant exception of the zoning by-law.

Despite the lack of any apparent authority in the Indian Act, Mr. Sparks can be credited with some creative draftsmanship. As he explained in his evidence:

> There was no specific legislative base for an official community plan within the Indian Act, but there is a provision that councils can enact by-laws to preserve law and order. So we created a by-law which regulated council and its employees to only do those things which comply — they conformed with the plan without council taking action to amend the by-law.

The Community Plan By-Law

The Community Plan by-law to secure compliance with the "official plan" made it an offence for the Band government and Band agents and employees to act contrary to the official plan. The Commission was not made aware of any test of the by-law. Perhaps the by-law had a salutary effect. However, the way things really worked, any project that was to take place during the regime of Chief Derrickson required his approval or sanction. The need for the by-law was superseded so the opportunity for contesting it has yet to arise.

Band Council Procedure By-Law, 1979–10

The Band Council Procedure by-law contained provisions with respect to conflicts of interest. Under the heading "Disclosure of Conflict of Interest" the following provisions were enacted:

> 11.1 A member of Council shall disclose any conflict of interest prior to voting on any matter in which he, a member of his immediate family or relative living with the member will benefit by financial gain.
> 11.2 As soon as a member of Council is aware of having a conflict of interest in any matter brought before Council, he will immediately make full disclosure by signifying his interest, and, if the Council by resolution so directs, leave the meeting until after the matter has been decided.

With respect to those provisions, Mr. Sparks gave evidence:

> This is a problem that you have when you have a small council. It's very difficult to, just in the normal course of business, for there not to be almost a continuing conflict of interest.
>
> So, what we did, we provided in the by-law that where the conflict, as it's defined there, exists, that the councillor who is in conflict must make it known, it must be recorded in the minutes and, if he was requested by the balance of the council, he is to leave the council proceedings.

I have commented elsewhere in my Report on the failure of individuals at Westbank to be sensitive to conflict of interest problems. The Department is to be commended for the efforts of Mr. Sparks to put a proper law in place, but no law will work unless there is the will to enforce compliance with its provisions. I elsewhere adopt certain suggestions by counsel for the Department to deal with this pervasive problem.

Band Administration By-Law, 1979–04, and Administration and Management By-Law, 1979–09

Mr. Sparks explained the by-laws relating to procedure and administration as an endeavour to distinguish between the executive branch and the administrative branch of band government. In speaking of the by-laws defining the position of Band Administrator, he explained:

> Well, what this does is separate the doing role of local government from the planning and decision role. The planning and decision role is the responsibility of the elected council. They're the people that can plan, make the decisions, and put those decisions in some form of resolution or by-laws or legislation. The administrative role, carrying those decisions out, is for somebody else, and this particular by-law foresaw that all of the decisions of council would be carried out by the administrator, or somebody hired by him, or appointed by him, or who is technically competent to do the job.

Those objectives were sometimes sacrificed under the administration of a strong Chief. The author of the administrative and procedural by-laws wished to have a definite and structured form of government to

ensure stability and continuity. This process, of course, takes time. I did not gain the impression that it had progressed to any great degree at Westbank in the era under review. Although a Departmental official had created a by-law, I do not feel the Department did much follow-up in this area at Westbank.

Land Control By-Laws

In this category there was included:

— 1979–11 zoning by-law,
— 1979–12 subdivision by-law,
— 1979–05 permit application fee,
— 1979–05 development permits.

In preparing this package of by-laws, Mr. Sparks undoubtedly called upon his experience in Surrey. Surrey underwent tremendous growth during the period he worked there. The municipality had little land of its own, and at the time of the municipality's expansion it expected difficulty in controlling development. Much land had been agricultural. A rigid zoning and development by-law regime was enacted, with the municipal government of the time working on the basis of what they called "down zoning". Land was zoned at a lower level than its designation under the official community plan. This forced developers to approach the municipal council to seek re-zoning in order to develop. The necessity to seek approval gave the municipal administration the ability to deal with developers. The result was (with some legal set-backs) that the municipality was placed in a position where it could control the type of development and ensure that developments were paid for by developers rather than by the municipality itself. Of course, this can cause friction between government and developers, but that is something that has to be worked out in the normal process. What must be avoided in this area is the appearance of arbitrariness or a lack of even-handed treatment of different persons similarly situated.

It was Mr. Spark's intention for Westbank that the bulk of the lands that were not in present use would be zoned as comprehensive development zones in accordance with the official plan. Under the by-law regime, developers would pay for the infrastructure costs for roads, sidewalks, and the installation of utilities.

The package of by-laws relating to land control were interdependent, incorporating the others by reference. It is not clear just what happened to the zoning by-law. Mr. Sparks gave evidence that it "never went forward". One person said it was passed by the Band Council but it never reached Ottawa. Chief Derrickson seemed to be of the opinion that it had been sent to Ottawa and disapproved. As far as Commission Counsel could determine, the by-law was never in force. The failure to

have the zoning by-law in force threw into doubt the legal efficacy of some other by-laws, particularly the development permit by-law. Whoever in the Department looked at the by-laws for approval should have noted that the latter by-law was conditioned on the existence of the zoning and subdivision by-law. Perhaps the by-laws were not carefully perused when they were forwarded to Ottawa for approval or rejection. The policy of letting by-laws stand until they are challenged in court should not mean that care is not required at the enactment stage. Court challenges are an expensive corrective.

The Development Permit By-Law

When a developer sought a zoning change or wished to effect a subdivision of land the legislative scheme seemed to call upon him to secure a development permit. I say "seemed" because the wording of the by-law is imperfect as to imposing the obligation of payment. I do not propose to go into a lengthy textual analysis of the by-laws, but I commend this matter to the Band government for closer study.

It has been alleged the Band applied the development permit by-law in a discriminatory manner. For comparable developments taking place in the same time frame, it was said that Ted Zelmer was charged $590, Len Crosby $2,600, and the Yorks $14,000. I think a considerable source of this complaint was the fact that the by-law regime was just coming into force — thus it might apply to one development just shortly after another one to which it would not apply. Difficulties often arise in such a transitional period. The Yorks were not conspicuously co-operative with the Band government and doubtless received no "breaks". Regardless of the merits of that controversy, it seems to me that difficulties could have been avoided by a more open and orderly procedure for initiating and putting by-laws in force. It think a great deal of confusion arose at Westbank because of the absence of Mr. Sparks at crucial times due to a transfer. I do not say this in a critical spirit, because personnel cannot always be static, but I urge the Department to try to ensure better continuity in such major undertakings in future to prevent the sort of confusion attendant upon this process at Westbank.

The faults of this group of by-laws are several. The package, never fully enacted, was not clear whether the fees charged in some of the by-laws are meant to be cumulative or whether payment of one sufficed for the fee claimed under another. Further, without a definition of such words as "subdivision" and "development", no one knows what they apply to. That lack of understanding has reduced these by-laws to erratic revenue-raising devices.

Because people doing business with the Band have only felt secure in doing their business with the blessing of the Chief, the land control by-

laws have not been as important as they might have been. On the other hand, if the by-laws were understood and fairly applied, it would inject stability into Band affairs that would benefit the Band immensely.

Community Control for Health and Public Welfare

This third group of by-laws Mr. Sparks prepared included:

— 1979–03 waterworks regulation,
— 1979–06 soil removal,
— 1979–08 construction regulations,
— 1980–02 business licenses,
— 1979–01 housing standards.

Only the waterworks regulation by-law came into question during the hearings. The manner in which it was passed could be considered by some as an awkward attempt at expropriation. Section 1 of the by-law provided:

> All water under, within, upon, or which may be conveyed on or to the Reserve shall be the property of and under the control of the Band, except as provided herein, and shown on Schedule F attached hereto.

Schedule F referred to a number of individually owned water systems. These systems listed belonged to members of the Band. Systems owned by lessees were not mentioned. Mr. Sparks gave evidence that it was intended that existing water systems would be exempted and left in the hands of their owners. When the by-law was forwarded to the Band, it was expected they would list all the existing water systems in Schedule F. The net result was a literal declaration of Band ownership of those water systems which was likely legally ineffective.

The thinking behind the waterworks by-law was that the Band would buy water from nearby water districts and supply it to residents and occupants of the Reserves. That prospect still exists and the supply of water will undoubtedly be a long-term concern. I address this question of water supply in Appendix C to the Report.

The Rentalsman By-Law

Perhaps the most remarkable of the by-laws passed was by-law 1981–03 which purported to give the Band Council power to set the rents. The Band Rentalsman had almost unlimited powers in matters affecting landlords and tenants, including the powers of "reviewing and excluding or declaring unenforceable any covenant in a lease, permit or agreement. . .which he finds to be unreasonable under the circumstances".

The Rentalsman by-law permitted the "discontinuance of a service or facility reasonably related to the use and enjoyment of residential premises occupied under a lease, permit, or agreement. . ." It included "terminating occupation of residential premises occupied under a lease, permit, or agreement. . .".

The powers of inquiry and decision were wide. This by-law (or the purported by-law) was used in an attempt to increase pad rentals charged to mobile home park tenants at levels far higher than had hitherto been in effect.

Although the Rentalsman by-law had apparently been disapproved, it was distributed as though it was valid. Rental notices increasing rentals to $150 per pad per month were distributed to the tenants of some of the mobile home parks. An outpouring of media coverage and litigation followed. The Band government had created an issue that spawned immense controversy. The Department once again was drawn into a battle not of its own making. The by-law in question was clearly excessive and was properly disallowed — I was never able to ascertain where it originated.

The Application of the By-Laws

A number of complaints made about the by-laws were related to their alleged discriminatory application. In fact, the by-laws, as by-laws, were not as important as people think. What was important was their invocation by the Band from time to time to justify financial charges. The $1,500 per pad sought as a prerequisite for Mr. Spring's development on the Jubilee Mobile Home Park does not seem to have been founded on any existing by-law. The increase of rents to $150 per pad was not founded on any existing by-law. I understand the development charges levied against Park Mobile Home Sales Ltd. are in question before the courts.

As I have said, it was to be regretted that after Mr. Sparks had drafted the by-laws, he was transferred from British Columbia and was not available to supervise their implementation. That implementation was not orderly and for that the Department must bear some responsibility.

To the Band government, the by-laws seem to have had value as follows. In practice, virtually every decision to build or develop was subject to the Chief's approval. The land development by-laws were used primarily as a revenue-raising device, and to some extent, the confusion surrounding the by-laws allowed the Chief to impose his will on any development taking place on the Reserves.

The passage of a sophisticated set of by-laws with an inadequate legislative base can only inhibit development of Indian lands, for no one

knows what the rules are. No one knows whether the rules are valid, and the Department's policy of allowing by-laws to be passed and leaving them in place until judicially challenged is a policy that can spawn problems. There is so much doubt surrounding the rules for development that uncertainty about by-laws may well inhibit development. This is an area of the Indian Act that again is rudimentary. I am confident this area can and will be improved by current ongoing initiatives.

The Regulatory Vacuum: The Problem of Surrendered Lands

In his testimony, Mr. Sparks adverted to a problem that has concerned Indian Affairs personnel for some years. It is a matter that seems to call for legislative remedy but has not been addressed in that manner. The question is whether or not bands have the power to apply their by-laws to surrendered or conditionally surrendered lands. There is a large body of opinion in the Department that thinks bands do not have that power and the problem is referred to as "a regulatory vacuum".

Many parcels of land on the Westbank Reserves are leased under locatee leases under Section 58(3) of the Indian Act. Aside from use of this section, Indian lands are usually conditionally surrendered before they can be leased to non-Indians. Bands may not have power to pass by-laws governing those lands. Probably no one else does either. The problem was seriously considered from 1975 to 1977. At that time, there was ongoing correspondence between several Ministers of Indian Affairs and Mr. Andrew Charles, then the Coordinator of the Alliance of British Columbia Bands.

The Associate Deputy Minister of the Department of Justice wrote to Mr. Charles in 1975 advising that band councils lacked proper regulatory power under Section 81 or Section 83 of the Indian Act over lands surrendered for leasing. He was of the view that Section 73(3) of the Indian Act, which allows the Governor in Council to make orders and regulations to carry out the purposes and provisions of the Indian Act, might not suffice to allow the Governor in Council to pass regulations and make orders with regard to surrendered lands.

The Minister of the day, the Honourable Judd Buchanan, wrote to Andrew Charles as follows:

> As Mr. P. Ollivier explained in his letter of September 24th, the opinion of officers of the Department of Justice is that the Governor-in-Council does not have authority to regulate the use of surrendered lands, and that specific legislative authority is therefore required. I am very concerned, as you are, about this regulatory vacuum. Officers of that Department are responsible for advising Federal Departments on all matters of law and, in this case, they have informed me of a legal problem which prevents my Department from pursuing a course of action consistent with our policy of promoting

local government. In view of this, I intend to ask the National Indian Brotherhood to support my request to Parliament for permissive legislation, which will allow Bands to assume as much responsibility as possible, consistent with good administrative practices, for the management and control of reserve lands, and lands surrendered for leasing. I say 'permissive' legislation because I believe these changes would be welcomed by many other Bands, and the amendment would also allow them to assume this responsibility.

In the meantime, I would suggest that part of the problem could be overcome by including in all future leases a covenant by the lessee that the Band by-laws are to be deemed applicable to him, and that he will comply with them as a condition of the lease.

In his testimony, Mr. Sparks expressed the view that incorporating a covenant to abide by such by-laws, regardless of their validity, would not provide a solution to the problem. It was his view that such a covenant would only give the landlord the right to terminate the lease, an unappealing prospect. It does not appear the recommendation was incorporated into any Westbank leases for the Commission did not see any such lease.

In 1977, the then Minister Warren Allmand took up the same question and wrote Mr. Charles the following letter:

This is to follow up on my special assistant's letter to you of November 3rd, 1976 regarding the legal status of surrendered land which you raised in your letter of October 19th, 1976.

Although my predecessor, Mr. Buchanan, felt at one time the simplest way of overcoming the so-called "regulatory vacuum" was to amend the Indian Act, there have been a number of developments since as well as a great deal of research done on the topic. As a consequence, I have asked my officials and those of the Justice Department to finalize work on an Order-in-Council which, if approved pursuant to Section 73(3) of the Indian Act, would enable me or my designee (i.e. the Indian Band through its Council) to regulate activities on surrendered Indian Lands. These regulations will be broad and will cover such aspects as sanitation, health, pollution, building codes enforcement, etc. While I am aware there is a possibility the regulations may not stand the full test of a Court of Law if they are challenged, I am nevertheless more inclined to adopting that route rather than opting for the more complex and lengthy process of amending the present legislation.

In addition, I want you to know that, as far as is legally possible, I will base departmental policies and practices on the premise that Indian lands that have been conditionally surrendered did not cease to be reserve lands. For example, if a Band Council made a by-law pursuant to Section 81 and 83 purporting to regulate or affect surrendered lands, I would not disallow the by-law for that reason alone. The fact remains, however, that the Band would be taking its own chances with respect to enforceability.

I hope that the above interim measures will serve the purposes intended pending appropriate amendments to the Indian Act.

Mr. Allmand seemed to express the view that conditionally surrendered lands could be subject to by-laws. He also seemed to be of the view that the government could and would pass regulations under Section 73(3) of the Indian Act. Regulations under Section 73(3) were apparently not passed.

It would be sensible to eliminate the doubts in this cloudy area. It is difficult to commend the view that "the band would be taking its own chances with respect to enforceability". Neither the bands nor their lessees should be placed in such a position. It is bad business for either party, and to leave such basic questions in doubt inhibits the development of Indian lands for those bands that seek it. I am hopeful that present initiatives relating to surrendered lands will dispel some of the difficulties of band governments in this area. Doubts about law-making capacity would tend to impede greater self direction.

For many initiatives the Department is to be commended. The submissions of the Department's counsel that times were rapidly changing and there were bound to be errors can be readily appreciated. If the Department is to be faulted, it is for failing to make appropriate adjustments when errors arose.

Complaints to Parliamentarians

As I have said in the Introduction to this Report, the basic evidentiary approach taken by the Commission was to avoid hearsay evidence. Issues arose on a number of occasions concerning matters of evidence. One such occasion concerned the possible testimony of parliamentarians past and present.

Commission Counsel investigated the question and discovered that no Members of Parliament had any first hand evidence concerning relevant matters at Westbank. Concern was expressed by counsel for the former Band executive and counsel for the Department to the effect that it would be most undesirable to have persons coming forward after the Inquiry with any new allegations of wrongdoing. I agree.

Counsel to the former Regional Director General put the matter in these terms:

> I put to Commission Counsel, and I believe that he passed that on to them; if not, I would like it to go on the record that the invitation go out to them, to bring forward any evidence which they may have, which will in any way touch upon the terms of reference of this Commission of Inquiry, and that they be advised that their failure to do so will be taken as an admission on their part, that there is no such evidence in existence, not only in a form about which they could speak personally, but in regard to which there are others known to them who may be able to testify.

Research by Commission Counsel showed that no Members of Parliament had any admissible evidence to tender nor were they aware of others who could testify. Certain statements had been made in the House of Commons that to me were unduly alarmist in nature, given the nature of the evidence I heard. I think that in large measure, the rather lurid tone of these statements originated from the activities of the Action Committee. The letters of Mr. Crosby may also have furnished some basis for the belief that matters at Westbank were in a sorry state. The allegations included extortion, murder and others that proved not sustainable. With regard to many of the allegations, after hearing evidence in the Inquiry, I concluded that there was much rumour, but a lack of proven facts.

Counsel to the Department made what I feel is a sensible suggestion. He submitted that the Commission should put on record that it should be accepted as a fact that Members of Parliament were not in possession of any facts concerning any wrongdoing that were not placed before the Commission. In other words, I have heard everything relevant there is to hear and if someone should attempt hereafter to come forward with "new" material they should not be listened to. I adopt those comments of counsel to the Department. I am satisfied that every relevant lead has been investigated and that the "whole story" has been looked into. I am satisfied that there is nothing further that could usefully be examined. The allegations have all been considered. There is nothing more to be said.

Minister
Indian and Northern Affairs

Ministre
Affaires indiennes et du Nord

Headquarters Directors General
Regional Directors General

Ottawa, Ontario K1A 0H3
July 26, 1976

About a year ago the Department was asked by the Government to review the current relationship between the Government and the status Indians in the light of the Government's current responsibilities for them. The attached paper which is a product of that review has been approved by Cabinet. It proposes specific action to strengthen the relationship and improve the situation of the Indian people. It provides a broad framework in which to develop the Government-Indian relationship in future by shaping policies and programs jointly, and to rationalize and stimulate policies and activities that have been emerging in recent years.

This approach is based on the concept of Indian identity within Canadian society rather than a separation from Canadian society or assimilation into it. The concept envisages that there would continue to be recognition for Indian status, treaty rights and special privileges resulting from land claims settlement and that there would also be programs and services based on need because of the disadvantaged situation of many Indian communities and individuals.

The diversities of need, aspiration and attitude among Indians in all parts of Canada rule out a single strategy that would be universal and uniform in its application. Policy/program initiatives or responses to be applied in any given location or set of circumstances must derive from consultations with the Indian group directly affected and would involve agreement on objectives and shared responsibility for implementation at appropriate levels.

The emphasis of the approach is on processes of joint participation in policy/program developments with organized Indian leadership at all levels. In conveying to you this paper, I intend that you should be guided at all times by this approach, the various implications of which are summarized in the paper. The approach would also serve as a broad policy framework for all Federal departments and agencies having programs that affect status Indians, with heavy emphasis on systematic consultation among departments concerned both in Ottawa and in the field.

"Judd Buchanan"

encl.

Judd Buchanan

MAIN ELEMENTS OF GOVERNMENT-INDIAN RELATIONSHIP

Indian Identity
within
Canadian Society

Group Continuity	— Full citizenship — Indian Act status — Treaty rights — Special privileges — Reserved lands — Local government	
Political change	— Revised Indian Act — NIB and affiliates funded — NIB-Cabinet process — Tripartite mechanisms in provinces — Enlarged band powers — Access to media — Representation in advisory bodies	POLICY
Personal Fulfilment	— Safeguards for Indian languages and other cultural values — Indian group activities under multicultural program. — Special assistance for education/ training — Local self-determination — Transitional services to facilitate mobility — Hunting/fishing safeguards	
Social Equity	— Social services on and off reserves. — Federally assisted education — Preference in employment — Joint housing approach with deep subsidy — Assured access to provincial programs and services off-reserves	
Environmental Concerns	— Environmental protection for Indian lands — Involvement in environmental protection and planning — Employment in national parks, tourism, game control.	PROGRAM
Economic Strength	— Reserve lands and other band assets — Proceeds from claims settlement (package) — Economic development assistance — Special counselling/training — Contract preferences — Tax privileges for reserve lands	

APPROACH TO GOVERNMENT-INDIAN RELATIONSHIP

Introduction

The principal means of concerting policies, programs and resources is to achieve an agreed policy approach. As the established authority and responsibility centre for status Indians, the Federal Government must assume part of the initiative in seeking to define the aims and shape of policies applied to Indian questions. Given the undertaking and need to consult with the Indian people concerned, this process of definition can best be accomplished through joint working arrangements with representatives of the Indian people, operating at various levels of contact. Through these arrangements the objectives, goals, priorities and methods for policy and programs alike can be worked out jointly and systematically, with emphasis on the acknowledged need for sensitivity and flexibility.

The underlying assumption of this approach is that some degree of Indian status will continue, certainly as long as it is perceived as needed both by the Government and by people recognized as "Indian" under Canadian law. The Government's relationship with the group recognized as status Indians is based on the concept of Indian identity within Canadian society rather than on separation from Canadian society or on assimilation into it.

Policy Framework

Indian identity within Canadian society is dynamic and flexible in its expression and evolution. It partakes of the Indian concept of citizen plus but both these concepts need to be given shape and dimension in policy terms. To begin with, neither concept implies a standard formula, set of criteria, or rules of universal and uniform application to all Indian groups in the country. The co-existence of Indian communities — within Indian society and in their relation to the larger Canadian society — that are markedly different in economic potential and social conditon, is an inescapable fact at present and an inevitable likelihood in the foreseeable future. The main elements of Government-Indian relationship are illustrated on the following page.

The first three elements relate mainly to policy content and emphasis, taking particular account of Indian status. The second three embrace programs that apply generally to disadvantaged Canadians, including status Indians.

The listing of main elements (which is indicative and not exhaustive) suggests areas of choice for various Indian communities and implies a range of gradations to accommodate the diversities of situation in which Indian people find themselves. It envisages that there would continue to

be recognition for Indian status, treaty rights and special privileges resulting from land claims settlements. There would also be programs and services based on need because of the disadvantaged situation of many Indian communities and individuals. Within Indian communities, based on the concept of band/reserve, the widest opportunity would exist for local self-determination and control of Indian affairs. It follows from all that has been said about flexibility and sensitivity, that every Indian band in Canada would not make the same choices — some bands might prefer to remain remote, others to join in the regional milieu where they are located.

Strategy

— The diversities of need, aspiration and attitude among Indians in all parts of Canada rule out a single strategy that would be universal and uniform in its application.

— The strategy, must be sensitive and flexible enough to facilitate a policy/program initiative or response that meets circumstances found in a broad spectrum of Indian communities, categorized by economic and human potential.

— The strategy to be applied in any given location or set of circumstances must derive from consultations with the Indian group directly affected and would involve ageement on objectives, goal-setting and shared responsibility for implementation, at appropriate levels of relationship.

Processes

In the past two years, a system of joint working arrangements at various levels, involving the Government and representatives of status Indians, has been emerging. The institutions that are taking shape at each level need to be defined as to role and mandate, along the following lines:

i) At the national level, the Joint NIB-Cabinet Committee has been established. As agreed, the Joint Committee should concern itself with major policy issues that emerge in the course of the Government-Indian relationship. These issues, which can be proposed by either side, constitute the agenda of the Joint Committee and become the subject of detailed consideration by Joint Working Groups established for that purpose. To expedite and facilitate the whole process, the Joint Committee has established (a) a Joint Sub-Committee of three Ministers and three Indian leaders, and (b) a Canadian Indian Rights Commission. In addition, there are joint working groups on specific subjects (e.g. housing, economic development) whose work so far

has not required the consideration of the Joint Committee. The objective of the Joint Committee process is to enable the Government and Indian leaders to work cooperatively toward the betterment of the Indian people through joint deliberation at the policy level. (The relationships in the process are shown in Diagram I, next page).

ii) At the provincial level, tripartite arrangements do exist but in this area further thought, experimentation and action are needed to arrive at suitable arrangements to accommodate particular needs and situations in the various provinces. Involving representation from the Federal Government, the provincial government(s) concerned and the provincial association, their provincial role is to give joint advice and assistance for policy/program implementation for bands in the various provinces. A key function would be to see that Federal/Provincial Programs, available to Indian people, dovetailed to ensure optimum effectiveness and avoid duplication and waste. The emphasis is more likely to be on broad guidance than on program delivery and an essential requirement would be the continuing consent of the Indian bands concerned to these arrangements and to the advice emanating from them. A joint study of program management in Saskatchewan now underway with the Federation of Saskatchewan Indians, is one example of explorations in this direction.

iii) At the band level, the process of transferring programs and resources would continue to grow at a pace determined by the capability and desire of bands concerned to assume control of their own affairs, including program delivery. The enlargement of band powers to facilitate this process would continue to be a top priority in the consideration of revisions to the Indian Act, with sufficient permissiveness to allow application of specific sections of the Act to bands wishing and able to take advantage of them. DIAND advice and support to all bands would be consistent with their development potential, their requirement for assistance and their choice as regards relationship with DIAND (e.g. as hired or seconded band officials; as consultants; as regional or district administrators). Diagram II, illustrates the transfer of responsibility to bands.

Other processes for consultation and negotiation are currently in place and they too significantly affect the relationship between the Government and the Indian people. The participation of the Treasury Board is considered whenever the consultations and negotiations referred to below occur on items that imply a disbursement of funds. For purposes of this paper they can be grouped in three main categories:

i) Consultations and Negotiations Concerning Comprehensive Claims

These are the discussions, and more specifically the actual negotiations, that are taking place in areas where traditional

Indian interest in lands—deriving from historic occupancy and use—has been lost or interfered with without adequate compensation; and has not been the subject of any Treaty nor superseded by law. The approach to settlement is based on established Government policy that agreements should be negotiated with the Indian groups concerned and incorporated in Federal legislation. The areas concerned included lands in northern Quebec, the Yukon and Northwest Territories and British Columbia. In all these areas the provincial/territorial government is directly concerned with and involved in the negotiations because the settlements envisaged call for a package of proposals including various categories of Indian lands, cash compensation, resource revenue-sharing, and Indian participation in both economic development and local government.

ii) Processes for Settling Specific Claims

Widespread discussions have been held about another broad category of Indian claims, known as specific claims, which relate to such matters as residual land entitlement under Treaties, the interpretation and administration of the Indian Act, other alleged injustices in past dealings with Indian groups. The claims relate to the Government's commitment to discharge lawful obligations and some of them may require action in the courts (many are considered to be non-justiciable). A priority concern of the Joint NIB-Cabinet Committee is to ascertain whether principles and processes can be devised for settling specific claims through various other approaches such as arbitration, conciliation, negotiation; and a supportive Canadian Indian Rights Commission is being established. Since third-party interests are frequently involved and since these claims affect bands in most parts of the country, the claims and processes of settlement bear heavily on the relationship between Indians as a group and Canadian society.

iii) DIAND Consultations

There are a whole range of major items (housing, Indian education, economic development, Indian community affairs, off-reserve services) that are the subject of on-going consultation/negotiation at various levels of the relationship with status Indians. Such consultations in the past have tended to lack cohesion and rationale. It is mainly to achieve order and system in the evolution and administration of these major programs of DIAND that this Memorandum gives primary attention to the organization of the Indian/Government relationship at various levels and to refining the DIAND mandate to accord with needs and activities at those levels.

The DIAND mandate would continue to be re-shaped to serve the

requirements of policy and strategy outlined in the preceding paragraphs. DIAND would serve as a source of ideas, initiatives and improvements in policies and programs, proposed from the Government side at appropriate levels. It would consult with departments and agencies concerned about the co-ordination of federal programs affecting Indians and those involving Federal-Provincial cooperation. It would provide information and other assistance to Indian groups advancing claims. It would discharge managerial responsibility on the Government side for the financial and administrative support required by policies, strategies and programs affecting the Government-Indian relationship.

Interdepartmental machinery at senior level is needed to coordinate the Federal effort to improve the relationship with the Indian people, along the lines indicated. The NIB-Cabinet process involves continuing participation of six to twelve Ministers whose responsibilities embrace programs of actual or potential benefit to the status Indians. Some of the Departments (but not all) are currently involved in the joint working groups already established under the NIB-Cabinet Committee (notably Justice, Treasury Board, Secretary of State and DIAND); and in other consultations about particular projects such as housing (CMHC), economic development (DREE) and native employment (M&I, PSC). Additional joint working groups will be needed as the process extends to new areas of concern. The key to interdepartmental consultation and coordination of the policies and activities of departments and agencies with programs concerning Indians, may be to establish an interdepartmental committee, but for the moment interdepartmental working arrangements should be linked firmly to the NIB-Cabinet process. The nucleus would be drawn from those departments whose Ministers are in regular attendance at meetings of the NIB-Cabinet Committee. Corresponding coordinative bodies will be needed at regional level as Government-Indian mechanisms evolve there.

Sources of Funding

For carrying out Indian policies and programs, the following funding sources should be fully explored to see whether and how greater effectiveness can be achieved in the pursuit of jointly agreed objectives:

i) Direct support for special programs and services, e.g. DIAND, NHW.

ii) Resources available to Indians from programs of general application, both Federal and provincial.

iii) Proceeds from claims settlement.

iv) Indian land and other band assets.

v) Core-funding of Indian associations and organizations including bands.

Greater benefits should result from systematic joint planning and cost-sharing arrangements of various kinds. As long as the Indian groups concerned were directly involved in the planning and broad management, through the various joint working arrangements, there is every reason to assume that greater program effectiveness would result. At the same time the relationship between the Government and the Indians would improve through this practice of cooperation.

Assessment of the Approach

The essence of this approach is joint participation at all levels of contact between Government and Indian representatives. It gives solid substance to the Government-Indian relationship in five significant ways:

i) It affords a distinct and relevant role to Indian leaders within their own sphere of influence and competence; and at the same time enables Government managers to see more clearly and more fully appreciate their respective responsibilities, role and mandate in the course of dialogue and joint enterprise with Indian counterparts. The more representative the Indian leadership the more effective their contribution will be.

ii) It affords real opportunities for exercising freedom of choice by the Indian leaders and groups directly affected by such choice. Choices exist on major questions at the national level in the consultative process under the NIB-Cabinet Committee process, even more apparently at band level in the face of clearly differing situations found there. All such choices would emerge from joint consideration of alternatives.

iii) It promotes sensitivity and flexibility of response to needs and aspirations at the various levels; where objectives, goals, priorities and courses of action can be set by the leaders and in the areas directly affected. Their knowledge and experience of local situations, problems and people can be effectively blended with the know-how, advice and resources (including services) available from whatever government source.

iv) It encourages and strengthens a sense of responsibility and accountability on both sides of the relationship; and opportunity to refine that sense into solid and effective management practices.

v) It helps to give reality to the promise of participation, to build the self-confidence and self-reliance of Indian leaders at all levels, and generally to yield psychological benefits to the Indian people that

could be as important to them as the substantive achievements flowing from the process.

Finally, it permits consensus to develop at all levels and at a pace consistent with perceived need. Through communication, and the evolution of policy at the higher levels, such consensus as may be reached at band level can be strengthened and broadened—accepting always that universality and uniformity in Indian affairs are probably no more desirable than they are attainable. At the same time, as the consensus evolves among Indians, it can spread among and within the ranks of Government representatives dealing with the Indians directly affected by it, at the various levels and from level to level.

Foreseeable disadvantages of the approach proposed are:

— It could lead to lengthy and diffused discussions resulting from a whole range of causes but principally perhaps because people on both sides were unfamiliar with the process, distrustful of it and certain participants, and generally skeptical.

— It could founder on rivalries that exist among Indian leaders and groups—and are not unknown in interdepartmental circles.

— It could degenerate into perfunctory meetings staged mainly for short-term political gains on both sides.

— It could, if a tight rein were not held firmly, lead to increasing demands for more money to mount bigger and better meetings.

— It could lead to expectations and demands from other native groups, notably Métis and non-status Indians, for corresponding treatment. In the case of the Inuit, their relationship and treatment in future is likely to be found in arrangements reached in the agreement on land claims settlements.

Financial Implications

The main trusts of this approach do not call for any major new expenditures for programs affecting status Indians although it is recognized that additional costs may result from more vigorous consultation processes. The basic aim of the policy and strategy proposed is to get greater effectiveness from programs now in place through agreed commitment to program objectives, through more efficient application of resources, and through joint planning of programs for implementing agreed policies. This paper is prepared in full awareness of the galloping inflation in costs for Indian programs and of the continuing need for restraint in government spending.

Federal Government expenditures for Indian-oriented policy and programs are likely to be heavy for some time to come. Some indication of the magnitude is suggested by principal items; the Indian affairs budget; the major costs for claims settlements foreseen; Indian housing prospects including the needed catch-up during the next five years; the core-funding of the National Indian Brotherhood and affiliated associations; claims research funding and related claims activity. Other Federal departments and agencies also commit substantial resources to programs for natives, although the proportion devoted to status Indians cannot always be identified precisely.

Federal-Provincial and Territorial Relations

The provinces are increasingly affected by Indian relationships with the Federal Government, and this has produced some strain between Federal and provincial authorities at senior levels. The main issues stem from land claims, including residual land entitlement under treaties.

The provincial tendency to portray status Indians as the sole responsibility of the Federal Government—for example in not fulfilling Canada Assistance Plan agreements—adds to the friction between the two levels of government. Some provincial policies and programs that directly affect the rights of status Indians and their lands have been pursued without consultation, or with only token consultation involving Indian representatives. There is, however, increasing recognition by provinces and acceptance by Indians, that provincial governments have a legitimate interest and share in dealing with Indian problems.

Public disturbance resulting from Indian unrest, office occupation and other obstructions have been a further source of irritation in Federal-Provincial relations, e.g. Kenora. Some provincial governments have been slow to recognize that their stake in achieving peaceful relationships with Indian groups ranks with that of the Federal Government.

The same kind of situation prevails in both the Yukon and Northwest Territories with effects that are more acute. Ethnic tensions are running high in both Territories, mainly because of land claims and associated assertions about native rights. The problems of relationship are made more complex and potentially more serious than those in the South because native people form a much higher proportion of the population than in any other part of Canada—in the Northwest Territories the Indian, Inuit and Métis people outnumber the white population at the present time. Conscious of this unique situation, the native associations in both Territories are seeking special arrangements and institutions for local government that will serve to entrench their position. The Inuit land claim calls for the creation of a new territory North of the tree-

line, with important federal-territorial implications that need only be flagged here.

Conclusions

In many ways this paper is a summary statement of conclusions about the Government-Indian relationship: about what it is at the present time; about where it appears to be heading; and about how it can be developed in future. Some of these conclusions are quite solidly based in experiences of the past five years, others are tentative, even debatable. A conscious effort has been made to present them in a way that emphasizes their significance in relation to each other and in terms of their possible impact on the relationship in future.

It is no accident that the emphasis in the approach is on processes. To begin with, it is abundantly clear that in the practical workings of this difficult relationship, involving two societies deeply divided by cultural differences and a long history of conflict, process can be very important, perhaps paramount. If the paternalism of the past is to give way to real partnership, requiring full commitment and cooperation from all its participants, the Indians must be satisfied above all that they are participating with some sense of equality.

The road to their self-reliance lies somewhere along those processes of joint participation, now being practised, proposed and explored in depth. It is a learning process for all concerned and one that may have lessons for wider application in contemporary government.

It follows that most of the substantive policy (and ultimately program) developments lie beneath the surface of the large and uneven profile of the Government-Indian relationship. They can and must be uncovered through joint exploration and experiment at the various levels of contact and communication.

These processes of participation are modular not hierarchical, decentralized rather than uniform, top-down and bottoms-up at the same time and in different ways. This paper seeks to show how they all relate, without trying to draw them too tightly together, with what could only be premature and probably counter-productive prejudgments.

This paper begins as a response to a government request for a composite report on the relationship. It is intended as well to assist individual Departments in assessing the Government's and their own responsibility, role and contribution for improving the situation of Indian citizens within Canadian society. It is the foundation for future policy and program adjustments, affecting that situation and the Government-Indian relationship. It is neither a blueprint nor a prophecy for success. But it is an honest effort to get greater effectiveness out of tight resources, through processes of working with, rather than against, organized Indian leadership, wherever it is located.

JOINT NIB-CABINET COMMITTEE STRUCTURE

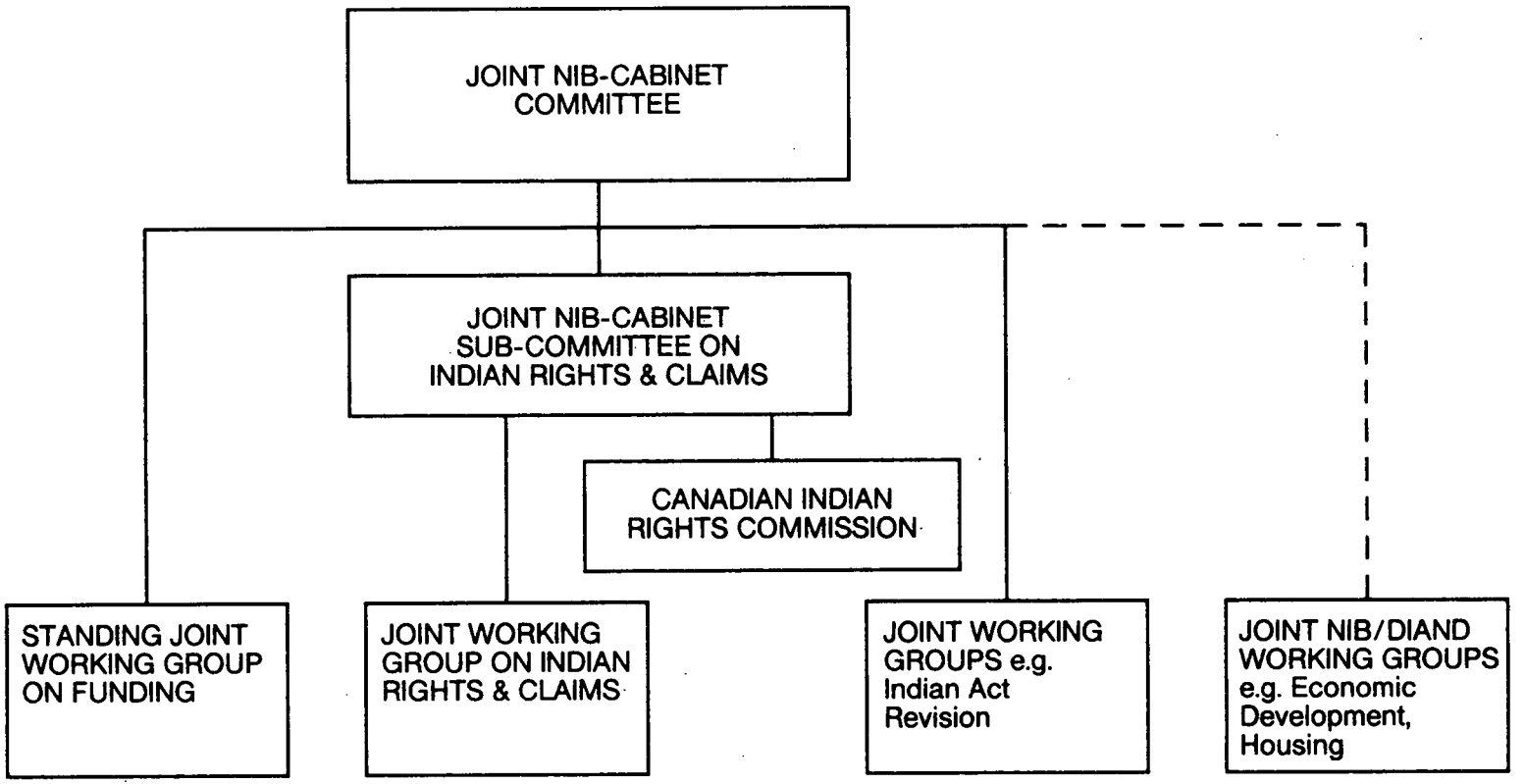
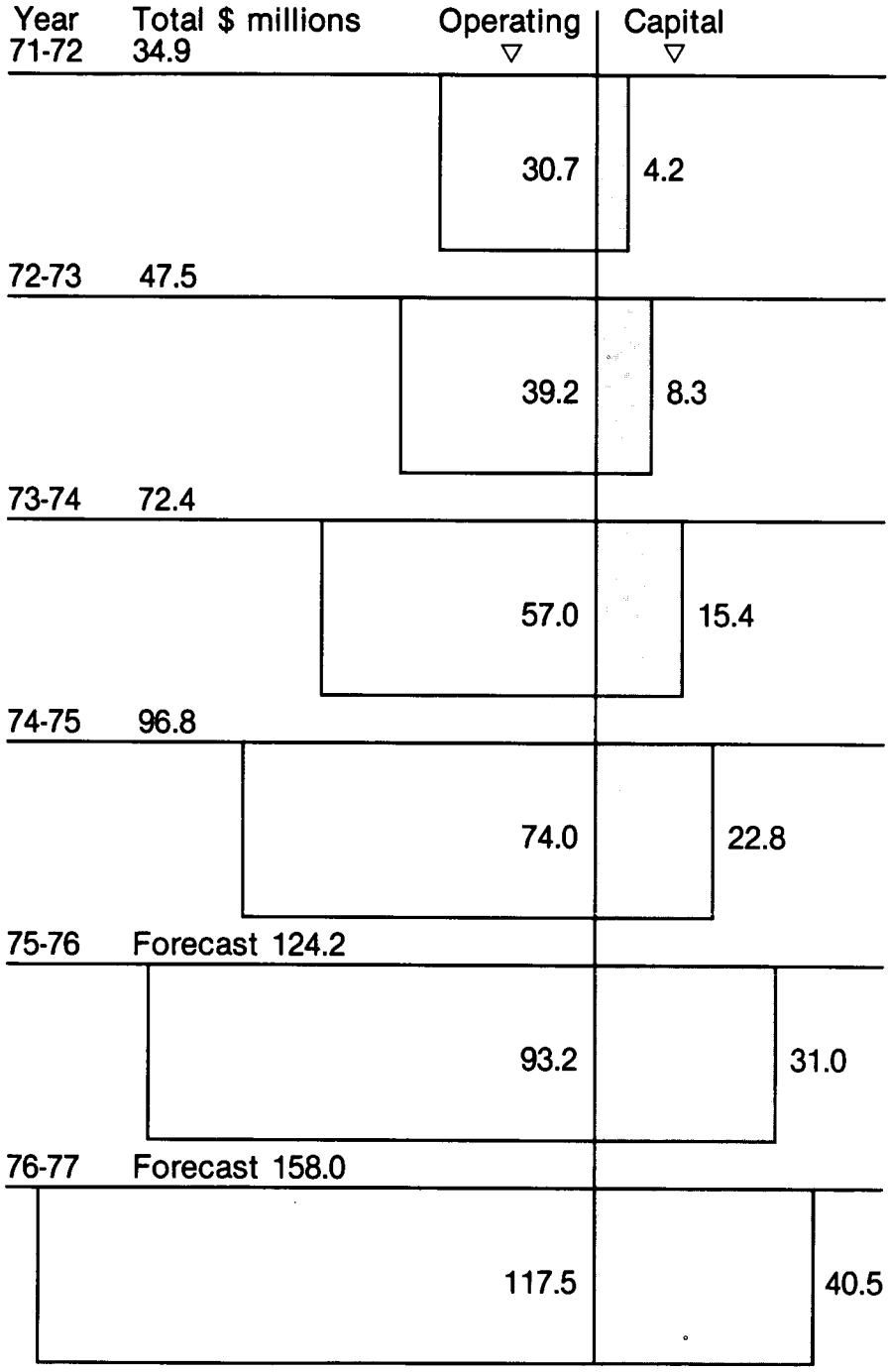


DIAGRAM I

DIAGRAM II

Indian and Eskimo Affairs Program
SUMMARY OF BAND MANAGED FUNDS
1971-72 through 1976-77



Minister
Indian and Northern Affairs Canada

Ministre
Affaires indiennes et du Nord Canada

Oct 6 1980

Westbank Indian Band
Box 850,
Westbank, B.C.
V0H 2A0

Dear Sirs:

Appointment in Respect of Surrendered Lands

Under the authority conferred on me by Section 53 of the Indian Act, I hereby appoint The Chief and the Councillors of the Westbank Indian Band, from time to time, jointly with respect to the signing of leases, rights of way, easements and licences of occupation, to manage, in accordance with the Indian Act and the terms of the surrender, the lands that have been set aside for the Westbank Indian Band which have been or may hereafter be surrendered. It is understood that:

(1) The Westbank Band Council shall have the necessary record system and all encumbrances will be submitted to the Indian Land Registry office in Ottawa for registration;

(2) The documents to be signed will first be acknowledged by the Band Council to be in the best interests of the Band;

(3) The Westbank Band Members shall be responsible for the actions taken by the person given this authority as stipulated in Band Council Resolution No. 1/278 dated September 5, 1978;

(4) The maximum term or period of any lease, right of way, easement or licence of occupation will not exceed the surrender term;

(5) Forms exemplifying the contract are to be the standard lease/permit forms pre-approved by the Minister or his authorized representative;

(6) The authority granted will extend only to those parcels or tracts of land that are specifically described by a plan of survey.

The Chief and Councillors of the Westbank Band will have the authority to carry out the powers granted on each occasion the authority is exercised and will be authorized on behalf of, and in the name of the Minister of Indian Affairs and Northern Development to execute such leases, rights of way, easements, licences of occupation and other instruments and documents as may be required in the carrying out of such authority.

Yours sincerely,

"John C. Munro"

John C. Munro

Indian and Northern Affairs Canada | Affaires indiennes et du Nord Canada

TO BE SENT BY DEX
AS SOON AS POSSIBLE

Ottawa, Ontario K1A 0H4

April 30, 1980

Mr. F.J. Walchli,
Regional Director General,
Indian and Inuit Affairs,
B.C. Regional Office,
P.O. Box 10061,
700 West Georgia Street,
VANCOUVER, B.C.
V7Y 1C1

Our File: 901/36-15

Management of Reserves and Surrendered Lands under Sections 60 and 53(1), Westbank Band.

We have received a telex (copy attached) from Chief Ronald M. Derrickson, Westbank Band, inquiring about the Band's request for authority to manage their lands under Section 60 and 53(1). I have asked Chief Derrickson to discuss the matter with you.

The Departmental Management Committee approved a policy proposal whereby the following specific powers under Section 60 of the Indian Act with respect to the management of reserve lands may be delegated to Indian Bands:

Section 18(2)

— to exercise the Minister's authority to authorize the use of reserve lands for schools, health projects, burial grounds, parks and playgrounds.

Any authority granted would be subject to the proviso that where an Indian, immediately prior to such taking, was entitled to possession of the lands in question, the Minister will retain authority to fix the compensation payable to him in the event the Band and the individual disagreed on the amount payable for such taking.

Section 19

— to allow an Indian Band to authorize surveys and subdivisions of reserve lands.

Sections 20, 24 and 49

— to exercise the Minister's authority to approve land transactions between Band members and between a member and his Band.

Any authority granted would be subject to the proviso that when an allotment is made to a sitting member of the Band Council or his family, the allotment is to be approved by a majority vote of the electors of the Band. This is to avoid any possible allegations of conflict of interest. Further, if approval is to be withheld under Sections 24 and 49 the Minister must be notified.

Section 25(1)

— to exercise the Ministerial authority to extend the time limit (up to 1 year) wherein an Indian who ceases to be entitled to reside on a reserve may dispose of his/her interest.

Sections 28(2), 58(1), 58(3), 58(4)

— to authorize Bands to execute on behalf of the Crown instruments disposing of interests in reserve lands by way of leases, licences and permits, to non-Band members.

This grant of authority to be subject to the following minimum conditions:

a) the authority granted would be for specific managerial activity — i.e. agricultural, recreational, residential, commercial, etc.

b) the maximum term or period would not exceed 21 years.

c) forms exemplifying the contract, to be those approved by the Minister and Justice. In cases where standard lease/permit forms will not adequately describe the proposed transaction, the Band land manager, with the assistance of Regional officers will draft a suitable document which Region will submit to Justice for approval.

d) the authority to be granted be limited to specific parcels or tracts of land. (There will be no blanket authority for all lands set apart for the Band).

In addition, the Departmental Management Committee approved the proposal that when requested, the Minister is prepared to extend the authority outlined above to a Band to enter into leases and/or permits with non-Indians for surrendered lands under Section 53(1) of the Act. This authority will be transferred on the proviso that the Band can provide some kind of surety by way of bond or other assurance.

Any powers granted to a Band pursuant to Section 60 or 53(1) must be specifically requested, and approved by a majority of the electors of the Band. The majority of the electors of the Band would also have to approve the delegation of its authority to the Band Council. In addition, a Band seeking such authority will have to have demonstrated that it has the necessary technical, financial and managerial capacity to assume some or all of these authorities.

Undoubtedly some Bands may seek funding from the Department to assume delegated authority particularly for those areas of Indian land administration that are non-revenue generating. If this is the case and inasmuch as there are no funds at Headquarters for this purpose, the Region should ensure that they have the necessary monies available in their budgets to deal with the request.

Upon certification that the above conditions have been met, and upon your recommendations with respect to the request, I am prepared to initiate the appropriate Headquarters action.

"J.D. Leask"
J.D. Leask
Director General,
Reserves and Trusts.

ATT.

CC: J.D. Nicholson,
Assistant Deputy Minister —
(Indian and Inuit Affairs)

CANADA

PRIVY COUNCIL • CONSEIL PRIVÉ

P.C. 1985-1836
6 June, 1985

WHEREAS the Westbank Band of Indians by a Band vote held on October 11, 1984 requested that the Band be granted the right described in Schedule "A" hereto to exercise the control and management over the lands in the Indian Reserves occupied by that Band.

THEREFORE, HER EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Indian Affairs and Northern Development, pursuant to subsection 60(1) of the Indian Act, is pleased hereby to grant to the Westbank Band of Indians the right to exercise such control and management over the Indian Reserves occupied by that Band as is set out in Schedule "A" hereto.

CERTIFIED TO BE A TRUE COPY - COPIE CERTIFIÉE CONFORME

CLERK OF THE PRIVY COUNCIL - LE GREFFIER DU CONSEIL PRIVÉ

P.C. 1985-1836

This is Schedule "A" to Order in Council P.C. 1984

WHEREAS Section 60 of the Indian Act provides that:

1) the Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable;

2) the Governor in Council may at any time withdraw from a band a right conferred upon the band under subsection (1);

THAT the Westbank Indian Band requested the Governor in Council grant to it the right to exercise such control and management over lands in Tsinstikeptum Indian Reserve No. 8, Tsinstikeptum Indian Reserve No. 9 and Tsinstikeptum Indian Reserve No. 10, which rights are more particularly set out in Appendix A to this schedule.

THAT the Westbank Indian Band requested that the duly elected Chief and Council of the Band be authorized to exercise these rights on behalf of the Band and be authorized to approve such leases, permits, assignments, consents and other instruments and documents as may be required in carrying out the authorities delegated to the Band;

THAT the approval by the duly elected Chief and Council of the Westbank Indian Band of any such documents or instruments shall constitute an acknowledgement that the document or instrument is in the best interests of the Band;

THAT such signing officer(s) as may be designated from time to time by the Westbank Band Council are authorized to execute such instruments and documents as may be required in the exercise of such authority, subject, in each case, to the prior approval of an absolute majority of the Chief and Councillors of the Westbank Indian Band;

THAT all payments provided for in the said documents shall be paid in the name of the Westbank Indian Band. Should any payments be thirty days in arrears, or should the Band Council consider that a permit or lease is in default by reason of a breach of covenant, the Band Council shall refer the matter, and all pertinent information in the Band's possession, to the Regional Director, Reserves and Trusts.

THAT the Band Council shall keep accounting records for leases or permits entered into, rentals received, receivable and overdue; shall operate a lease billing system; shall be responsible for collecting rentals under routine collection procedures; and shall submit quarterly a detailed aged listing of rentals receivable and collection action taken to the Regional Director, Reserves and Trusts.

.../2

THAT the Band Council shall forward duplicate originals of all documents granting interests in their reserve lands to the Indian Land Registry in Ottawa for registration;

THAT no member of the Band Council shall have a vote in the exercise by the Band Council of any authority provided for under this delegation in which he or she has a personal interest, either direct or indirect;

THAT the Band Council shall establish and maintain a land management records system;

THAT the Band Council shall make available to the Band members and a designated officer of the Minister all records, financial statements and audits and other information as may be necessary to enable the Minister to monitor the exercise of the authorities delegated to the Band.

P.C. 1985-1836

This is Appendix "A" to Schedule "A" to Order in Council P.C. 1984

The Band may exercise the power given to the Minister:

1. a) by subsection 18(2) of the Indian Act to authorize the use of lands in the reserve for the purpose of Indian schools, Indian burial grounds, Indian health projects, or any other purpose that is for the general welfare of the Band. This authority is subject to the proviso that where an Indian, immediately prior to such taking, was entitled to the possession of such lands, compensation for such use shall be paid to the Indian by the Band, or failing agreement, in such amount as the Minister directs;

   b) by Section 19(a) of the Indian Act to authorize surveys for lands in the reserve and the preparation of plans and reports with respect thereto;

   c) by Section 19(b) of the Indian Act to divide the reserve into lots or other subdivision;

   d) by Section 19(c) of the Indian Act to determine the location and direct the construction of roads in the reserve;

   e) by subsections 20(1) and 20(2) of the Indian Act to approve the allotment of land in a reserve to Band members and to approve the issuance of Certificates of Possession.

   f) by subsection 20(4) of the Indian Act to withhold approval for the allotment of land and authorise temporary occupation under prescribed terms and conditions. This authority is subject to the proviso that when approval is so withheld, the Band must notify the individual Indian and the Minister, in writing within 30 days, of the grounds for withholding approval, and of the individual's right of appeal to the Minister. Disputes will be settled by the Minister.

   g) by subsections 20(5) and 20(6) of the Indian Act to extend the term of Certificates of Occupation for a period not exceeding two years and at the expiry of this time to approve or reject the allotment. Refusal under subsection 20(6)(b) is subject to the same proviso with respect to written notification of the grounds for refusal and the right of appeal to the Minister as applies to refusals under subsection 20(4);

   h) by Section 24 of the Indian Act to approve transfers of land between Band members or between a member and his Band;

.../2

i) by subsection 25(1) of the Indian Act to extend the time limit wherein an Indian who ceases to be entitled to reside on a reserve may dispose of his or her interest;

j) by subsection 28(2) of the Indian Act to authorize by permit in writing any person to occupy or use the reserve or to reside or otherwise exercise rights on the reserve;

k) by subsection 58(1)(b) of the Indian Act where land in the reserve is uncultivated or unused and is in the lawful possession of any individual, to grant a lease of such land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession;

l) by subsection 58(1)(c) of the Indian Act where land in the reserve is uncultivated or unused and is not in the lawful possession of any individual, to grant for the benefit of the Band a lease of such land for agricultural or grazing purposes;

m) by subsection 58(3) of the Indian Act to lease for the benefit of any Indian, upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered;

n) by subsection 58(4) of the Indian Act to dispose of the property mentioned therein which is on the reserve and issue the permits mentioned therein subject to the Minister's power to determine the division of the proceeds where the Band and the individual Indian in actual possession cannot agree.

2. It is understood and agreed that the exercise of the powers referred to in paragraph 1(a) through 1(n) is subject to the following conditions;

i) unless changed by policy of the Department of Indian Affairs, the maximum term of any lease or permit will not exceed 21 years, including renewals, without consultation with Reserves and Trusts, Ottawa;

(ii) all leases or permits for terms of more than 5 years will contain a periodic five year fee or rent review clause, unless rent is pre-paid for the entire term;

(iii) no action to recover overdue lease monies or permit fees will be taken without the approval of the Department of Indian Affairs on the advice of the Department of Justice;

(iv) the exercise of the authority will be in accordance with applicable Departmental policies and procedures in force from time to time.

Chapter 9

The Highway 97 Project: Compensation

From 1978 to 1983, the Westbank Indian Band Council was involved in negotiations with the Provincial Ministry of Transportation and Highways concerning the acquisition of Reserve lands for highway construction purposes. The Ministry wanted to widen and upgrade Highway 97, which passes through Tsinstikeptum Reserves 9 and 10. In addition to the widening of Highway 97, other public roads which passed through the Reserve were to be upgraded or rerouted at the same time as the main highway project was being done. A major issue in negotiations was the amount of compensation to be paid to the Band or to individual locatees in exchange for land taken or affected. Various other matters such as the location of intersections and access roads, cattle guards, fencing, and the accretion of new lands to the Reserves were also agreed on between the Band and the Ministry negotiators.

There were two settlements, one for each Reserve. The negotiations concerning Reserve 10 were completed by the spring of 1983. The negotiations concerning highway construction through Reserve 9 were completed by July 1983, using the earlier negotiations as a model. The acquisition of reserve lands by the Province for highway purposes is not complete until the lands are transferred by federal Order-in-Council. This final step in the procedure, which should be relatively straightforward, has proven to be slower than expected. Although negotiations were concluded on Reserve 10 in 1983, the Order-in-Council transferring the lands was not passed until 1985. The Order-in-Council for Reserve 9 has still not been passed.

I propose to deal chiefly with matters related to Reserve 9 as there did not seem to be any particular matters of significance to the Commission that emerged from the Reserve 10 negotiations. The resolution of certain land issues arising out of the highway project on Reserve 9 appeared necessary to investigate and comment upon because conflict of interest issues were present.

Mr. Donald MacSween, who conducted negotiations on behalf of the Ministry of Highways, gave evidence before the Commission. Speaking of the negotiations concerning Reserve 9, Mr. MacSween described how the Ministry had negotiated a comprehensive agreement with the Band Council to cover all aspects of compensation and construction specifications. The Ministry agreed that the Band Council would obtain releases from affected locatees and lessees on the Reserve in exchange for a global sum of money. The total amount involved in the Reserve 9 settlement was approximately $3.5 million. After obtaining the required

releases, the Band Council would then be in a position to transfer title to the Province for all of the land required for highway purposes.

Mr. MacSween noted that this procedure simplified matters very much for the Ministry of Highways. Usually they would have to negotiate with at least three parties when acquiring land on an Indian reserve — the band council, individual locatees, and any lessees affected. The settlement procedure innovated at Westbank was a new departure in negotiations between the Ministry of Highways and Indian bands in British Columbia. While it may have simplified matters from the provincial perspective, the procedure placed considerable responsibility on the Westbank Band Council. Under the arrangement, it was agreed that the Ministry would not enter into negotiations with individual locatees. Instead, the Band Council would conduct these negotiations. This put the Band Council in the position of negotiating with individual members and concurrently representing all Band members. Because of the closeknit nature of a smaller-sized band, the Council did not wish to drive hard bargains with individuals. However, all compensation negotiated had to be satisfied out of the global sum available. Any money not required to be paid to individuals could be expected to accrue to the membership generally. Council had a delicate task to perform — it could not be too tight-fisted with individuals but at the same time, it had a duty to conserve funds to be applied for the general purposes of the Band.

The $3.5 million settlement on Reserve 9 included a number of items, the largest of which was compensation to be paid to individual locatees. Locatees received compensation for both lands taken for highway purposes and for lands lost or affected by what is termed "severance". Most of the land on that Reserve had been previously allotted to individual locatees. Consequently, individuals received most of the compensation. Since there remained only a small portion of unallotted lands on Reserve 9 affected by the highway construction, the Band received little compensation. Some money was required to satisfy damage claims of lessees and to pay for construction work to be performed by the Band or others.

In arriving at a final figure, provincial negotiators ascribed values to properties on the Reserve. These values ranged from $20,000 per acre to $90,000 per acre. The disparity in values depended on a variety of factors, including proposed use, distance from the main highway, and total amount of land being acquired. Mr. MacSween said that in dealing with reserve lands, he did not have any zoning by-laws or regulations to rely upon in determining land values based on the highest and best use. Nevertheless, values were eventually arrived at based on the best information available. Negotiators got some guidance from the overall development plan applicable to the Reserve and also considered specific plans for individual parcels of land. For example, a figure of

$90,000 per acre was attributed to Lot 15–5 on Reserve 9. This was land held by Ronald Derrickson. A high value was attributed to this land because of Mr. Derrickson's intention to construct a shopping centre on it. Ultimately, the shopping centre plan had to be deferred, but at the time of the negotiations it was a contemplated project. I was told it was deferred because of the construction of a large new shopping centre in the nearby village of Westbank.

The amounts allocated in the global settlement to cover construction costs were calculated with the assistance of Ministry engineers. Provincial negotiators estimated the cost of work required to satisfy claims of lessees where businesses were likely to be affected by the highway construction. Ronald Derrickson said in his evidence that the Band Council did not feel constrained by the Ministry of Highway's valuations or calculations. These were useful guides when the Band Council conducted negotiations with locatees and lessees, but it was the responsibility of the Band Council to divide the global amount as it saw fit. This allowed the Band Council a certain amount of flexibility. If they felt that the Ministry evaluation was low or high on an individual property, they could make such adjustments as they felt proper. The only limitation was that the global figure would have to suffice to satisfy all claims. It is, of course, understandable that in discussing a compensation figure for an individual locatee, Band Council negotiators and the locatee would often differ — the final figure in each case would reflect the agreement reached between Band negotiators and locatee.

The settlement monies were to be held in trust by the then Band solicitor pending passage of the federal Order-in-Council transferring the lands to the Province of British Columbia. It was agreed that certain specified amounts could be released in construction draws following the completion of individual projects. It was contemplated that the monies payable to locatees and lessees would remain in trust until the federal Order-in-Council was passed. These monies were deposited into an account at the Northland Bank.

As previously noted, the Order-in-Council transferring the highway lands on Reserve 9 has yet to be passed. The Band used Band funds from another source to pay the highway compensation claims of Reserve 9 locatees in December 1983. The Westbank Band had recently received a substantial money settlement from its "cut-off" lands claim and voted to utilize the "cut-off" monies to compensate locatees of land taken for highway purposes. Highway settlement funds held in trust at Northland Bank were to be credited to the Band when the Order-in-Council was passed. By December 1983, the Band Council had completed negotiations with locatees on Reserve 9 and had obtained or was obtaining the necessary releases. The locatees were able to be paid more quickly than would have been the case if they had been forced to wait for the passage of the Order-in-Council. The accelerated payment

process was clearly a utilization of general Band funds to pay the locatees and this was, of course, a benefit to affected locatees. Those who had substantial land holdings in the highway corridor were the major beneficiaries of these accelerated payments.

At the Band meeting, before a vote on the issue was held, some Band members expressed concern that a large sum of the Band's revenue monies would be tied up pending issuance of the required Order-in-Council. It was noted at the meeting that some $2.5 million of Band funds would be required to pay out various locatees. However, it does not appear that the total figure was broken down to disclose roughly how much compensation would be paid to individual locatees. Because they were voting on such a substantial commitment of general Band funds, I believe that the members should have had true, full, and plain disclosure of who was getting what. Under the terms of the negotiated settlement, the Band Council had in hand a global sum to obtain the necessary releases and to complete specified construction works. As Ron Derrickson said in his evidence, if Council could negotiate efficiently, there would be money left over for the benefit of the Band. Band records indicate that the total money paid out to locatees exceeded the amount the Ministry of Highways would have been prepared to pay under this head. The Band Council, of course, was not bound by the Ministry's figures when negotiating with any individual locatee but was only limited by the total settlement figure. Additional sums paid to locatees of course diminished the amount of money that would be available for use by the Band. Because of this and the very large sum of cut-off money being utilized, it appears to me that Band members required full information on payment details in order to make a fully informed choice on the issue of using the cut-off funds to pay locatees for land (or severances) on Reserve 9. Full disclosure should also have included Ministry of Highways valuations.

Ron Derrickson was the recipient of a substantial amount of the compensation funds. His brother, Noll Derriksan, also received significant compensation as the result of highway construction. Since both individuals have large land holdings on Reserve 9, it was to be expected that their lands would be affected by the highway project. Included in the compensation they received were monies payable for losses apparently incurred due to the severance of properties. I comment hereafter on two of the severances for which compensation was paid by the Band, which severances were examined in some detail during this Inquiry.

Ron Derrickson received $112,500 for 1.25 acres of land that was part of Lot 15–5. Noll Derriksan received approximately $60,000 for three acres of land which had been separated from two large parcels of land which he owned. The construction of East Boundary Road caused the severance of Noll Derriksan's properties. Generally the road did not

encroach upon the Reserve. However, in order to avoid a rock outcrop at the base of Mt. Boucherie, it was necessary to encroach upon Noll Derriksan's property. In both cases the amount of land involved was rather large to be described as a severance. These respective severances remained in the possession of the locatees (Ron Derrickson and Noll Derriksan), but they were compensated for the loss. Neither severance had been recognized as compensable by provincial highway negotiators. It should be noted that there was disagreement between the provincial negotiators and the Band Council over just what would be described as a "severance" for purposes of compensation.

Mr. MacSween described how the Ministry of Highways dealt with severances. In cases where a roadway crossed an individual's property in such a way that it severed a small portion of that property from the larger portion, the land owner would be compensated for the severed portion. The Province would purchase the severed portion because the roadwork would have rendered it useless to the original owner. However, because they were dealing with Indian lands, the Ministry decided to pay compensation for any severance, but did not take title to the land.

Compensation for damage caused by severance is recognized under the general law regarding injurious affection. The policy described by Mr. MacSween, of purchasing unusable severed portions, may be viewed as one way of dealing with a loss caused by severance rendering land unusable. Generally, the term "severance" relates to a small separated portion of one property that becomes detached following an expropriation. Where a property is severed by a roadway, the owner may claim compensation for loss or injury caused to his remaining lands. In order to establish a claim for injurious affection, the owner must demonstrate that the property has been rendered less useful as a result of the expropriation. A claim for injurious affection may be set off against any enhanced value resulting from the expropriation. For example, the construction of a roadway may have the affect of severing part of the property, but the value of some or all of the remaining property may be increased because of improved access to a public road.

Under the terms of the negotiated settlement, the provincial government offered a lump sum of money to the Band Council, which would in turn purchase the lands required for highways from the locatees. The Band, as owner of all lands required for highway purposes, would then be in a position to agree to the transfer of those lands to the provincial government. Due to this arrangement, the Band became the owner of any severed portions of lots and could deal with them as it saw fit. The policy adopted by the Band Council was to transfer the small severed portions to the adjacent land holder. The Band Council and the Ministry differed on the size of parcels which could be termed compensable severances. The Ministry of Highways would only

recognize very small parcels as severances. Generally, if a severed portion was so small as to be rendered unusable, compensation would be paid for the loss. The Band Council was prepared to recognize larger portions as compensable severances.

The negotiators for the Province did recognize some severances that required compensation, but the Band Council felt that there were additional cases which should qualify. The final sum agreed upon included compensation for all losses, including severances. Only the small severances were considered by provincial authorities in arriving at their final figure. Since the Ministry of Highways did not recognize certain of the severances when they calculated the total settlement sum, it would appear that had Ron Derrickson or Noll Derriksan dealt directly with the Ministry of Highways as individual locatees, they would not have received compensation for some "severances". However, because it fell to the Band Council to deal with the individual locatee claims, both Ron Derrickson and his brother Noll Derriksan were able to receive additional compensation.

The compensation claimed by Ron Derrickson and Noll Derriksan may fall under a broad category of injurious affection. Even if matters are viewed from this perspective, the claims appear difficult to fit into the traditional doctrine. In both instances examined, it is difficult to identify any resultant injury that would justify the compensation received.

Band Policy Regarding Severances

Ron Derrickson and Brian Eli testified regarding the Band's policy with respect to compensation payable for severances. Mr. Eli stated that the Band Council and the Ministry of Highways often disagreed as to what would be classed as a compensable severance. If the severed portion was large enough to be of economic use, provincial negotiators would not recognize that severance as being a compensable loss. The Band Council felt it was undesirable to have one locatee in possession of a small portion of land which, as a result of road construction, was logically contiguous to a larger property in the possession of a different locatee. Mr. Eli explained that that situation could result in some problems for the locatee of the larger parcel. He said, for example, that the locatee of the smaller portion could seriously affect the value and use of the larger portion by not maintaining the small lot or by allowing debris to accumulate. Also, because the smaller portion would always be adjacent to the roadway, a situation might arise where access to the roadway from the larger parcel could be hindered. It was feared that the development plans of a locatee might be unreasonably interfered with by the holder of the smaller parcel. In order to prevent such problems from arising, it was the Band Council's policy to purchase the smaller severed portion from the original locatee, and then to add it to the

dominant parcel that was on the same side of the road as the severance. The locatee of the dominant parcel received the benefit of this additional land. The Band Council's policy did not fix a maximum limit on the size of parcels which could be described as severances.

The reasoning behind the Band Council's policy makes sense where there are two locatees involved. However, the logic is much less compelling where both the holder of the severed portion and the holder of the adjoining portion are the same. In that case, locatee X loses a portion of land from his lot on one side of the road, but he adds that same amount of land to his lot on the other side of the road. He has suffered no loss of total area. According to the evidence of Brian Eli and Ron Derrickson, the Band policy was followed regardless of whether there were two locatees involved or only one. As long as there were two separate lots involved, the policy was "blind" as to the ownership of the lots. Mr. Eli defended this application of the policy, arguing that it had to be implemented in this way or else the Band Council could be criticized for being inconsistent. While that position can be urged, it seems to me that it rather ignores the original reason the Band adopted the policy, namely to prevent a different locatee from hampering the use of the larger parcel. The policy of the Band tended to generate windfall profits for those who had substantial numbers of parcels affected by highway construction.

During the negotiations between the Band Council and the Ministry of Highways, the ownership of the various parcels affected by the roadworks was not revealed. Mr. MacSween testified that he was unaware of which locatee owned which lot. At that stage of the negotiations, it made sense that the Band would not reveal who was in possession of each parcel. However, once negotiations occurred at the local level as the Band Council negotiated compensation with various locatees, they would be aware of who was in possession of which lots. This information would have been significant in determining what should be Council's policy regarding individual severances, depending on whether or not the same locatee held the properties on both sides of the completed roadway.

Ron Derrickson's Severance

The severance for which Ron Derrickson received $112,500 is a flat, triangular piece of land which formerly was part of Lot 15–5. The 1.25-acre severance was created by the construction of the new Bering Road, which crossed the lot diagonally. Immediately to the north of the parcel is Lot 15–2, and immediately to the east is Lot 15–1. Ron Derrickson was the locatee of both these adjacent lots. Lot 15–1 was under lease at the time to a company which operated an amusement park known as "Old MacDonald's Farm". Lot 15–2 was under lease to a corporation controlled by Ron Derrickson and was in use as a drive-in theatre. Mr.

Derrickson had the choice of either leaving that severed portion of Lot 15–5 as it was or being compensated by the Band for the 1.25-acre severance based on the figure of $90,000 per acre. That value was arrived at based on the proposed use of the land for a shopping centre. Ron Derrickson was compensated for the land as though he had lost it, when in fact he retained possession of the land. He said, though, that he felt the separated land was less useful to him because it accrued to the Old MacDonald Farm property, which property was already under a long-term lease. He felt he would not get any additional rent for the land under the then existing lease.

During the course of his testimony, Ron Derrickson was asked to explain why the Band Council's severance policy was applied in the case of the 1.25-acre parcel. He said that everyone else who had a severed portion added to their lands "got something for nothing", so why shouldn't he? He was apparently referring to the fact that those persons who held the larger parcels and received the benefit of a smaller severed portion being added to their lands did not have to pay anything for the extra land they gained. However, in those cases the individuals did not also receive compensation for the land they gained. The land that they gained had formerly been in possession of another locatee, and that locatee had received compensation for land that he had truly lost. Mr. Derrickson, on the other hand, never lost possession of the 1.25-acre parcel. He simply had the boundaries of an adjacent lot resurveyed to include the 1.25 acres.

Mr. Derrickson said that the lots that were immediately adjacent to the 1.25-acre parcel were under long-term lease to third parties. By adding the parcel to Lot 15–1, he did not expect any extra income to be generated from the lease to Old MacDonald's Farm. Consequently, he maintained, he had suffered a loss. I think that, in his own mind, he was convinced that he had been adversely affected.

I am not convinced that the reasons he advanced in favour of compensation are persuasive. The total transaction has to be considered, both the positive and negative aspects. The severance of Lot 15–5 resulted from the construction of Bering Road. Mr. MacSween testified that the Ministry of Highways did not intend to build Bering Road, but that the Band had pressed for its construction. As part of the overall settlement, the provincial authorities agreed to pay for the construction of Bering Road. Ron Derrickson testified that the road construction on Lot 15 was specifically designed to service his proposed shopping centre. The construction of Bering Road would enhance the land in question for future development because there would be better access to all lands. The road that created the severance at Lot 15–5 was constructed at the request of Band Council in order to enhance the development potential of that land. That was a benefit to Mr. Derrickson because of the improved access. However, besides receiving this benefit to his land, Mr. Derrickson received an added bonus when he was compensated for the

1.25-acre severance. The Ministry of Highways had agreed to pay compensation for the construction of the road and for land taken for the roadway. However, they did not consider that there was a compensable severance created by the construction. The size of the "severance" exceeded what the Ministry normally termed a severance. Ron Derrickson claimed and was compensated handsomely for the 1.25-acre parcel.

Mr. Derrickson's claim for compensation for severance in these circumstances seemed to me to be overreaching. Any injury caused by having the smaller parcel severed by the roadway appears to me to be set off by the consideration that the remaining property became much more usable. The parcel of severed land seems to me to be large enough to support some separate commercial use. It fronts on a public road and is near the growing village of Westbank.

Mr. Derrickson would have had the option of leaving the property as it was, but he chose to consolidate it with his adjacent Lot 15–1, which was at that time under long-term lease. If he felt he suffered a loss as a result of amalgamating the property with another of his properties under lease, any such loss would appear to be the result of his choice. If Mr. Derrickson suffered some loss of value as the result of the severance that is not matched by the increased value of the shopping centre parcel, compensation should have been calculated considering the pluses and minuses of the global transaction. In the end, Mr. Derrickson was compensated for the parcel at the $90,000 per acre rate as if he had lost the use of the land completely. That seems to me to be an imprecise assessment of any loss since it fails to consider the total transaction. I think that if the matter had been considered in this way, the Band could well have had some of these funds accruing to it, and as chief executive officer of the Band, the Chief should have had a more enlightened perspective in this particular instance. Council members are not to be unduly penalized simply because they are office holders, but their conduct must be scrupulously correct as an example to their constituents.

Noll Derriksan's Severance

Mr. Noll Derriksan received approximately $60,000 for three acres of land which the Band Council classed as a severance. This land was not recognized by the provincial negotiators as being a compensable severance. The severance was the result of the construction of East Boundary Road, which crossed Lots 33 and 34, located on the extreme northeast corner of Reserve 9. Prior to construction of the roadway, the three-acre parcel formed a physically distinct portion of Noll Derriksan's properties. The land in question is a rocky (and apparently unusable) outcrop at the base of Mt. Boucherie. Mr. Brian Eli was a councillor at the time when negotiations with locatees were conducted.

He told the Inquiry that he and Ron Derrickson were "primarily responsible" for negotiations on Reserve 9. He dealt with Noll Derriksan concerning the compensation to be paid for this severance. He was uncertain whether Ronald Derrickson had any input into this matter. In his evidence, Mr. Eli described the land as "a sheer rock pile" and said that he could not recall precisely how the value was arrived at for this land. However, he said the payment of compensation for this parcel was consistent with the Band Council's policy concerning severances. He said:

> A The position we took was that it didn't matter who was locatee, we were going on properties, boundaries, and we followed that same circumstances as we did on #10. We just carried it over to #9 continuously. We never diverted from our initial policy or direction that we took at that time. I couldn't even say it was a policy; it was just the direction that the Council took.
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> (Transcripts: Volume LXIII, p. 9298)

He noted in re-examination by counsel for the former Band executive that the value attributed to the three acres was at the lower end of the scale of land values for Reserves 9 and 10 in the highway negotiations.

The Council policy or position with respect to compensating locatees for severances does not entirely fit this situation because there is no other locatee land adjacent to the severed portion. Mr. Eli was not sure whether Noll Derriksan would remain in possession of the land or whether it would be transferred to the Band. However, it appeared to me that the land in question is of little use or value, regardless of who possesses it. It is difficult to understand how a roadway passing in front of this "rock pile" could diminish the value of the property. Why then did the Band Council agree to pay $60,000 compensation? The only justification offered by Mr. Eli was that the Band Council policy was being implemented consistently. Mr. Eli was questioned by Commission Counsel regarding the decision to recognize the "rock pile" as a severance and to pay compensation to Noll Derriksan for it. The following passages deal with the matter:

> Q Another one I would like to have you look at is Map #10, and if I have it right, that's the one that you spoke of yesterday as a rock pile?
> A Yes.
> Q Now, looking at that, that's right on the boundary of the Reserve, isn't it?
> A Yes. That's East Boundary.
> Q East Boundary Road?
> A Yes, East Boundary and east of I.R. 9.
> Q Okay. And then you see on the Map #10, you see the road going around the rockpile?
> A Yes.
> Q Now there are two, there are actually two parcels of land there?

A Yes.
Q And one of those is approximately two acres of land, and one is a little under one acre of land, I think, if my information is correct. Do I have that correctly?
A I will have to go on your — I don't have —
Q Okay, if you will take that for the time being?
A Yeah.
Q And one, the note has 2.04 and the other has .97. Now, is that land good for anything?
A If you blast the rock, I guess.
Q Pardon me?
A If you blast the rock and sell it, I guess.
Q But other than that it doesn't have a high commercial value?
A No.
Q Now, I understand that there was approximately $60,000 paid for that particular severance?
A I couldn't recall unless I seen the documentation.
Q Okay.
A To refresh my memory.
Q But if you take my word for it for the time being my note is $60,200 for that parcel of land.
A Yeah. . . .
Q Okay. So what you have got is a pile of rock —
A And nobody wants it.
Q Nobody wants it, and it costs $60,000?
A Yeah. Nobody wants it other than the Band, I should say.
(Transcripts: Volume LXIII, p. 9303–9304, 9308)

It is not apparent to me that anyone would covet this unlovely parcel of land unless it contained a deposit of platinum! It appears to be presently unusable and I have difficulty appreciating what economic use could be made of it in the future. The payment of $60,000 compensation for these pieces of "severed" land seemed to me unjustifiable.

Effects of Severance Payments

As previously noted, neither the "rock pile" nor the 1.25-acre parcel owned by Ron Derrickson were classed as severances by the provincial negotiators. Compensation for these severances was not included in their calculations when arriving at the total sum to be paid for settlement. The Band Council was not bound by the Ministry of Highways detailed calculations. However, they were working with the same global figure when it came time to negotiate with the locatees and lessees. Had the Band Council simply distributed the total sum among the various locatees and lessees according to the Ministry of Highways calculations, there would not have been any funds designated to pay for these two severances. In his evidence on this issue, Ron Derrickson explained how extra money was found to compensate the locatees over and above the amounts calculated by the Ministry of Highways. He stated that there were areas in the overall settlement where the Band

Council had a lot of leeway. For example, if the Band Council could negotiate efficiently with the various lessees and satisfy their claims with less money, then they would have a surplus to use in other areas. Claims of lessees were related to physical damage or disruption caused by the construction works. The Ministry of Highways had recognized this situation and had provided funds in the settlement to cover damages to improvements on leased lands. If the Band could get the lessees to settle for less, or if through the Band construction company they could do whatever work was necessary for less money than the Ministry of Highways had estimated, perhaps there would be some money left over. As Ron Derrickson put it:

> Well, that's what I keep trying to say. Everybody is hung up on the fact that there is some valuations done, and we should have been sticking with them. I would have never agreed to that. I would have never agreed to that, because that would have put us back in the negotiations. The fact is that we had a global figure; one figure that covered everything. Now, if we were efficient in negotiating the improvements, and negotiating the prices with the locatees, and so forth, we would have something left for the Band at the end.
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> (Transcripts: Volume LXVI, p. 9911)

Additional funds expended to pay these severance payments to Ron Derrickson and to his brother Noll Derriksan diminished any sum available to the Band for general Band purposes. Given all the circumstances, I do not view the payment of compensation for these properties as equitable to the Band membership as a whole.

A potential source of extra money for severance payments was surplus funds resulting from Band negotiations with particular lessees. For instance, the Ministry of Highways had agreed that the Band would be responsible for dealing with the lessee who operated under the corporate name of Park Mobile Home Sales Ltd. and that an additional sum would be added to the global amount for this purpose. It was further agreed that should a lesser sum be sufficient to satisfy the claims of any particular lessee, then the Band could use resulting surplus funds to compensate locatees for severances which the Band recognized, but which the Ministry of Highways did not.

The mobile home park that was operated by Park Mobile Home Sales Ltd. was sold prior to the commencement of highway construction. The new lessee, Mr. John Ross, gave evidence before the Commission. He indicated that he was still involved in negotiations with the Band Council regarding compensation for alleged damages caused to his enterprise by the highway construction. Mr. Ross said that the Band had performed some work for him. It was a condition of the agreement between the provincial government and the Westbank Band that in exchange for the global sum received from the Ministry, the Band would obtain necessary releases from all locatees and lessees. If Mr.

Ross still has any outstanding claim, there is a possibility that the Band may have to utilize Band funds to resolve it. If extra money to pay for severances came from this portion of the global fund, such allocation could have a negative impact on current Band finances.

Another source of "extra money" could have been monies left over from construction projects that were the responsibility of the Band. For example, the Band received money to cover the cost of fencing and clearing work. The Band negotiated for this work to create employment and therefore put money into the pockets of Band members. If there were any profits from these projects, either the Band or its construction company would benefit. If extra money to pay for the severances came from this source, it came at the expense of the Band or its construction company.

Wherever the funds were allocated from in the global settlement to cover any compensation paid to Ron Derrickson and Noll Derriksan for these severances, they were a potential source of benefit for the Band. The rationale for payment of compensation for these two severances was dubious, since there was little or no apparent loss involved. The payment may have been made as a result of the application of Band policy concerning severances, but it lacked compelling logic. As Chief of the Band, Ron Derrickson should have appreciated that in the case of the 1.25-acre parcel, uncritical application of the Band's severance policy was poor policy. In fact, the blind application of the policy could adversely affect Band finances.

By claiming and accepting the payment of $112,500 for the severance on Lot 15–5, it does not appear that Ron Derrickson, as Chief, paid due regard to the wider interests of the Band. Rather, he viewed the situation solely from the perspective of Ron Derrickson the locatee, and realized a financial windfall. I believe that he failed here to be properly sensible of his position in the course that he followed. Similarly, Noll Derriksan, who was a former Chief of the Band, might be expected to appreciate that he was receiving a windfall at the expense of the Band. I doubt that the former Chief would have any valid complaint about a "lack of consistency" had Council declined to designate the "rock pile" as a compensable severance. Some nominal payment might have been justifiable, but $60,000 for that patch of rock seemed to me not supportable.

I do not wish to be unduly critical of Ronald Derrickson in this matter, as he worked hard in negotiations with the Ministry of Highways. There, his aggressive stance was desirable for the Band. It was, of course, also beneficial to him as a substantial locatee on Reserve 9. Perhaps he unconsciously felt that he should have his negotiating efforts recognized. Whatever his reasoning, I think he demonstrated a lack of sensibility to his position in the Band.

The chief executive of any organization must always be conscious of his particular position of influence. His conduct must set the tone for those subordinate to him. He must be careful to take no undue advantage of his position. Ronald Derrickson must have been aware that his position in the Band was a special one calling for restraint of a high order. It placed Councillor Eli in a difficult position to be negotiating with his Chief. The Chief had to be careful to refrain from overreaching. Subtle pressures can be present when a subordinate is negotiating with a superior officer.

All of us fail at times to live up to our ideals, but we ought to keep these ideals before us and always try to do better. In the case of those in elective office, such individuals must realize that they set the tone for the organization. Their conduct can be a force for good or ill and it should be seen to be principled and above reproach.

Former Chief Ron Derrickson was not and is not a poor man. In economic matters that concerned the Band, it behooved him to exercise a high measure of self-restraint and probity. Any perceived failure by him to so act could tend to lower the esteem in which Band government ought to be held.

The necessity for the observance of high standards of conduct by those in band government is especially important in the present day. The Government of Canada has been for some time moving towards giving greater self-determination to Native people. This is a desirable course. If independence is to flourish, there must exist confidence that those in power in the new order will conduct affairs in a highly principled manner. If it is perceived that elective office is an opportunity for personal enrichment, untold harm can be done to progress towards self-government. Government must be seen to be exercised in the interest of the electorate, not the self-interest of the elected.

I was somewhat taken aback by some evidence given by a person who was in the group politically opposed to former Chief Derrickson. This person said that she felt the Indian Act Section 60 powers (regarding land management) could be entrusted to the present administration, but that she doubted the wisdom of granting such power to the previous executive. On the face of it, I thought such an assertion lacked logic and smacked of unreasoning partisanship. But, on further reflection, I concluded that there may be a lesson to be drawn from the expression of such a sentiment. It betrays a lack of confidence in government that I found disquieting. But, if the electors perceived a lack of evenhandedness in the conduct of administration, such feelings could be understood. There should be no room for people to entertain such sentiments. There will be political divisions in all organizations. What is intolerable is that there be concerns about the probity of an administration. To me, the worrisome thing about the payments for these severances was that they

could raise questions about the conduct and motives of the administration. That is something no government can afford.

Indian leadership at the present time is going through a period of increasing scrutiny. Is the new order going to be a fit replacement for earlier direction by the Department? Can the electors feel that their interest will be well served? Or will there be a tyranny of the majority or of those in power at a given period? These are legitimate questions and to the extent that doubts about Indian government exist, there will be some corresponding slowdown in progress towards effective self-government. I would be sorry to see obstacles on what I think is a good and hopeful course. Any actions that could foster doubts about the probity of local Indian government are liable to hinder progress towards self-government.

Restraint and a high sense of responsibility are vital ingredients of Indian band leaders in the present era. Indian leaders today are very much a city set upon a hill and their actions must be free of any taint of dubious conduct. There must be no lack of confidence in their fitness to govern.

Former Chief Derrickson placed before me some very eloquent words of a former president of the United States, Theodore Roosevelt. The gist of those remarks was that it was better to labour mightily to achieve great things than to languish by undue timidity. I agree with the former Chief that those are worthy sentiments, but I might also commend to him a study of the career of an even earlier president, General George Washington. While President Washington was a rather aggressive speculator in lands west of the Allegheny Mountains in his earlier years, he was as President very sensible of his need to be an example of proper conduct to his countrymen. That sense of a leader's responsibility is an example that band executives and, indeed, all elected representatives can usefully bear in mind.

I would not characterize the Chief's actions on this severance issue as one of gross abuse of office. But I must say that I found his performance in this area rather disappointing. I think he could have and should have done better. He was unfair to Mr. Eli, he was unfair to the Band, and ultimately he was, in the largest sense, unfair to himself. It is matters like this that can lead to the sort of unedifying comments that emanated from the so-called "Action Committee". I believe that, on reflection, Mr. Derrickson will perceive that his conduct here fell short of that standard one would wish to see adhered to by band executives. His failure may have been in large measure unconscious, but it should be a salutary example to those who come after, so that criticism and controversy are not engendered concerning those people who have the opportunity to advance or hinder the cause of Indian self-government by their conduct in elective office.

Chapter 10

Highway Contracts

As a result of the proposed improvement of Highway 97 through the Okanagan Valley, the Westbank Indian Band was involved in the early 1980's in a series of negotiations with the B.C. Ministry of Transportation and Highways concerning highway construction on Tsinstikeptum Reserves 9 and 10. These negotiations culminated in agreements being signed by the Band, the Department of Indian Affairs, and the Ministry of Highways dealing with various aspects of compensation as well as special construction arrangements.

Mr. Ronald Derrickson was Chief of the Band at this time. He testified that in the highways negotiations, he sought to obtain as much construction work as he could for the Band and Band members. The Band did succeed in obtaining contracts for some portions of the highway-related construction on both Reserves. As one example, the Band was paid to perform preparatory clearing and slashing work for road construction on Reserve 10. During the highway improvement project, WIBCO Construction (WIBCO), a Band-owned construction company, came into being to undertake highway and general construction work. Mr. Derrickson said it began to operate in late 1982. With respect to Reserve 9 highway works, the Band or WIBCO undertook a number of projects including clearing, fencing, secondary road construction, and certain drainage works. In addition to this work, the Band or WIBCO were on the lookout for further contracts in order that profits could be made and Band members given employment. Chief Derrickson said he was always in favour of getting Band members working to instil in individuals a more active economic spirit. It was also desirable for the Band construction company to develop a good track record, giving it the ability to perform a wider range of contracts in the future.

Ronald Derrickson has, over the years, been involved in a number of business enterprises including construction. He was interested in land development and had been involved with the Lakeridge Park subdivision. To a greater extent than most people in the Band, he was aware of how contracts could be awarded and was dealing with contracts generally on the highway improvement project.

Evidence presented at the Inquiry revealed that Mr. Derrickson received significant benefits from two highway-related contracts, one being a contract for sign removal and relocation, primarily on Reserve 10, and the other being a contract for the re-channelling of McDougall Creek on Reserve 9. Each of these projects had a gross value of

approximately $100,000. At all times while the negotiations were under way and at the time these contracts were obtained and performed, Mr. Derrickson occupied the office of Chief of the Westbank Indian Band. Mr. Derrickson's personal involvement in these contracts needed to be examined in the context of a possible abuse of office.

It would appear that Mr. Derrickson was engaging in an enterprise similar to the Band, namely obtaining and completing highway-related contracts. He played a leading role in the general negotiations with the Ministry of Highways concerning the terms and conditions of the transfer to the Province of Reserve lands for highway purposes. In the context of securities law, for instance, he could be classed as an "insider" who knew the deal and the people involved in the negotiations. It was a situation in which he would have to take special care to avoid any potential conflict of interest that could engender allegations that he was abusing his position.

The Sign Contract

Highway construction operations on Reserve 10 began in 1981. Through discussion with the Ministry of Highways, the Westbank Band obtained a contract for much of the initial clearing of work sites. The head construction contract had been awarded by tender to Cantex Engineering and Construction Ltd. (Cantex), a construction company based in nearby Penticton. Following normal practice, Cantex engaged various sub-contractors to perform various segments of this major highway improvement project. One task to be completed under the umbrella of the head contract was the relocation of a number of billboard signs along the route of the new highway through Reserve 10. Because the main highway was being widened and sound berms were to be constructed in some places, the existing billboards had to be relocated. In some cases signs had to be elevated so that they could be seen above the raised sound berms on the side of the new highway. The sub-contract for this particular project was obtained by Mr. Mervin Fiessel of Kelowna, a long-time friend and business associate of then Chief Derrickson. Chief Derrickson said he assisted Mr. Fiessel by providing the necessary financial backing for him to qualify for the contract. Because of a marital split and businesses reverses, Mr. Fiessel was in a poor financial situation around this time. He also owed a substantial sum of money to Mr. Derrickson. I was told that these debts arose when Mr. Fiessel was unable to contribute his share in ventures in which he had been a partner of Mr. Derrickson. He said he owed Mr. Derrickson "a tremendous amount". Counsel for the former Band executive cross-examined Mr. Fiessel as follows:

> Q Mr. Fiessel, over the last number of years, probably 10 years or more, you have been involved in a number of business transactions with Ron Derrickson?

A Yes.
Q And you are still involved in a number of business transactions with Ron Derrickson?
A Yes, yes.
Q And during that period of time, you have been involved in not just one or two business projects, but probably multiple business projects, is that correct?
A Yes.
Q Louder?
A Yes.
Q Now, during the 1981/82 period of time when this particular contract was being handled, you chose to handle this particular contract by depositing the funds into an account, which is referred to as Salmon River Ranches?
A Exactly.
Q And that was an account that was controlled, in effect, the signing officer was Ron Derrickson?
A Right.
Q Now, could you tell me without going into a lot of detail as to why you chose that particular route at that point in time?
A The reason I chose that is the Royal Bank of Canada, we had a number of properties together and the interest payments were due and coming out of Ron's Salmon River account. At that point I was going through a divorce and everything that I was working on is basically gone into his account and my wife was trying to attach everything of mine.
Q So you were using that particular business account for business transactions because of this particular domestic situation that you were in?
A Domestic and also Ron was carrying the properties we had together.
Q Now, when you say carrying, was there monies owed by you, personally, to Ron Derrickson as a result of business transactions that you were involved with?
A Yes, a tremendous amount.
Q And what you were trying to do was you were endeavouring to repay Ron Derrickson those monies that you owed him?
A Right.
Q And, in effect, you received credit for those monies?
A Right.
Q With Ron Derrickson?
A Right.

(Transcripts: Volume LXXIV, pp. 11095–11097)

Mr. Fiessel gave evidence concerning how he obtained and managed the sign relocation contract. He stated that he had an oral agreement with Cantex to perform the necessary work on a cost-plus basis. The scope of the contract is perhaps most succinctly set out in the evidence of Mr. Victor Davies of Cantex during his cross-examination by counsel for the former Band executive:

Q Mr. Davies, when you state that this was a cost-plus contract, it appears to me that what was happening here was that you hired

Mr. Fiessel Construction to act as a supervisor for the relocation of these particular signs, and when you made that agreement with Mr. Fiessel, you must have either discussed or agreed with him certain rates that would be charged for his services and for the services of other people that he'd require, is that correct?

A I personally didn't, but I believe our supervisory people on staff would have agreed with him what his hourly rate would be as a supervisor, plus what his hourly rate would be for the labour that he supplied.

Q Yes, and the equipment that he supplied?

A Yes, generally, if there was any supplied by him, yes.

Q And you assume that because you look at the invoices and that's the way it was billed and that's the way it was paid by your company and certainly you wouldn't have asked him to bill it that way and you wouldn't have paid it in that manner if that wasn't the nature of the agreement between yourself and Mr. Fiessel?

A Yes.

Q So when you go back and review those documents, it indicates to you that someone in your company made an agreement with Mr. Fiessel to supervise and to pay those rates that were set out in the various invoices?

A To supervise and employ the people to do the work; to do it all as a collective unit.

Q Now, Mr. Davies, then your company, in turn, was paid, according to what you have been able to determine from your research, by the Department of Highways for this particular work?

A That's correct. We would have submitted those daily time cards or chits, if you will, that were turned in, we would have submitted those to the Ministry for their approval.

(Transcripts: Volume LXXIV, pp. 11076–11077)

Mr. Fiessel invoiced Cantex periodically for labour and material used on the job. Cantex then issued a cheque to Mr. Fiessel. These cheques were deposited into the bank account of Salmon River Ranches, an account at the Royal Bank in Kelowna held by Ronald Derrickson. The total value of highway project cheques which were put into this bank account totalled about $100,000. Expenses incurred in the performance of the contract were paid from this account. In other words, this account was apparently used as the contract account. The estimated profit from the job was approximately $40,000 according to Mr. Fiessel's testimony. Mr. Fiessel said in cross-examination by counsel for the former executive that he was not paid anything by Salmon River Ranches for his services, but that the monies he received and deposited to Salmon River Ranches were utilized to repay the monies he owed Mr. Derrickson. Although Mr. Fiessel appeared to be the contractor, the financial matters relating to the contract were handled through this account of then Chief Derrickson.

Mr. Derrickson was questioned about the sign relocation contract and why the sign contract monies were deposited to his Salmon River Ranches account:

Q Now, at some point in time, we have seen from the evidence — probably in the fall of 1981 — there were certain funds deposited in an account of Salmon River Ranches by Mr. Fiessel.

Were you aware of that at that time? That that account was being used by Mr. Fiessel?

A Yes. He didn't deposit them in the account. When he got the contract from Cantex — and as far as I can remember, you know, and that's all I can tell you is what I remember — Merv made an agreement, or had a contract with a guy by the name of Peter Doyle, who was the superintendent for Cantex at that time.

Peter Doyle gave — he discussed this contract with Peter Doyle and got it, and then Merv was — he wasn't financially able to carry the contract himself, from my recollection, and so he came to me; if I would fund the contract.

Now, you know, at that time, you know, I was delighted to fund the contract because I wanted to grab the profit from it because he owed me a lot of money.

(Transcripts: Volume LXXV, pp. 11170–11171)

Cantex was unaware of Ronald Derrickson's involvement in this matter, as were the members of the Westbank Indian Band. To the world at large, it appeared that Mr. Fiessel was the only person involved, given that he managed the contract and received cheques payable to himself. He arranged for labourers to work on the project and organized the necessary equipment and materials. The only indication of Mr. Derrickson's involvement was the fact that cheques received by Mr. Fiessel on account of the contract were deposited into the Salmon River Ranches account. The ultimate beneficiary of the proceeds of the contract was, of course, Mr. Derrickson through this bank account. Mr. Derrickson was an undisclosed beneficiary. Only after evidence was led before the Commission were the full facts of this sign contract made public.

Ronald Derrickson said that during the highway negotiations he had sought to obtain for the Band a contract for relocation of the billboards, but that he was unable to do so. In response to questions asked by his counsel, Mr. Derrickson described this contract:

A The only involvement I had with that sign removal contract, when we were negotiating with the Department of Highways, we had requested that the Band get that contract, and when the contract was let, they omitted us from it; and we were furious about it, but there was nothing we could do.

Q I would like to back up and just go into that in a little more detail, Mr. Derrickson. When you say "we", you as Chief, and the councillors were negotiating with the Department of Highways, and you wanted that part of the work — that is, taking down the signs and putting up the signs again — included in the work that was to be done by the Westbank Indian Band?

A Not only that — yes, but not only that, we requested that the highway project be broken up into a smaller contract, so we could

> qualify under our bonding to handle some of them smaller contracts on the reserve, but we never got any of it.
>
> The only thing we got was a clearing and grubbing contract.
>
> (Transcripts: Volume LXXV, p. 11169)

Mr. Derrickson said that when the main contract had been awarded by the Ministry of Highways to the Cantex company, he did not enter into discussions with Cantex for sub-contracting the work. He said that if anyone from Council had approached Cantex in order to obtain work for Band members, it would likely have been Brian Eli. There is a brief reference to contacting Cantex with regard to relocation of highway signs in the Band Council minutes dated November 9, 1981. Under Item 5 in the minutes, there is the following notation:

> In regard to relocating the highway signs, agreement to be negotiated with Cantex using Band members for labour.

There was no evidence that any action was ever taken to obtain the sub-contract for the Band from Cantex. I found this to be somewhat surprising in view of Mr. Derrickson's professed concern about getting employment for Band members to the maximum extent possible. As we have seen, Mr. Fiessel obtained this sub-contract for sign relocation work. According to the invoices which Mr. Fiessel submitted to Cantex, he commenced work on the project on November 11, 1981. Mr. Fiessel was asked by Commission Counsel about the sub-contract from Cantex:

> Q How did you meet or come to get hold of that contractor?
> A How did I get a hold of Cantex?
> Q Yes, what was the origin of the contract?
> A Well, I was around while the negotiations on the highways were going and I knew they were — the sign contracts were coming up and I think Brian Eli said, why don't you go over there and maybe get a job with Cantex, you know, raising the signs or moving the signs. I went over to Cantex yard, which was on Boucherie Road; they had a trailer set up there and I met a fellow, the supervisor, and asked them if there was anything in the construction end of it.
> Q Yes?
> A And that's how the deal was actually consummated. He drove me through the site and looked at the signs and asked me to give him sort of a ball park figure to move the signs back, I think it was 20, 30, 40 feet, in that neighbourhood.
> Q Who was the person you dealt with?
> A Pete Doyle.
> Q And was he at that time associated with Cantex?
> A Yes.
> Q Was there any requisite or stipulations with regard to using Band labour in the original negotiations with Cantex?
> A Basically, I don't believe there was, I can't remember at all.
> Q This was all done orally, was it?
> A Yes, it was.

Q Nothing was, as far as the original contract was concerned, nothing was committed to writing at all?
A Nothing at all.

(Transcripts: Volume LXXIV, p. 11081)

Mr. Fiessel said he had some Band members working on the project from time to time. Their wages were paid by the Band. The Band does not appear to have been reimbursed by either Mr. Fiessel or Salmon River Ranches (Mr. Derrickson) for these wages. Mr. Fiessel said in his evidence:

Q And you deposited those cheques, or you caused those cheques to be deposited to a bank account known as the Salmon River Ranches band account?
A That's true.
Q Now, the expenses, or certain expenses, were paid out of the Salmon River band account?
A All of the expenses, I believe.
Q Now, I want to deal with specifically wages that were paid to Band members who worked on the job.
A Okay.
Q Now, how was that handled administratively?
A Administratively, it was — Brian came to me and asked me if I could use some local Native people to work on the signs. And I said, well, I had a pretty full staff that was with me on a daily basis, and I said anytime I could use a Native person, I would definitely use them. During the course of the whole sign contract, once we got into the higher removals, I couldn't get hardly anybody to work on them, because we were using scaffolding up to 40, 50 feet high.

Robert was basically the bravest guy to go up there. I know there was a couple that we used, and my agreement was with Norm Schwartz that any of the Band members that I used that he would keep track of it and bill Salmon River Ranches for me, whenever we used a member and then he would bill and I just handed the bills right to Barb De Schutter. . .

(Transcripts: Volume LXXIV, p. 11084)

At least three Band members were employed from time to time on the contract at rates ranging from $5.00 an hour to $6.50 per hour and the total amount of wages paid by the Band for this project was said to be in the neighbourhood of $1,000. Mr. Fiessel invoiced Cantex for his labourers at the rate of $15 per hour. This was a supervisory type of contract where Mr. Fiessel obtained the labourers and supervised the sign removal and relocation. Then he charged a fee for his time and a surcharge for the labour he employed. I think it could be best characterized as a cost-plus contract and as I understand it, that is how Mr. Fiessel viewed it. Clearly, from the profits realized, it would have been a desirable contract for the Band to obtain.

Ron Derrickson said that he had no direct involvement with obtaining employment for Band members on the sign project since employment

matters would normally be dealt with by Councillor Eli. I can appreciate that there would be a division of labour in any organization, but the Westbank Indian Band in those days was not such a large organization that Mr. Eli and Mr. Derrickson would have been operating entirely separate and apart. Mr. Fiessel stated that Brian Eli came to him after he had secured the contract with a request that he consider using Band members as labourers on the project. This was in accord with general Band policy at that time — namely to seek out maximum employment opportunities for Band members on highway jobs. Mr. Fiessel agreed to contact Mr. Eli whenever he was in need of extra help on the project. Mr. Fiessel stated that he had worked out an arrangement with Mr. Norm Schwartz, the Band Administrator, that the Band would keep track of the hours worked by its members, and then bill Mr. Fiessel for that amount, plus an additional 5 per cent. Mrs. Linda Grover, the Band bookkeeper, was called as a witness. She said that she had searched the Band financial records and could find no evidence that the amounts paid by the Band for wages on the sign project had ever been billed or repaid. She said this sort of matter would be "under the direction of Chief and Council or Norm [Schwartz] to tell us to bill them and who to bill for..." (Transcripts: Volume LXXIV, p. 11145). Mrs. Grover stated that she could not recall whether she knew in 1981 that Merv Fiessel held the sign contract personally or whether he was working for the Band. She said that Merv Fiessel had often done work for the Band. She was not aware that the monies paid to Mr. Fiessel under the Cantex contract flowed through to the Salmon River Ranches account.

Mr. Bruce Swite, a Westbank Band member, was employed on the sign relocation project for several weeks. In his testimony he stated that he got the job by phoning the Band office and talking to Brian Eli. Mr. Eli instructed him to report to the job site to work under the supervision of Mr. Fiessel. Mr. Swite stated that he was paid by the Westbank Indian Band for the time that he worked on the project.

It was not unusual at that time for Mr. Fiessel to undertake projects for the Westbank Indian Band. He stated in his evidence that at the same time that he worked on the sign relocation project, he was engaged by the Band to construct a fire hall, and he had also done some construction work in the Band housing subdivision. However, with regard to the sign relocation contract, it is clear that Mr. Fiessel was not working for the Band, but rather in a personal capacity. Because of the arrangement that he had negotiated with Mr. Derrickson, it could be said that Mr. Fiessel was working for Mr. Derrickson. Mr. Derrickson took no direct part in any negotiations between Mr. Fiessel and Cantex about the contract. But in fact, because he financed the contract and monies from Cantex flowed to him, the contract was in reality his. Mr. Fiessel was his nominee or alter ego.

As noted above, it appears from the Band Council minutes that the Council considered approaching Cantex to obtain the sign relocation work. The minutes indicate the subject was raised and thus the Chief and Council would be aware of the possibility of obtaining work for Band members on this project. Councillor Eli, according to Mr. Fiessel, advised him that he might successfully bid on the sub-contract. Since the Band had used Mr. Fiessel as a supervisor for construction projects before, it appears that the Band Council would have had the opportunity to ask Mr. Fiessel to work on behalf of the Band in regard to the Cantex contract.

Mr. Fiessel said that he was not in a financial position to undertake the contract alone, so he turned to Ronald Derrickson to seek his assistance in providing financial backing. Mr. Fiessel and Mr. Derrickson had been long-time business associates. Mr. Derrickson testified that he was pleased to back him because Mr. Fiessel owed him a considerable sum of money and this would enable him to be repaid (presumably by having control of the contract proceeds). Because Mr. Derrickson's participation in the contract was kept from public view, it could be inferred that his role as beneficiary under the contract was intentionally hidden. The route of payment was Cantex to Fiessel. No monies flowed from Salmon River Ranches to pay for Band labour. The bank transactions were known only to Mr. Fiessel and Mr. Derrickson. This transaction clearly seemed to be a case where the former Chief was in a position where his interest and the Band's were at cross-purposes, and for this reason I found it necessary to investigate the transaction. It seemed to be a breach of the fiduciary obligation owed by the Chief to the Band. An executive of government is not allowed to profit from an enterprise where he is in competition with his government. Nor can he use his position to obtain financial benefits which are not disclosed.

It was submitted by Commission Counsel that the situation with respect to the sign removal contract was generally analogous to the Ontario case of The Queen v. Arnoldi (1893) 23 O.R. 201. In that case an officer of the federal public service was charged with the offence of "misbehaviour in office". This is comparable to the offence of breach of trust of office now found in Section 111 of the Criminal Code of Canada.

> 111. Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and is liable to imprisonment for five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.

The accused, Arnoldi, was Chief Mechanical Engineer of the Department of Public Works. His duties included the hiring of contractors and equipment and the auditing of accounts. One of the vessels that was used in certain dredging operations was actually owned

by him. It had been registered in another name apparently in order to conceal the true situation with regard to its ownership. Mr. Arnoldi received funds from the contract. It was acknowledged that there was no suggestion of excess profit or overcharging. The invoices would not disclose his involvement in the contract since it was let under another name. Arnoldi was convicted at trial of misbehaviour in office, with the presiding judge reserving certain questions for the decision of the Divisional Court.

It was argued in the Divisional Court by counsel for Arnoldi that there was no proof of any duty resting on the accused which his conduct contravened, and because everyone in the Department of Public Works knew what was being done, his intention was fair and honest. It was suggested by one member of the court during argument that Arnoldi could not retain any profits from the transaction for the same reason that a trustee is not allowed to retain profits as against his beneficiary.

It was argued for the Crown that the question was not one of financial damages, but rather misbehaviour in office to the detriment of the public. It was said that if there was an injury which would be a breach of trust or an injury of a private nature, such matters would not be criminal, but, if it concerned the public and was an evil example to the public, it would be criminal. Reasons for Judgement in the Divisional Court were given by the two judges who sat on the case, Chancellor Boyd and Mr. Justice Meredith.

Chancellor Boyd said this (pp. 208–9 of the report) in the law reports:

> The main facts on which the reserved question of law arises, may be briefly abstracted: An office in the public service of Canada, charged with the expenditure and audit of public moneys, certifies to the justness and accuracy of a series of accounts as for services rendered by contractors with the government, and thereby received for himself payment for these services. The defendant having charge of public dredging in Quebec and Ontario, used his own steam yacht for the purpose of towing the dredges from place to place, and of furnishing them with supplies during the working season, and also used a storehouse of his own in Ottawa for the purpose of housing plant and machinery connected with the dredges during the winter. The steam yacht, a tug, was registered in the name of first one and then another of the defendant's friends, and accounts were made out in their names for the use of the steam yacht (not including fuel and wages, which were paid in a manner not complained of or objectionable). Accounts for the storage were sent out in the name of a third friend of the defendant. These names were used in order that "newspaper notoriety" might be avoided, and not with a view of making any dishonest gains out of the department. The services were rendered, and no undue gains were made by the defendant.
>
> Upon this statement of facts, it is urged that no criminal offence exists, because it is essential that pecuniary damage should result to

the public by reason of the irregular conduct of the officer. But in my opinion the gravity of this administrative transgression is not to be measured by mere ascertained pecuniary results. The defendant was tempted to do what he did by the prospect of gain, — he profited by his own dereliction of duty, and to accomplish his purpose it was necessary to conceal the actual transaction. This was misbehaviour in office, which is an indictable offence at common law.

The duty of the defendant was to audit the special accounts, of which he had personal cognizance as a government official, and to verify their propriety and correctness. He was placed between the contractors and the public represented by the government, in order that the claims of the one might be checked out and the rights of the other protected. This work of public audit (not less, if not more, than that of private audit), must be a real service in which no concealed pecuniary self-interest should bias the judgement of the officer, and in which the substantial truth of every transaction should be made to appear. Publicity is the preservative of free institutions; any scheme which is devised to keep from the public information to which the public is entitled, in so far as it succeeds, is prejudicial to the well-being of the community. Let the defendant's example be followed so that each trusted officer might work for himself and for private ends, then the whole public service would be honeycombed with corruption.... (My underlining)

The Chancellor further said (at p. 212):

Where there is a breach of trust, fraud, or imposition in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject, it is indictable. That such should be the rule...is essential to the existence of the country.

I take the other case cited from the State trials, Rex v. Valentine Jones, (1807) 31 St. Tr. 257, to be in principle a decision on all fours with the case in hand. The gist of the complaint was, that the defendant being the Commissary General of stores, colluded with one Higgins for the supply of public stores so that he, the defendant, might share the profits with Higgins. There was no charge of exorbitant profit. The only provision made was for sharing a fair mercantile profit. The fact that the scheme was so worked as to result in abnormal profits was treated as only an aggravation of the offence. (See pages 283, 289, 299, 313, 334.)

Therefore I conclude that the element of profit more than ordinary is immaterial, except as a circumstance to be regarded in mitigation of the defendant's conduct, to which due weight will be given when judgement is pronounced against him.

The gravity of the matter is not so much in its merely profitable aspect as in the misuse of power entrusted to the defendant for the public benefit, for the furtherance of personal ends. Public example requires the infliction of punishment when public confidence has thus been abused, and my judgement is, that conviction should be sustained.

Mr. Justice Meredith, in a short concurring judgement, said that this was not a case where proof of undue gain was necessary, nor was proof of knowledge of the facts by the defendant's superior officer any defence to the charge. He said that Arnoldi had been rightly convicted of misbehaviour in office.

Counsel for the former Band executive submitted that the Arnoldi case was distinguishable because that case involved "an element of deceit, it involves an element of somebody doing something wrong". Counsel for the former executive went on to say that "Ron Derrickson had a clear responsibility. . .that his personal interests did not conflict with the Band's". The Arnoldi case is a leading case in the area of the required standard of conduct of government officials in Canada. It is open to serious doubt that the Arnoldi case would be applicable to a chief or a member of the band council of an Indian band in Canada because such an elected officer is not expressly included within the definition of "official" in the applicable part of the Criminal Code, and the case authorities do not suggest that a member of a band executive would be found to be an "official".

The Arnoldi case is, however, highly relevant in defining the standards that should be adhered to by someone who is in the position of a fiduciary. The offence of which Arnoldi was found guilty predated the Criminal Code. The present Code offence is described as a breach of trust of office. Counsel for the Department said in his submission to the Commission:

> It is suggested that the Commission consider recommending that Section 112 of the Criminal Code of Canada be amended so as to include band chiefs, councillors and officials in the definition section. This would then provide a criminal sanction against councillors, chiefs and officials of bands abusing their positions as described in Section 112 of the Criminal Code.

I think this submission has merit. I rather think that perhaps counsel meant to refer to Section 111, but obviously both Sections 112 and 111 are directed to wrongful behaviour by public officials or by those having dealings with public officials. As counsel for the Department said, we need a less cumbersome process than a Royal Commission to address problems of conflict of interest or abuse of office. There must be available a simple mechanism to address such problems, which may be expected to arise more frequently with the increasing economic activity of Indian bands. It appears to me desirable that Parliament take steps to change the relevant definition section of the Criminal Code so that "official" includes a chief or a member of a band council.

In the Arnoldi case, the accused had concealed his involvement in the dredging transaction in order to gain a financial benefit to which he would not otherwise have been entitled. He was responsible for auditing

all accounts for work done, and was thus in point of fact auditing his own account. The Court viewed the audit function of the accused as further aggravating his deceit regarding the true ownership of the tugboat. The facts of the Arnoldi case are, in a number of ways, similar to that of Salmon River Ranches' involvement with the sign relocation contract. In both instances, a person who occupied a public position received a financial benefit while occupying his office. In both instances, a measure of concealment was used.

Counsel for the former Band executive submitted that the reasoning in the Arnoldi case was inapplicable to the Salmon River Ranches matter because there was complete disclosure. However, it will be remembered that the Court in Arnoldi held that disclosure to superiors was not an answer to the charge. In any event, there was precious little disclosure here because the whole transaction was done out of sight of the Band membership and ostensibly in the name of Mr. Fiessel. It was submitted that since the Band had earlier sought to get the contract and failed, any duty Mr. Derrickson owed to the Band with respect to that contract was at an end. Counsel summarized his argument as follows:

> Now, had Mr. Derrickson been in a situation where he was competing with the Band and had entered into this business relationship with Mr. Fiessel, then I agree that there would probably be a conflict of interest, but that's not what the evidence disclosed.
>
> It disclosed that it was history as far as the Band was concerned and Mr. Fiessel got the contract.

I was not wholly convinced the Band could not have obtained the contract. If there was a financing problem as indicated by Mr. Fiessel, could not that difficulty have been overcome? But in any event, I do not understand the gravamen of the offence in Arnoldi to have involved his competing with the government, but rather the use of his position to enhance his personal fortune. He tried to conceal his role in events by disguising the ownership of the vessel.

It may have been politically undesirable to make public the fact that Ronald Derrickson was receiving benefits under this contract. It was noted in Arnoldi that one reason why different names were used was to avoid "newspaper notoriety" I should think that it would be a feature in many secret contracts that different names would be used and usually there would be some element of concealment. One such feature was present here, namely an element of concealment of the real transaction. I can understand that Mr. Fiessel's marital problems might have led him to be secretive, but I saw no logical reason for Chief Derrickson's failure to make the fullest disclosure of the true position.

Clearly there was an element of conflict of interest in this case. I found it curious that there was a failure to ensure that Band members' wages were properly debited back to Mr. Derrickson. One would

reasonably expect that in such a delicate situation, both Chief Derrickson and the Band Administrator, Mr. Schwartz, would have taken some pains to see that there were no mix-ups that could lead to a suggestion that the Chief was profiting from Band labour without proper reimbursement to the Band.

This whole transaction was handled in a highly suspicious fashion. Mr. Fiessel said he wanted to keep the matter hidden from public view, apparently in order to avoid problems with his estranged spouse. He thus had a motive for depositing the contract cheques into an account other than his own. But the very opposite would have been true for Chief Derrickson. It is obvious that if an outsider had known of these payments flowing surreptitiously into the Chief's bank account, searching questions would have been asked about what was transpiring. Here was a profitable contract that was a possible source of good income to the Band. Mr. Fiessel, a friend and business partner of the Chief, obtains it and financing is furnished by the Chief. It appears to be a clear breach of the fiduciary duty owed by an elected official. From the perspective of Chief Derrickson, it seems to me that it was essential for him to have been very "up front" about this transaction. It should, as a minimum, have been fully documented in Band Council minutes and made clear to Mr. Schwartz and others that, in fact, this particular contract was being funded by Chief Derrickson. I find it hard to believe that if Mr. Schwartz had a true view of matters he would not have been vigilant in ensuring that proper chargebacks were made to Salmon River Ranches. There should have been scrupulous regard paid to keeping track of the time of Band members and charging it back to the Chief. Because the matter was done so secretively, not even the accounting staff at the Band offices realized that there should be a chargeback to Chief Derrickson. To me, it was relatively unimportant that the Band may have realized some financial loss on this labour payment mix-up — the sum was small and such errors in themselves are insignificant. Far more troubling was the inference that the oversight was the result of deliberate concealment in order to keep from Band view the true nature of the transaction.

I can only conclude that Chief Derrickson was sensitive to the fact that he might be criticized for appropriating the benefit of a contract that was said to have returned many thousand dollars' profit to Mr. Fiessel and thus ultimately to Mr. Derrickson himself.

If the Band was unable to obtain this contract, that circumstance could not be altered. It must be remembered that in 1981 the Band had not yet received the substantial funds that it had after 1983. The work was probably of a slightly more substantial nature than clearing and grubbing and may have required some financial strength to stand behind the contract and ensure performance. In this respect, the former Chief may have been in a more advantageous position financially than the Band at that time. I could not be sure, therefore, that it was clearly

a case where the Chief had taken this opportunity away from the Band and was in competition with the Band. But the way in which the transaction was handled could only lead to the belief that something wrongful was occurring. There was an element of deceit in the proceedings in the use of Mr. Fiessel's name to mask the reality of the transaction. Valuable benefits were obtained. The real deal was not disclosed.

There may be nothing to be criticized where a person occupying a fiduciary position takes the benefit of a contract if the beneficiary, person, or corporation to whom he or she owes a duty is unable to undertake the venture themselves. In company law, the wrongful appropriation of profits of a venture is sometimes referred to as the "corporate opportunity doctrine". Encompassed in this phrase is the idea that it is not permissible for a person in a fiduciary position to use that position to the detriment of the party to whom duties are owed. The law of equity has always frowned on any element of competition between trustee and beneficiary and there is a heavy onus on a person in a fiduciary position to justify benefits received where there is any benefit obtained. Where a person occupies a position in government, specific rules prohibit such conduct as the acceptance of benefits. I think that on the facts of this case there could have been made a prima facie case of breach of trust in office if former Chief Derrickson had been within that class of officials who fall within the parameters of Section 111 of the Criminal Code. Chief Derrickson was owed money by Mr. Fiessel. He had strong motives to wish to obtain the benefit of that contract for Mr. Fiessel and thus have Mr. Fiessel repay some of his outstanding debt. It may have been permissible for him to obtain the benefit of this contract, but only, in my view, if the fullest disclosure had been made at least to the Council. The better practice would have been to obtain informed Band consent by a Band vote, but in situations of urgency, this may not always be possible. As it was, the matter was done in a secretive, wholly unacceptable way. I found this case to be a very troubling instance where Chief Derrickson was acting in total disregard of his obligations as Chief of the Band. It was an instance where there was a conflict of interest that the Chief failed to resolve, or indeed even address. Secrecy is often a badge of fraud. This matter was kept secret. The failure to disclose the true state of affairs prompts but one conclusion: the former Chief feared disclosure of his true role in events and was conscious of wrongdoing.

Because Mr. Fiessel had inadequate funds to obtain this contract, he had to approach Chief Derrickson. In effect, he was the alter ego of Chief Derrickson in performing this contract. I have said elsewhere that I do not think it fair to prevent people in band office from obtaining legitimate business advantages. What must be avoided is acting in secret. At the very least, Chief Derrickson should have called in Mr. Schwartz, Mr. Eli, and the other councillor of the day and described in

plain terms exactly what was occurring. It should have been recorded in full detail in the minutes that such disclosure or discussion had occurred and that, the Band being unable or unwilling to take on this contract, it was therefore acceptable for the Chief to become involved through Mr. Fiessel. The way in which this situation was handled indicates a desire to keep the facts from public scrutiny. It was not easy for investigative staff of the Commission to unearth the matter, and no satisfactory explanation was ever tendered as to why there was such confusion in the Band office over reimbursement of monies paid to Band members who worked for Mr. Fiessel on the sign contract. As I have said, given the delicate circumstances, I would have expected Mr. Derrickson to have actively overseen the matter to ensure that no criticism could be directed towards him regarding use of Band funds or labour.

I view this case as an abuse of office. Problems could have been avoided by adopting the precautions I have set forth above. If a government official had behaved in this way, he probably would have found himself facing a charge of breach of trust in office. If there was no wrongful intent on the part of Mr. Derrickson, his behaviour was certainly bizarre for an elected official. While Chief Derrickson may not have been a detail man, it was my impression that he was usually quite astute in keeping track of Band business. He was alert, for instance, in lease negotiations and was an articulate correspondent. The concealment of his involvement gives the matter a sinister appearance and this illustrates the need for greater disclosure, which I address in Section II, Part C of the Report. The grave lapses in proper procedure should be a salutary warning to those in elective office about how not to behave. Band members appear to have had no access to the facts. There was a failure to document the matter in Band records. No Band Council Resolution dealt with it. This conduct is best categorized as an abuse of office and no chief should ever act this way.

The McDougall Creek Re-Channelling

Mr. Derrickson was also involved in a highways-related contract on Reserve 9. As part of the negotiations with the Ministry of Highways concerning highway construction, the Band obtained the contract for the diversion of McDougall Creek near Lower Boucherie Road on Reserve 9.

The contract price for the diversion was $100,000. This item was included in an agreement between the Band and the Ministry of Highways in the following terms:

> The Ministry will place $100,000.00 in the trust account of the Band's solicitor, in addition to the Compensation Price, for the purpose of allowing the Band to make drainage improvements on Lot 45 and, possibly, Lot 44, with the channel to be kept within Lot 45.

> . . . It is agreed that the channel shall not encroach upon the highway right-of-way except at Stn. 45 + 50 where the watercourse will cross the proposed new highway in a culvert to be supplied and installed by the Ministry, at its own cost, at the time of highway construction. The Band may draw from the $100,000.00 as construction proceeds, on 30 day draws in accordance with standard construction practice.

Mr. MacSween, the negotiator for the Ministry, explained what the works generally involved. A new segment of a secondary road (Lower Boucherie Road) crossed McDougall Creek. It was proposed that the creek should flow under the roadway through one large culvert. However, in order to ensure that the creek flowed through the culvert, it was necessary to divert the channel of the creek bed towards that culvert. It was agreed that the Band would be responsible for the work. As I understood it, the Highways Ministry would be dealing with the culvert work.

Although this contract was to be with the Band, it appeared from Band financial records that in fact two payments of $50,000 each had been made by the Band to a company called Waterslide Campground Ltd. This was a company in which Mr. Fiessel and Mr. Derrickson were interested. Because of the apparent conflict, Commission Counsel had this matter investigated. When questioned by Commission Counsel, former Chief Derrickson seemed unable to be precise about the amount of money owed to his company by WIBCO — this debt was said to have been the basis for the transfer of the contract from the Band (or WIBCO, the Band construction company) to Waterslide Campground Ltd. Once again, there seemed to be a lack of documentation of any such agreement.

A What happened, it was negotiated as a part of the overall negotiations.
Q Yes.
A And at that time, I don't know where to start and finish on this one.
Q I could give you some paper, but that's —
A No, no. Before the negotiations I guess were completed, the Band, our company had a contract with Matsqui.
Q That is the construction company?
A WIBCO, WIBCO the general contracting company.
Q Yes.
A And they had a pipe contract to put in 36-inch main lines right down to the river, or to the inlet, or to somewhere.
Q Yes.
A It was about a mile and a half of main line, and they needed a piece of equipment for that. It was a bonded contract that we won as low bidders and —

THE COMMISSIONER: Who were you contracting for? Who was WIBCO contracting with?

THE WITNESS: The City of Matsqui, or the Municipality of Matsqui, or whatever they call it.

THE COMMISSIONER: Yes.

THE WITNESS: And they were the low bidders and they got the job, but they had to — you know, WIBCO was not a company that had much equipment. We generally leased everything we had.

And when we won the contract, you know, we knew it was a tight contract financially, we were going to have to really perform to do it, so Peter Doyle, who was our superintendent for WIBCO, and Dave Derrickson, went to Edmonton to an auction sale and picked up a 1066.

Q What sort of equipment is that?

A It's an excavator.

Q Yes?

A It is probably one of the — the second or third largest excavator made. The reason they bought it was because they wouldn't have to — with the size of that excavator, they would be able to eliminate two cranes to put in the big concrete pipes, and they are very, very heavy. They are almost as heavy as a boxcar to put in.

So the excavator could dig the land, dig the ditches and the ditches were something like 30 feet deep or 28 feet deep, and so — we bought the excavator.

Q That is the construction company?

A No.

Q Oh, yourself?

A Actually —

Q And this was bought in Waterslide Campgrounds, was it not?

A I don't know where it was bought. We bought it in Edmonton and shipped it to Matsqui, and it worked there. They lost money on the Matsqui job, something like — oh, I can't remember offhand — but I know it was over $100,000 they lost on that job, and I had something like, and again I forget the exact figures, maybe a couple of hundred thousand dollars coming to me in rentals for that equipment, 150.

So the Band made me a deal, if I would knock off fees off of that, off of that hoe, I would get the McDougall Creek contract, and so I did. And I can't remember — I phoned Barb De Schutter and asked her, because somebody had told me you were going to ask this question.

Q Yes.

A I asked her and she said I knocked off $50,000 of that Matsqui contract.

Q You knocked off $50,000 off your bill to Matsqui?

A Yes, to WIBCO.

Q Yes, WIBCO to you for that equipment?

A Yes, yes.

Q So you knocked off $50,000 off that bill.

A And the other problem is, before I would buy the machine, they had to pay, number one the hauling, and it's always the way from the point of where you rent it from, and return. In that case it was from Edmonton, they had to pay for it to Matsqui, and then from Matsqui back to Kelowna — or Edmonton, but I didn't want to — well, I wasn't sure whether I wanted to take it back to Edmonton. I might take it back and sell it.

But anyways, we brought it back. They were paid the hauling back to Kelowna, and then it would do the McDougall Creek job, and that's basically what the story was.

Q Okay. Your real bill to WIBCO, that is the bill for leasing the machine to WIBCO, and for whatever expenses you had for hauling back and forth —

A Yes. They had to do any repairs on the machine too while they had it.

Q All right. Now, what do you say your real bill to WIBCO was?

A Offhand I don't know. I think it was close to $200,000, but I am not sure.

Q $200,000 was —

A Let me finish what I was saying before, though.

Q Okay.

A I checked with Barb DeSchutter and she said I had taken $50,000 off of them. Well, I talked to either Harold or Brian, I can't remember, and they thought it was 25 off of that bill. Whatever it was, the 25 or 50 that I deducted off the bill, was if I got the McDougall Creek, that's what was offered to me to do it.

Q Okay. So you yourself got the McDougall Creek contract?

A Yes.

Q And you did, yourself, the McDougall Creek contract?

A Did the job, yes.

Q And you did it —

A I hired a friend of mine to oversee it, actually there were about five or six people, or seven people working on it, including about five Band members.

Q Okay. Who did the overseeing of the contract?

A A Lyle Shunter.

Q And you would have paid Mr. Shunter out of your own pocket?

A Oh, sure.

(Transcripts: Volume LXXI, pp. 10759–10763)

From the limited documentation that did exist, it appeared that in April and May 1983, heavy equipment was rented from Waterslide Campground Ltd. to WIBCO for a total amount of $48,000. This was apparently for the use of this equipment on the Matsqui project. Mr. Derrickson, in his testimony quoted above, seemed to hold the view that the total bill from Waterslide Campground Ltd. to WIBCO was in the order of $200,000 — whether it was $200,000 or $48,000, the significant figure would appear to be the outstanding debt of $23,097.50. In August 1983, an agreement was entered into, the text of which I set out hereafter:

This agreement made this 11th day of August, 1983

BETWEEN: Ronald Michael Derrickson, Mervin Fiessel Waterslide Campground Ltd., and Merv Fiessel Construction

OF THE FIRST PART

and W I B CO. Construction Ltd. and the Westbank Indian Band

OF THE SECOND PART

WHEREAS:

1. The parties of the first part supplied equipment in the form of a 1066 Hoe, a John Deere 555 Loader, etc. in accordance with an agreement with the parties of the second part, as per schedule "A" attached hereto marked Equipment Rental: From Waterslide Campground to WIBCO Construction Ltd. for period April 23, 1983 to May 28, 1983.

2. The parties of the second part acknowledge they are unable to pay the parties of the first part the full amount owing because of cost overruns.

3. The parties of the first part hereby agrees to accept as payment in full the sum of Twenty-five Thousand ($25,000.00) dollars of the total amount due from the Matsqui contract and further agrees to cancel the balance of $23,097.50 from the invoice.

4. In consideration of the above, the parties of the second part, their heirs, executors, administrators and assigns release and forever discharge the parties of the first part from any and all expenditures and work done for either parties, all actions, causes of actions, claims and demands, whether known or unknown, suspected or unsuspected, whatsoever and wheresoever which hereafter can, shall or may have and which have arisen out of or resulted in any way from or developed from or related in any way whatsoever to the herein parties up to and including this date.

SIGNED, SEALED AND
DELIVERED

"Barb DeSchutter" "Ronald M. Derrickson"
In the presence of

On behalf of the Westbank Indian Band and W I B CO. Construction Ltd.

"Brian Eli"

"H.J. Derickson"

It appears that to satisfy the then outstanding $48,000 debt, the parties agreed that WIBCO would pay $25,000 and that the remaining debt of $23,097.50 would be cancelled. According to Mr. Derrickson, it was

further agreed that WIBCO and the Band would allow the diversion contract for McDougall Creek to be obtained by Waterslide Campground Ltd. Presumably this was to compensate Waterslide Campground (Derrickson and Fiessel) for any loss sustained by reason of not receiving the full sum due on the equipment rental debt. One is left to wonder why such agreement was never documented. It would have been a simple matter to recite it in the text of the agreement set out above. The evidence does not disclose the total amount of profit realized on this contract, but it was clear that Ronald Derrickson wished to obtain the contract and viewed it as a source of profit. No breakdown of the costing on this contract was furnished, so it was not possible to determine the precise amount that accrued to Waterslide Campground Ltd. on a net basis. If it generated profit on any similar scale as the sign contract, it was a highly desirable contract to obtain.

While the financial details of this contract are more sparse than in the case of the sign removal contract, there are obvious problems with this particular transaction. The contract was clearly available to the Band and/or to its construction company, WIBCO. That was the original agreement with the Ministry. There was no suggestion that the Band could not obtain this contract, as was said to be the case with the sign contract. The benefit of the contract was appropriated by Waterslide Campground Ltd., the ultimate beneficiaries being Mr. Derrickson and Mr. Fiessel. Again, if Mr. Fiessel was heavily indebted to Mr. Derrickson, as he testified, then the ultimate beneficiary of the funds would be Mr. Derrickson. At all material times, Mr. Derrickson was Chief of the Westbank Indian Band and a major negotiator for the Band with the Ministry of Highways. This was a situation that called for complete disclosure, proper documentation, and an indication from the Band (or at a minimum, Band Council) that it was acceptable for this benefit to accrue to Waterslide Campground Ltd.

I am at a loss to understand why there was no documentation of any agreement by the Band and WIBCO to assign the benefit of this contract to Waterslide Campground Ltd. The only related document is the agreement of August 11, 1983, which simply recites that $23,097.50 is being forgiven and that the parties release each other mutually from all actions, etc. There is nothing in this particular document that reflects in any way the alleged agreement to permit the contract to be obtained by Waterslide Campground Ltd.

Unlike the situation in the sign relocation contract, there does not appear to have been any potential problem with the Band or its construction company obtaining the benefit of this contract. Here again there was a total failure of disclosure to the Band and there was absolutely nothing documented, either in any Band Council minutes or any written agreement setting forth an understanding between the Band Council and Waterslide Campground Ltd. that this contract should be

assigned. Given the clear conflict of interest, these omissions were obvious lapses of proper procedure or, indeed, of any procedure.

It is surprising, to say the least, that the Band Administrator would not have recognized this problem. As I have said in connection with the sign contract, it would seem to me desirable that the Band should have had a chance to comment on the situation to ameliorate the problem of conflict of interest. At a bare minimum, there should have been full documentation of the authorization by members of the Band executive, excluding Chief Derrickson, to assign this contract to Waterslide Campground Ltd. As it stands, there seems to have been a bare-faced appropriation of a contract and its proceeds from the Band and WIBCO by Waterslide Campground Ltd. Here is an absolute failure by the Band Council, the Chief, and the Band Administrator to pay the least regard to an obvious conflict of interest situation and to take steps to ensure that the matter was handled appropriately.

Another disquieting feature of this transaction is the fact that Waterslide Campground Ltd. did not furnish any accounting, then or later, for the financial experience on this contract. For instance, it may be that the true profit was $80,000, or it may be that it was $10,000. There is nothing in the record, either by way of documentary evidence or any evidence adduced that would satisfy any of these questions. And Band members have a right to get the answers to such questions. It seems to me quite wrong for the Chief of the Band to be receiving a contract of this sort when there is no disclosure as to the actual profitability. If the facts are not known, then no judgement can be made by Band members or by other Council members as to the propriety or otherwise of the arrangement.

The situation was not improved by the wording of the Band Council Resolution of October 24, 1983 concerning the matter. It says: "be it resolved that subject to the approval of the Province of British Columbia, we hereby approve the release of the funds held in trust by Mr. Allen of a construction draw in the amount of $50,000 made payable to the Westbank Indian Band". That Resolution was signed by the two Band councillors and Chief Derrickson. Likewise, the Band Council Resolution of November 25, 1983 concerning the final $50,000 draw is signed by Chief Derrickson and the two councillors and simply recites that the work has been done to the satisfaction of the Ministry of Highways and the Westbank Indian Band. It appears that the Band Administrator, Mr. Schwartz, was involved in at least one of the construction draws because his name appears on one of the authorizing vouchers. Also, there is, upon inspection of the documentation (Exhibit 205), an element of non-disclosure approaching deceit. As I said, the original arrangement with the Ministry called for the Band to do the work. The wording of the Band Council Resolutions makes no disclosure of the change — indeed, the Band Council Resolution of

October 24, 1983 gives the impression that the Band was doing the work.

The failure of all concerned to be alive to this conflict of interest is breath-taking. It is quite inconceivable to me that any official of a government, be it municipal, provincial, or federal, could escape prosecution for breach of trust of his office in the circumstances that are disclosed here by the records, or perhaps more properly, by the lack of records. Where there is such a plain and obvious conflict of interest, it would require the most scrupulous documentation and open procedure to make it clear to all that there was no sinister conduct. Counsel for the former Band executive said in his submission before the Commission relative to the McDougall Creek situation:

> The Band company wasn't in a position to pay that money; an agreement was made, and my understanding, Mr. Commissioner, and you may wish to review this in the evidence because I can't put my finger on it at the moment, but my understanding was also that the Band was not in a position to perform that contract at that point in time; that Mr. Derrickson gave evidence that for whatever reason, the Band equipment was not available to perform that contract at that point in time, and therefore it arose that he would use his equipment to complete that particular contract, and there would be a set-off in reference to the monies that were owed for the rental of the particular equipment.
>
> Again, I would respectfully suggest that there was complete disclosure on that matter, and it was known to all parties involved as to what the deal was and the nature of the transaction.

I am doubtful that the facts support this submission. It seemed to me that the Band or WIBCO was in a position to undertake this contract. No written agreement was ever produced setting out an understanding between either the Band or WIBCO and Waterslide Campground Ltd. Given the obvious conflict of interest that existed here, I found that omission surprising.

With regard to the submission that there was complete disclosure on this matter, it can only be said that the matter was handled less surreptitiously than the sign relocation contract. Cheques flowed to Waterslide Campground Ltd. through the Band office after the Ministry of Highways had paid the funds to the Band. But there was an almost total failure of disclosure in this matter, or at least of any meaningful disclosure. No one in the Band, save perhaps a Council member familiar with the highway agreement, would have understood what was really happening.

I think that this situation falls into the category of abuse of office regardless of whether or not there was some financial basis for the Waterslide Campground Ltd. to be awarded this contract (because of the less than full rental payments on the earlier contract). Mr.

Derrickson failed to disclose this matter properly to the Band, and there was further failure to document any agreement in even the most rudimentary way. As I have said before, if potential or actual benefit is to be appropriated by a Chief or a sitting member of council, there must be clear disclosure and full documentation of any agreement made to permit this benefit. Band members have a right to know what their executive is doing. They may or may not agree with the transaction, but they should certainly have the transaction brought to their attention. Only in this way can conflict be dealt with and obviated. The conduct in the McDougall Creek case is the sort of procedure that casts a band government in a bad light and is ultimately harmful to progress towards self-government.

The point of the matter is that if these situations are properly documented and the other council members, as a minimum, concur that certain actions should be taken, then it will be plain that the issue has at least been considered. Regarding the McDougall Creek contract, there is absolutely no indication that the matter was examined in any informed or orderly way, and one is left with the inference that the contract was simply "scooped" by the company in which Mr. Fiessel and Mr. Derrickson were interested. This is an obvious case of competition between an agency of the incumbent Chief with the Band and WIBCO, and was, of course, quite impermissible because of the fiduciary relationship of the executive to the Band. It could only be rendered permissible by informed consent, preferably of the Band, but at a bare minimum by those members of the executive who had no financial interest in the contract.

Matters relating to both the sign relocation contract and the McDougall Creek diversion were handled extremely poorly by the Band executive, and in particular by former Chief Derrickson. Despite the clear and obvious conflict of interest that existed, no steps were taken to deal with the conflicts. There were no steps taken to deal with conflict of interest situations; indeed, I am not sure that anyone in control at Westbank even recognized or understood what a conflict of interest situation was. I cannot believe that Chief Derrickson, with his extensive business background and experience, was not aware of the need to be more forthright in dealing with such situations. I am also disappointed that the Band Administrator failed to advise elected officials concerning their responsibilities. The lapses here were obvious and severe. It is hard for me to appreciate how a former member of the Department, which Mr. Schwartz was, could fail to recognize the difficulty and advise on a proper course of disclosure and documentation. He may not have been fully aware of the sign contract problems, but he apparently was involved in some of the paperwork on the McDougall Creek payments.

Both the sign contract and the McDougall Creek contract were cases in which abuse of office occurred. They are models of how an elected

member of a band executive ought not to act. The Department should take steps to make plain to band councils throughout the country the nature of conflict of interest, asking council members and chiefs to be vigilant in this area to avoid a repetition of the conduct in these two instances at Westbank. I hope education suffices — if not, it may be necessary to resort to the stronger measure of prosecution suggested by counsel for the Department.

Chapter 11

Possible Abuse of Department Funding

Pursuant to the Department's policy of devolving the administration of programs to band councils, the Westbank Indian Band administers a Social Assistance program for eligible recipients living on the Reserves. The Band Council employs a Social Assistance Coordinator to oversee the management of this program. The Department furnishes a manual setting out the rules and procedures for the guidance of the Band and also provides funding to cover the costs involved.

Evidence brought before this Inquiry revealed that funds from the Social Assistance Program had been used to pay for television receivers known as "satellite dishes". These receivers were purchased for various Band members resident at the Band housing subdivision on Reserve 9. Mr. Brian Eli, a former Councillor of the Band, gave evidence concerning the purchase of these satellite dishes for various Band members and how it was planned to recoup costs from Social Assistance funds.

Mr. Eli stated that he had developed a plan to purchase a number of satellite dishes to enable residents in the Band subdivision to improve television reception at homes in the area. He explained that television reception was a problem in this subdivision because of the interference caused by the proximity of Mt. Boucherie. Cable television services were either unavailable or very expensive. Due to a volume purchase, Mr. Eli had managed to get what he considered to be a very good price on satellite dishes. The proposal was that the Band would purchase the dishes and enter into contracts with the recipients (Band members) to pay the money back over a period of time. Mr. Eli planned to structure the debt as a second mortgage on Band housing and to require residents to pay an additional amount of "rent" each month until the cost of the dish was reimbursed to the Band. However, when the plan was presented to the Council, Chief Derrickson expressed reservations about the purchase. Mr. Derrickson was concerned that the Band would not be repaid. He perceived a potential difficulty in the case of some residents of the Band subdivision who were not regularly employed. In those cases where purchasers were receiving Social Assistance, Mr. Eli proposed that the second mortgage would be included in the shelter cost component of their monthly allowance.

The Commission heard evidence from Mrs. Rose Derrickson, Councillor and current Social Assistance Coordinator for the Band. She had assumed the duties of Coordinator in the fall of 1986 and had sought the advice of Departmental staff on various matters pertaining to

the Social Assistance program at Westbank as she became familiar with her responsibilities. She realized that Social Assistance funds had been used to purchase satellite dishes for certain Band members from April 1984 through June 1986.

Mr. Gordon Van der Sar, a Social Assistance Adviser from the Vancouver District Office, visited Westbank in November 1986. It had come to his attention that certain members of the Westbank Indian Band who were receiving Social Assistance had purchased satellite dishes apparently using public funds. He asked Rose Derrickson about the matter and she said that while she could confirm that payments of some sort had occurred, she was unaware of the full details of the purchases because they had taken place before she assumed her duties. She was under the impression that the use of Social Assistance funds for that purpose had been approved by the Department. Mr. Van der Sar did not think that this was a permitted use of funds and wished to have the matter further investigated. He instructed her to make a complete analysis of Social Assistance files and Band financial records to determine how Social Assistance funds had been utilized.

Mrs. Derrickson related in her evidence how the purchase plan had operated. The terms of each individual contract required that monthly payments of $200 be made for a total of fifteen months, commencing in April 1984. In those cases where a purchaser was receiving Social Assistance, this $200 monthly payment was recorded as a "shelter cost" in the Band's Social Assistance files. In some cases, the $200 payment was described as "second mortgage". In each case, the $200 item shown as a shelter cost was followed by the letters "PD". This was a notation to pay the $200 directly to the Westbank Indian Band. The $200 monthly payment was charged against the Social Assistance funds that were available to the Band, and credited to the Westbank Indian Band's account as a payment on the individual's satellite dish contract with the Band.

Eleven persons who obtained satellite dishes were receiving Social Assistance during the entire fifteen-month period of the contract. There were other instances where purchasers of satellite dishes had received Social Assistance funds from time to time during the contract. While they were receiving Social Assistance, the $200 monthly payment was paid directly to the Band from the Social Assistance funds.

Each month the Band sent to the Department an accounting of monies spent on the Social Assistance program. The Department then reimbursed the Band for the full amount it had expended. There was no specific reference to the expenditure of Social Assistance funds for satellite dishes on these monthly accounting statements, and indeed the monthly reports are not detailed enough to show that kind of information. The individual Social Assistance files may have revealed a payment as a second mortgage, but there was no reference in the

individual files to a purchase of a satellite dish on behalf of a recipient of Social Assistance.

Mr. Van der Sar stated that he had done a review of the Westbank Band Social Assistance files in the late spring of 1986, following a request from Chief Derrickson for a general review. He took a random sampling of 10 per cent of the case load and subsequently reported on the management of the Social Assistance program at Westbank. Mr. Van der Sar did not discover that Social Assistance funds were being used to purchase satellite dishes during the course of his review, nor were the purchases brought to his attention. After his review, he indicated to the Band administration that he felt generally comfortable about the operation of this program.

Mr. Van der Sar did indicate that, as a result of his review, he was concerned that the Social Assistance records did not contain sufficient back-up information to justify the shelter costs shown for each recipient. Of the files he had reviewed, some had shown this $200 payment under "shelter cost". He testified that he did not know what the notation "$200 PD" meant. As noted, some of the forms showed the $200 figure as a second mortgage as well as the direct payment notation. Mr. Van der Sar said that the "$200 PD" notation would not have caused him any particular concern or alarm, as there are cases in which payments are made directly to a third party. He testified that he was unaware of this use of Social Assistance funds prior to visiting the Westbank Band again in November 1986 to review programs. He said that the use of Social Assistance funds to purchase items such as satellite dishes would not be an authorized expenditure under this program. He was unpleasantly surprised to discover what the "200 P.D." notations signified.

Former Councillor Eli testified that he had sought and obtained Departmental approval to use Social Assistance funds for the purchase of the equipment. He said that he had received this approval from the late Mr. Simon Muldoe, former District Manager for the Department of Indian Affairs Central District. He said in cross-examination by counsel for the Department:

> Q Who was at that visit?
> A Myself, Norm Schwartz and Simon Muldoe.
> Q Just the three of you?
> A Yes, in his office.
>
> (Transcripts: Volume LXII, p. 9115)

Mr. Norman Schwartz, Band Administrator, also gave evidence about the satellite dish purchases. He stated that he and Mr. Eli had met with Mr. Muldoe and Ms. Donna Moroz before proceeding with purchase of the satellite dishes. He said in answer to a question by counsel for the former Band executive:

A . . .If I remember correctly, Brian Eli and myself did speak to Simon Muldoe. In fact, we didn't go down there specifically for that purpose, but we did talk to him about it and mentioned it to him. We also spoke to Donna Moroz on it. They indicated very clearly in regard to any of the ones that were on SA that —
Q If I could just stop you there for a moment. "SA", social assistance?
A Social assistance.
Q Yes, all right.
A We have to go back further than that, though. When the original concept of the satellite dishes came up there was no intent for any of the social assistance people to have the satellite dishes. What happened was a letter was sent out to the Band subdivision, and the letter was sent out by — I think it was under Brian's signature — by Heidi Simkins, who was an employee, indicating that anybody in the Band subdivision that required a satellite dish, to let them know, because they were under the impression that they could get some satellite dishes quite a bit cheaper.

(Transcripts: Volume LIII, p. 7337)

Mr. Muldoe died in the fall of 1985, but Ms. Moroz was available to testify before the Inquiry. She had been employed with the Department of Indian Affairs Central District as the Superintendent of Social Services, although she is no longer with the Department. She said that she did not take part in any meeting with Mr. Schwartz or Mr. Eli where the purchase of satellite dishes was discussed. She said when questioned by counsel for the Department:

Q And, you have described earlier, Mr. Muldoe's position. Do you have any meetings of any kind with Mr. Muldoe present and Mr. Eli and Mr. Schwartz?
A No, I did not.
Q Did you, yourself, discuss with Mr. Eli and Mr. Schwartz, a proposal, or one or the other of them, a proposal of the nature that I have just described?
A No, I did not.
Q Had such a proposal been put to you, would you have approved it?
A Absolutely not.
Q And why not?
A Well, it certainly would not be within the regulations of the Department to accept payment for satellite dishes out of welfare funds. This is definitely not the purpose to which welfare funds are to be put.

(Transcripts: Volume LXIX, p. 10407)

Ms. Moroz acknowledged under cross-examination by counsel for the former executive that while she could not recall taking part in a meeting with Mr. Muldoe, Mr. Schwartz, and Mr. Eli concerning the purchase of satellite dishes, she had on occasion seen Mr. Muldoe about the office around this time. I think she was acknowledging that it might have been possible for Mr. Muldoe to meet with Messrs. Schwartz and Eli on some occasion when she was not present.

It seems quite improbable to me that the use of Social Assistance funds to purchase these satellite dishes would have been knowingly approved by an official of the Department of Indian Affairs. Mr. Schwartz and Mr. Eli may have believed that Mr. Muldoe had given approval in principle to the plan, but it was my very clear impression from the evidence of Mr. Van der Sar and Ms. Moroz that this was not a course that would generally find favour with the Department. I think Chief Derrickson was aware of the dubious nature of this proceeding and carefully refrained from endorsing it. Given the nature of the planned purchase, it seems elementary to me that it would be the practice of officials involved to carefully document this matter in order to be able to fend off possible criticism of such an expenditure. The absence of such documentation speaks louder in this case than any of the evidence I heard. I have serious doubts that Mr. Muldoe ever approved of this expenditure and I think former Chief Derrickson was showing good sense in steering well clear of this potential minefield.

The scheme to purchase satellite dishes for residents of the Band subdivision was for their benefit in that it was intended to improve the quality of life of Band members who otherwise would not enjoy the range of television programming that was available to other persons resident in the general area. When Mr. Eli and Mr. Schwartz proposed the plan, they felt that those less fortunate persons who relied on Social Assistance for their only source of income should also be able to enjoy the benefits of good television reception.

I have considerable sympathy for the sentiments that underlay this foray into creative accounting. Individuals receiving assistance should not be made to feel like second-class people, nor should their children be deprived of advantages. The problem with this matter was that it was reflected but dimly on the books — it appeared surreptitious. Also, here was a relatively well-off band getting an apparent advantage from the Department of Indian Affairs. Was it really fair? Surely there were other alternatives available to the Band Council. This may have been a case where the Band itself should have provided funding. For example, the Band might have voted the funds from its own revenue account rather than making the purchases out of public funds. Here would have been a worthy cause for the application of some of the cut-off funds.

One cannot fault the recipients of the satellite dishes for participation in the plan. The persons responsible for administering the Social Assistance program instigated the purchase and worked out the repayment plan. The average recipient of Social Assistance would naturally presume that everything was "above board". I certainly do not recommend that the Department should take any action concerning the individual recipients.

This scheme was a half-baked one and ultimately not in the best interests of Indian bands in Canada. The purchase of the satellite dishes

became a matter of controversy at Westbank. The Westbank Indian Action and Advisory Council specifically mentioned the use of Social Assistance funds for the purchase of the satellite dishes as a grievance against the former Chief and Council. Public censure is to be expected when public funds are put to such a use. It is essential that those persons responsible for managing public funds have a clear understanding of what is and what is not appropriate expenditure. This is especially so when they are charged with managing a program like Social Assistance, where flexibility in rules demands responsibility in judgement.

But let it be said that the Department should manifest a degree of flexibility in its allocation of Social Assistance resources. Putting some money into improving the quality of life is as necessary as meeting bare necessities. I trust that legitimate requests can be approved by Departmental officials, but in so doing there must be a rough equality of treatment for all entitled. Also, the matter must be handled in a completely frank and honest manner and properly documented. The way in which the matter was handled here was not a model for the future.

Mr. Eli and Mr. Schwartz failed to document this program in any satisfactory fashion. A moment's reflection by either must have made it clear to them that this sort of matter had great potential for trouble. Mr. Schwartz especially is to be faulted for this lapse. He was the Band Administrator and was there to advise and inform the elected officials. He was a former member of the Department. With his experience, I find it absolutely inexplicable that he failed to document the purchase of these satellite dishes in a proper and detailed fashion. Such failures can put a band in a bad light and lead to unnecessary controversy, as was the case in this instance.

Chapter 12

Controversy at Westbank: The Action Committee

Mr. Ronald M. Derrickson served as Chief of the Westbank Band from 1976 until 1986, a period of some ten years. Not surprisingly, certain dissatisfactions and grievances developed over that period of time. In political life, it is not possible to keep all of the people happy all of the time. Mr. Derrickson was a controversial figure, and some of the projects and policies which he implemented or attempted to implement caused a certain amount of resentment on the part of some Band members. Near the end of Mr. Derrickson's last term as Chief in 1986, a number of Band members who were dissatisfied with the administration of Band affairs formed a group that styled itself the Westbank Indian Action and Advisory Council (hereinafter sometimes called the "Action Committee"). Assisted by a person who is not a band member, one Nicholas P. Kayban, the group prepared a petition to the Minister of Indian Affairs calling for the removal of the then Chief and Council. The group also sought to involve Members of Parliament in the affairs of the Westbank Indian Band.

The Westbank Indian Action and Advisory Council may be best described as a loosely knit group of political opponents of Ron Derrickson. In petitions and press releases, the group listed a number of general and specific grievances and made allegations of wrongdoing on the part of the Band executive. The activities of the Action Committee appeared to peak during the spring of 1986 and abated following the election of the new Chief and Council in the summer of 1986.

The operations of the Action Committee were not unlike those of previous dissident groups at Westbank. The Commission heard evidence from Band members Mary Eli and Millie Jack, who described the activities of former dissident groups from 1972 to 1976. Some were pushing for more development and were dissatisfied with the lack of progress by the then Chief and Council. Petitions were organized and news releases were given to the media, very much like the mode of action undertaken by the Action Committee. I got the impression that political feeling at Westbank could be quite intense and sometimes could lead to actions that one might term "overenthusiastic".

Present Chief Robert Louie gave evidence of his past experience on the Band Council and on the Board of Directors of the Band's development company in the mid-1970's. Apparently a group of Band members, unhappy with the way that Band land development was

progressing, had spread reports that the Band was in a bankrupt situation, thus threatening the viability of the development company. The Council of that day considered legal action against those who had made such statements, but decided against it.

I understand legal proceedings were commenced arising from the statements made by the Westbank Indian Action and Advisory Council. Comments were made to the press and others about Band management and personnel, comments which have resulted in the lawsuit filed by former Chief Derrickson and councillors for damages for defamation.

The 1986 dissident group appears to have been motivated by a number of specific concerns which arose from a variety of circumstances. Some Band members had long-standing grievances about the distribution of Reserve land, or the proposed use of Reserve land. Others were concerned about a lack of disclosure of Band business affairs to the general membership, or a general lack of communication between the executive and membership. The lack of full information in turn spawned rumour and innuendo, but perhaps the main catalyst of serious discontent was the Band's greatly increased wealth resulting from a cut-off claims settlement and funds received for land acquired for highway use. As might be expected on reserves where substantial portions of land are held by individual locatees, not all members of the Westbank Band were as fortunate as some of their neighbours, depending on the location of their land. Some may have felt "left out" in terms of the compensation received. And, of course, there was the collapse of the Northland Bank, an institution in which the Band had a significant financial investment. Band finances were more robust and those in political opposition to Ron Derrickson were increasingly concerned or professed to be concerned about the stewardship of Band funds. The Band had a considerable amount of its money either invested in or on deposit with Northland Bank. The Bank failure in September 1985 created serious concern and unrest on the part of many Band members. There were additional specific complaints which were articulated through the various petitions and press releases, but the particular outburst of protest in the spring of 1986 can only be fully understood when seen in context against a background of political frustration, lack of confidence in the Band executive, and apparent financial catastrophe.

The role of Nicholas Kayban in organizing and encouraging the dissident Band members was quite significant. Mr. Kayban testified that he first made contact with some dissatisfied Westbank Band members in October 1985, and agreed to help them have their grievances addressed through the assistance of his alleged political connections. During the winter and spring of 1986, Mr. Kayban met with groups of Band members on several occasions. He eventually asked them to sign a petition authorizing him to act on their behalf. Once he received this request in writing, Mr. Kayban became actively involved

with the group as a self-styled consultant. He forwarded the group's request to have him act on their behalf, together with his acceptance, to Mr. Fred King, M.P. (whose riding included Westbank), in order that he could put their concerns before the Minister of Indian Affairs. Both Mr. Kayban and the Band members were hoping for some financial assistance, although it is not clear from precisely what source. The Action Committee sought funding to help them advance their cause and have their grievances heard. Mr. Kayban was hoping that funds would be available to pay for his services. It was he who suggested that the group list their concerns in a petition to be forwarded to the Minister.

After the petition had been circulated and numerous Band members had signed it, Mr. Kayban delivered it to Ottawa. Mr. Kayban discussed the petition and promoted the group's cause with several Members of Parliament, including Mr. King, Dr. Lorne Greenaway, and Mr. David Kilgour. Dr. Greenaway was a member of the Standing Committee on Indian Affairs and Mr. Kilgour was then the parliamentary secretary to the Minister of Indian Affairs and Northern Development.

Perhaps in a misguided effort to augment the political pressure, Mr. Kayban and some members of the dissident group drafted a document containing several specific allegations of wrongdoing, which Mr. Kayban delivered to a Kelowna radio station. Shortly afterwards, Mr. Kayban, accompanied by several members of the group, travelled to Edmonton to meet with Mr. Kilgour. They sought his assistance in addressing their grievances. By this time the Action and Advisory Council had achieved a certain visibility. They had also accumulated some debts in the process as legal and other bills mounted. When it became clear to Mr. Kayban that the group could not expect any special funding, he became disenchanted with the cause. By then a lawsuit had been filed against some members of the group and Mr. Kayban.

He began to distance himself from the group in June 1986 when it became apparent that he might not be paid for his services. The petition, which was signed by a large number of Band members and forwarded with the "press release" to the Minister in the spring of 1986, was entered as an exhibit during the course of this Inquiry. While the written documents provide some insight into the nature of the complaints of the dissident group, the Commission also heard evidence from several Band members who had signed the petition. The petition requested the removal from office of Chief Derrickson and his councillors. A number of complaints were enumerated as follows:

— failure to hold regular Band meetings;
— misappropriation of Band property and assets;
— illegal enforcement of Band by-laws, such as the Rentalsman by-law;

— fraudulent representation of the Westbank Indian Band;
— failure to consult with and advise Band members of Band dealings and business affairs such as the removal of band assets from the province without knowledge or consent of Band members — Northland Bank.

These broadly worded grievances apparently held different meanings for different people. Ms. Barbara Coble testified that she was not satisfied with the number of Band meetings that were held during the year. She felt that there was a continuing failure to consult the membership on the part of the Chief and councillors. She believed that the purchase of shares by the Band in the Northland Bank amounted to a "misappropriation" of Band assets. As well, she stated that the Chief was guilty of fraudulent representation of the Band because of statements he made concerning the Band and the wealth of its members to the media, which statements she believed painted a picture that was far from accurate. She said only a few Band members were wealthy and that an overly optimistic picture had been painted of the Band as a group of wealthy people.

Ms. Coble was concerned about the purchase of several businesses by the Band. She felt there was lack of disclosure to the Band membership regarding details of those purchases and that there was considerable division among Band members. She said she had been opposed to the granting of Section 60 authority to the Band in 1985 when Mr. Derrickson was Chief, as she did not feel comfortable that the then Chief and Council should have the extensive land management powers conferred under Section 60 of the Indian Act. She was sufficiently concerned to circulate a petition among Band members to counteract the Band vote which had been taken, which had been in favour of the Band receiving Section 60 authority. She maintained that many Band members did not attend Band meetings because they did not like to vote (as the voting was usually done) by a show of hands. She testified that many Band members felt intimidated at Band meetings and consequently stayed away. Ms. Coble suggested that voting at Band meetings should be done by secret ballot. I must say that this suggestion is one that I think has merit — it seems to me that it would enhance the democratic process and I recommend it for consideration and possible adoption by this Band and others in Canada.

Mrs. Rose Derrickson (a past and present Band councillor) also gave evidence as to why she signed the petition. She felt that Band meetings were held too infrequently and was concerned with how welfare monies were being managed, in particular the use of social assistance funds to purchase satellite dishes for some Band members and to pay for paving driveways. In addition, she expressed concern about how the previous Band Council had obtained funds from the provincial government to build a community centre, though it was not in fact built. I looked into this matter, and while I think the then Band executive congratulated

itself about getting the facilities funded to a greater degree than was appropriate in view of the modest results, I was satisfied that funds obtained were spent for the welfare of the Band. Mrs. Derrickson listed both these concerns as falling within the category of "misappropriation of assets" and "fraudulent representation" of the Band. She was also greatly concerned about the collapse of the Northland Bank as it affected Band fortunes. She was aware that the Band had funds on deposit there, and she feared that a significant loss of funds could occur to the great detriment of the Band. Her concerns here were not misplaced and to this day that matter is not wholly resolved. I deal with Northland Bank issues in some detail in Chapter 4.

Present Chief Robert Louie's main concern was that the Band Council had used Band money to purchase shares in the Northland Bank without prior consultation with the Band membership at large. His concerns about the need for fuller explanation and investigation of the transaction were heightened because he was aware that Mr. Ron Derrickson had been a director of the Northland Bank. Mr. Louie was also doubtful about the existence of an alleged fund which was said to have been placed "in trust" for minors. The fund was to have originated from various per capita distributions made over the years. His concerns about the existence or safety of that fund were compounded by the demise of the Northland Bank. He did not feel that Band members had been given a clear picture of Band investments.

Mr. Louie had been a long-time political opponent of Mr. Ronald Derrickson, having run in opposition to Mr. Derrickson in two previous Band elections. He recalled an incident which led to a political falling out between the two men, which is illustrative of the kind of division caused by some of Mr. Derrickson's development initiatives on the Reserves. In 1976, Mr. Derrickson apparently was pressuring Robert Louie to prevail on his grandmother to join in the overall development plan for Reserve 10. That would have involved agreeing to turn the Louie farm into a golf course, a plan to which Mrs. Louie was decidedly not partial. After she had expressed her wishes to her grandson, Mr. Louie was not disposed to put further pressure on her. This stance was said to be not pleasing to Mr. Derrickson. Because of the pressures he felt himself under, Mr. Louie said he elected to resign his post on the Board of Directors of the Band Development Company. This was the company chiefly concerned with development of the Lakeridge Park subdivision.

On numerous occasions during the course of this Inquiry, it was suggested that there is a basic division among the Westbank Band members between those who favoured development and those who did not. While there are obviously differences of opinion among Band members over the issue of development of Reserve lands, it did not appear to be simply a dispute between those in favour of development and those opposed. Rather, there was and is a division of opinion as to

how development is to take place, including what type of development and when and where it is to occur. There is no agreement in place to equitably distribute the proceeds from developments on locatee lands. Without such an agreement, a situation could arise where the landowner who has a golf course, for example, could receive far less than one who has a resort hotel, even though one development complements the other and the comprehensive plan may be viewed as one for the common good and prosperity of all Band members. Perhaps it is natural that there would be opposition by some locatees to develop their lands for the "common good" when an appropriate revenue-sharing scheme is not yet fully worked out. Indian reserves are not the only places where development proposals divide communities. Such differences of opinion are common to many communities.

Mr. Larry Derrickson, a cousin of the former Chief, gave evidence during the Inquiry. He testified that he believed that in the past the former Chief had interfered with certain dealings involving family land. Mr. Derrickson's evidence and that of his brother, Mr. Dave Derrickson, illustrated how politics can become entangled with family relationships. Larry and Dave Derrickson held and hold a joint interest in a small but valuable piece of property on Reserve 9. According to their evidence, Dave Derrickson had at one time agreed to transfer his share in that property to Larry Derrickson. Transfer papers were duly drawn up and signed by both brothers. Larry believed that the deal was complete except for final processing by the Department of Indian Affairs. However, without telling Larry, Dave Derrickson apparently changed his mind about the deal and sought the intervention of then Chief Ron Derrickson to stop the transfer from being approved. Ms. Barbara Shmigelsky, secretary to Chief Derrickson at the material time, said that she had no recollection of Chief Derrickson interfering in the matter but that for some unknown reason, the transfer was never processed at the Department of Indian Affairs. Because of the unavailability of Mr. Sheldon McCullough as a witness (due to illness), the Commission is unable to say just why this transfer was not completed. Larry Derrickson suspected that some pressure had been applied to "gum up the works" on the transfer but the Commission could not find evidence to support wrongful interference by the Band executive.

The transfer was never completed and the landholding situation between the two brothers has remained the same to the present. Larry Derrickson testified that he and his brother had a falling out some years ago and that Dave had a very close friendship with Ron Derrickson. The land transfer controversy and other political differences, including Larry's involvement with the Westbank Indian Action and Advisory Council, not only pushed Larry politically farther apart from his cousin Ron Derrickson, but also, regrettably, resulted in a widening rift in the relationship between the two brothers.

When Larry Derrickson was asked what he understood when he signed the petition, he too referred to the purchase of shares in the Northland Bank without the knowledge of the Band membership as amounting to a misappropriation of Band assets. He also objected to the Band Council's purchase of lands at Gallagher's Canyon without seeking more specific approval of the transaction from Band members.

Analysis of Complaints

Many of the complaints in the Action Committee petition appeared to reflect concerns that Band members were not being sufficiently consulted or informed regarding major expenditures of Band funds. These concerns were raised to a high pitch by the collapse of the Northland Bank, and the resulting fear for the security of the Band's funds. Combined with these concerns was a feeling of distrust or lack of confidence in the executive, a situation not all that unusual among those in political opposition. By way of contrast, Mary Eli and Millie Jack testified that they had no concern over the major land purchase or the purchase of shares in the Northland Bank because they supported and trusted Ronald Derrickson. They felt that he was a very capable Chief, was always accessible, and that they could always get any information they wanted. Ronald Derrickson is a decisive and dynamic personality and is perhaps the sort of individual who invokes both strong loyalties and strong animosities. Feelings appear to have been running at a high, almost fever, pitch at Westbank in early 1986. The body politic was in a state of ferment.

The perceived lack of sufficient information on issues of concern common to all Band members was a recurrent theme in the complaints of the Action Committee. Perhaps it is for that reason that the failure to hold regular Band meetings headed the list of grievances on the petition. Although the lack of confidence of those in political opposition may never be cured by greater information, there can also be created a level of distrust when there is a lack of knowledge and understanding of basic facts. Perfection is never attainable, but these feelings can be ameliorated by the dissemination of more information on Band business to all Band members through a regular reporting process. I do not believe that it is necessary to call endless Band meetings, but some are appropriate. The Band should only be called together for matters of major significance. It seems to me, however, that a system of annual reporting (as recommended in Section II of this Report), perhaps coupled with the use of a periodical newsletter in more economically active bands, could be a force for good government and more stability on reserves. If the "in" group treats everything like a state secret, there is necessarily going to be suspicion and dissatisfaction. When a lack of information is combined with a lack of confidence, there can be rampant speculation and wild rumours. As the rumour mill grinds on, petty disputes are blown out of all proportion. When that happens, foolish action like the

petition and press release can be the end result. Controversy is the lifeblood of politics, it is sometimes said, but when it reaches the pitch it did at Westbank, it can be ultimately harmful to Band interests.

In reviewing the written words on the petition and the so-called press release and comparing these to the evidence that was led, it seems to me that there is lack of unanimity as to the meanings of words such as "misappropriation" and "fraudulent representation". These words very often connote quite wrongful conduct. Perhaps they were chosen for their shock value, as they appear unduly harsh to describe the activities in question. However, it appeared to me that some Band members did not fully comprehend the meaning or use of some of those words. For example, Barbara Coble appeared wholly sincere in her assertion that when Chief Derrickson made unduly favourable statements of fact concerning life at Westbank, he was guilty of "fraudulent representation of the Westbank Band". That point of view may be sustainable, but I believe most people would view it as a somewhat extravagant use of language. The former Chief is certainly not a man inclined to understatement, but I would not characterize painting too rosy a picture as "fraudulent" — perhaps Ms. Coble would have been more accurate in characterizing such comments as a "misstatement" or "wrongful description".

The petition was drawn up at the suggestion of and with the assistance of Mr. Nicholas Kayban. Perhaps the choice of words may in part be explained by his rather aggressive political approach. Mr. Kayban said he was directly involved with the release of certain statements to the news media. Although he testified that he was assured that all of the allegations that were put forward could be supported by evidence, he apparently failed to make any serious inquiry to test the accuracy of the allegations. Given the nature of the allegations, I found his failure in this regard surprising. His decision to make public the allegations without obtaining proper evidence of their veracity is in no way commendable. Mr. Kayban apologized to the Commission for his actions. His apologies could more appropriately be directed to the former Chief and Council and to those Band members whom he purported to serve but only misserved. He proved not to be a force for rational debate and discussion at Westbank.

Band members who signed the petition said that it was intended to be given to the Minister in confidence. It called for the removal of the Chief and Council, but primarily it was a request for an investigation into Band affairs. It may be viewed as a political protest by a group of dissatisfied Band members to the Minister of Indian Affairs. Because of the historical relationship between Native people and the Crown, represented by the Minister, the direct petition seems to be an often-used method for airing grievances. Whether it is a desirable or useful method is highly questionable. While the choice of words was intemperate, given the generality of the phrasing of complaints, it is unlikely that

officials of the Department of Indian Affairs would take those words at face value or necessarily view matters in a particularly sinister light. Phrased as the petition was, it could only be acted upon after further investigation. That is what the petitioners apparently had in mind.

The sudden influx of revenue into the Band coffers, and then the equally sudden prospect of losing it all with the collapse of the Northland Bank, may be in part an explanation for the alarmist tone of these public pronouncements. Frustration is rarely the parent of clear thought — add to it an apprehension of economic catastrophe and one has a recipe for trouble. The political climate at Westbank in early 1986 was one of hostility, almost of hatred in certain cases. No doubt some had personal grudges against the former Chief and Council. Mr. Kayban stepped in, apparently to help, but I believe his main object was to help himself — in the end he proved simply to be a mischief-maker. Under his direction, the Westbank Indian Action and Advisory Council became quite vociferous. Their language became saturated with hyperbole lightly interspersed with fact. Perhaps those directly involved in the matter will, on sober reflection, realize that scurrilous abuse is always to be avoided in discussing public issues. A decent regard for the facts is preferable to accusations founded on slender grounds. While debate must be free, it should also be conducted on a higher plane than the "petition" and the "press release". The Action Committee would have done better to stay out of action if that was to be their modus operandi.

The fact that so many Band members would sign a petition, primarily aimed at having an independent person or body investigate the affairs of their Band, was evidence of the existence of a serious malady in the body politic at Westbank. However, as I have said, political debate on reserves can become quite intense because political power can mean so much in economic terms. It must be remembered too, that Mr. Derrickson was a strong personality who could arouse animosities. I doubt that matters would have gotten so far out of hand as they did if Mr. Kayban had not been involved. Events at Westbank moved quickly, and perhaps too quickly for some, in the decade 1976–86. One witness used the term "pilot project" — was Westbank a pilot project? It was in the vanguard of change certainly. Certain lessees and members of the Band apparently lost faith in the Vancouver office of the Department. There came to exist a perception that nothing could be done through that office as there did not seem to be an adequate system in place to address grievances at that level. Protests then were made to headquarters in Ottawa. This perception clearly was an underlying factor in the formation of the Action Committee. My view is that the sort of problems we saw at Westbank could be developing in many bands across Canada as they become more economically advanced. In the next section of this Report, I make some suggestions that may help to defuse these situations before they reach the sorry state that affairs came to at Westbank.