SECTION II

The Question of Change:

Indian Law and Policy in Canada

Preface

Certain provisions of the Indian Act, and policies of the Department of Indian Affairs and Northern Development as they concerned the Westbank Indian Band, have been discussed in Section I of this Report. Part IV of the Terms of Reference of this Commission deals with broader issues and reads as follows:

> to recommend any changes to the Indian Act relating to the management of lands, Indian monies and by-laws, or to the policies or the procedures of DIAND in relation to the said matters, or any remedies to specific problems that may seem appropriate having regard to the Government's established policy of supporting and strengthening Indian self-government on Indian lands.

During the first phase of the hearings, I was advised of some difficulties encountered by band members, band executives, and the Department relating to the administration of the Act and Departmental policies. Specific hearings were convened under Part IV to consider whether any recommendations for changes could or should be made pursuant to the Commission's Terms of Reference. Major Indian groups in British Columbia were invited to participate and were requested to make such submissions as they deemed appropriate. Before proceeding to the question of possible recommendations, I think we must consider the present Act and current conditions.

The Act exhibits a basic structure that has often been described as paternalistic. The complex series of statutory changes made over many decades relating to Indian affairs is narrated in the historical abstract included in this Report (Appendix A). I acknowledge with thanks the great assistance of Professor Hamar Foster in the preparation of the historical abstract. As is said in that Appendix, the history of the Indian Act is in many respects a history of the tension between wardship and independence, or the tension between protection of Native peoples and their assimilation into European culture. That kind of tension is still evident today in the desire of Native people to preserve their land base and traditional culture while continuing efforts to achieve self-government and economic self-sufficiency. These tensions can never be entirely resolved, as human affairs are always subject to a certain amount of tension or conflict. Times change. The problems of one era are not the problems of another. Human nature does not change, but the economic and social landscape changes and so the precise nature of perceived problems are often quite different in one era than in an earlier period.

The situation of some bands has changed beyond recognition since 1951 when the last major reforms of the Indian Act were enacted.

Other bands have not changed much at all. The Department today is adopting a much different posture than it did 35 years ago. These factors do not mean that everything must be changed, but the present situation must be considered in order to assess the adequacy of the existing legislative regime. It may be that certain changes can be recommended that will enhance the lives of Native people and that may also help to ensure the maintenance of a good relationship between Native and non-Native people in Canada.

The Indian Act has changed little since 1951 — indeed, substantial portions of the Act are rooted in the nineteenth century. There is, of course, nothing inherently wrong with this. Change for the sake of change is pointless and the general concerns for the well-being of Native people that underlie the Indian Act are not greatly different today from what they were in earlier times. I am inclined to be cautious in considering what should be done under Part IV of my Terms of Reference. Change that is too sudden is hard to digest and seems to me likely to be unpalatable to a broad spectrum of people. But if, after hearing submissions and reflecting on issues, I do have a clear impression that a certain area can be improved or specific problems alleviated, to fail to speak out would not be consistent with my duty.

PART A

Efforts for Change Since 1960

From 1960 to the present, the history of attempts at legislative change or reform is a narrative of sincere efforts all too often falling short of the sought-after improvement.

Chief Joe Mathias' personal experience in these efforts strikingly demonstrates this fact. He related his involvement in a Ministerial Committee on Indian Affairs in 1969, the preparation of the famous (or infamous) White Paper on Indian affairs in that year and the 1975 Committee which met with the members of Cabinet then responsible for Indian affairs on the subject of statutory reform. He was engaged from 1977 to 1980 as a policy analyst dealing with the Indian Act. In this capacity, he naturally had extensive consultations with the Department. He outlined to us the considerable efforts made by the Indian people to communicate their concerns to the Parliamentary Committee which produced the *Penner Report* of 1983. All of these studies and proposals were aimed at identifying areas of concern or making recommendations for change. Aside from some amendments flowing from the requirements of the Charter of Rights and Freedoms, there has not been much concluded legislative activity since 1951. However, there has been a fair degree of policy change by the Department in response to the changed climate or direction of Indian affairs in the past several years.

It is safe to say that, since approximately the mid-1960's, certain problem areas of Indian affairs and Indian legislation have become more visible. The White Paper of 1969 entitled "Choosing the Path" addressed a number of the topics touched on in this Report. It created a reaction which led the federal government to embark on a more active policy of devolution to Indian bands and associations in the 1970's. That policy continues to the present.

The *Penner Report* dealt with a wide spectrum of issues and made some far-reaching recommendations for change. The Report touches on the current suggestions for change advocated by Indian people. While it may have had certain effects on policy implementation by the Department, it does not appear that any substantial legislative or constitutional changes have yet resulted from the Report.

Proposed Bill C-52, which received first reading in June 1984, was seen by the Department to be at least a partial solution to some of the more obvious areas of concern to Native people and Native leaders. The Department was, and is, aware that slow progress on change had been caused largely by demands that there be consensus on the part of all of

the affected groups before any substantial amendment of the existing Indian Act could be undertaken. That Bill would have, amongst other things, enabled bands to opt out of the Indian Act's limitations by adopting self-government in accordance with the terms of the proposed legislation. The Bill was not enacted because the government of the day was not returned to office in the general election of September 1984.

Recent efforts for change have not borne much fruit. For present purposes, I think it is important to examine why change has proved difficult to effect. The history of the past decade as disclosed in the Westbank phase of the hearings disclosed major alterations in the content and application of Department policies with virtually no significant statutory alteration. This situation could lead to an uncomfortable hiatus. A Departmental official, speaking of the legislative base for by-laws, said that there is a very slender legislative base for many by-laws he considered desirable. This is true also for policies based on other portions of the Act.

During the hearings, it was often said that the long standing relationship between Native people and the federal government is unique and special. It has features that are not just legal and historical but also traditional. Long standing relationships are unlikely to be fundamentally altered without pain and some sense of dislocation. Mankind is an animal that, in common with all nature, is disposed against rapid change. This is true in the political sphere as well. The *Penner Report* endorses many suggestions for change from national Indian organizations. Some of the recommendations are likely to raise divisive political issues. It may be that the government will implement certain of those recommendations, but I would think that in areas where fundamental change was contemplated, it would wish to ensure there was a strong sentiment in the Canadian community that supported the change. I cannot say when or to what extent any such alterations will occur. For the purposes of this Report, I cannot assume that such alterations are imminent.

Any new structure must allow various cultural and historical differences to be accommodated in the legal framework. This will require statutory alteration which is responsive to the real differences in culture and aspirations of the bands and individuals from Newfoundland to British Columbia and the Territories. Total unanimity is probably a chimera, as anyone who has worked on a large committee will doubtless appreciate. Some general sense that a change is progressive or desirable seems likely to be the extent of support for any alteration.

Parliament should ensure that the statutory structure in place at a given time accommodates as much as possible the needs of all Canadians, both Indians and non-Indians, from the point of view of certainty, clarity, and fairness in the administration of Indian affairs.

This task must take account of the limits of the possible or the probable, and cannot be indefinitely deferred in hopes of the arrival of a new Jerusalem. Certain areas can probably be chosen where improvements can be effected without being insensible of the past or stultifying the possibilities for the future growth of self-government.

Recent and Ongoing Legislative and Policy Initiatives

At the outset of my appointment as Commissioner, the Department made many of their people available for interviews and briefings on contemporary concerns within the Department. Two formal briefing sessions were held with members of the Department, one before and one after the hearings convened. Hearings were held specifically to entertain submissions from Indian groups relative to possible changes in the Indian Act and Departmental policy. These hearings followed the conclusion of the hearings on Westbank issues.

The Departmental briefings were very helpful, and crystallized what issues concerning change are common to the majority of bands across the country, and which were unique to Westbank. I think it is widely acknowledged that many difficulties experienced at Westbank are harbingers of future difficulties, and arose largely from the fact that Westbank has been a band at the forefront of development in economic and social terms since the mid-1970's. Mr. David Sparks, of the Department, said in his evidence that Westbank was one of the first bands to be interested in implementing a comprehensive by-law regime. Many aspects of the Westbank situation which were unique in 1977 are more common now, and may be commonplace by 1997. In this sense we have an opportunity to learn from history without having to live through it first.

The briefings included a wide range of policy and statutory considerations such as:

(1) the "Kamloops Amendments";
(2) land, revenues, and trusts;
(3) Indian land issues, including registry and land management matters;
(4) policies and administrative procedures relating to Indian monies;
(5) downsizing and devolution; and
(6) self-government by means of specific legislation.

1. The Kamloops Amendments

I was told that the Kamloops Amendments had their genesis in the desire of the Kamloops Band and their Chief, Clarence "Manny" Jules, that the Band's by-law powers include taxation powers. This would

enable the Kamloops Band to raise revenue to provide services on industrial lands within its reserve. The Kamloops Reserve, which is adjacent to the City of Kamloops, has had a substantial industrial park on its land for many years. Industrial parks are normally located on conditionally surrendered lands. Under present legislation, the precise status of these lands vis-à-vis the remaining lands of the reserve is uncertain. There are substantial doubts as to whether or not band by-laws will apply to surrendered lands, since the latter may not have the character of "land in the reserve" for such purposes. It was a matter of concern to the Kamloops Band that provincial jurisdiction should extend over non-Indians who operated businesses on surrendered land. The apparent purpose of provincial taxation was to raise funds for local governments for the provision of services, but services were not in fact being provided from such funds to the lands in the park. I was told that, possibly as a consequence, a majority of such taxes are in default across the province and that only .33 per cent of provincial tax revenues is attributable to this source. The Kamloops Amendments received the support of the vast majority of bands in Canada and are presently before the House of Commons.

These amendments are designed to alleviate doubts concerning the power of a band council to exercise jurisdiction over conditionally surrendered lands, which will become known as "designated lands". By obtaining this jurisdiction, it is contemplated that a band council will be able to levy a form of tax to raise revenue. I think this is likely to substantially alter the relationship between band councils and lessees and residents of surrendered lands. In effect, it will enhance the jurisdiction of the band council over surrendered land. I think it means that bands and provincial governments will have to work out methods to handle taxation between them in this area; both will have jurisdiction, but the job may be better done by those on the scene, namely the band councils. The objects in view — better services and more equitable taxation — are worthy ones, but taxes are always a thorny issue and I foresee a certain amount of skirmishing before solutions are found to the problems arising from such amendments. I support the thrust of the amendments, but I do not expect the road to realization to be always smooth.

2. Lands, Revenues, and Trusts

The Minister has initiated a comprehensive review of matters dealing with statutory provisions and Departmental policy concerning lands, revenues, and trusts. Requests for proposals from contractors were issued on June 1, 1987, and the initial contracts have since been awarded.

This comprehensive review will deal with administration, policy, and statutory concerns. The matters under consideration include the land

registry, land management and entitlement, environmental considerations, trust monies, estates, Indian government, and litigation. The project has been divided into two phases. The first phase will summarize and analyze previous studies relating to operational and management issues of the lands, revenues, and trusts sector, and will identify priorities for remedial action. This phase is intended to include an analysis of whether previous studies have been sufficiently comprehensive to identify clearly the problems to be addressed, and whether proposed solutions are feasible given the current legislative base and the resources available.

The second phase will include the development of an implementation plan for approval by the Deputy Minister. Upon completion of the second phase, a searching review of the terms of the implementation plan will be undertaken by the Comptroller General, an advisory committee, and members of the Department. The Report of this Commission doubtless will form part of the input to the advisory committee and the contractors carrying out the comprehensive review. The planned review seems designed to focus mainly on issues of business management and the reconciliation of competing priorities. I think the approach taken is sensible in that the review is wide-ranging and seeks to involve a wide spectrum of the Indian community. The danger is that issues will be studied to death. I hope, from this Report and the comprehensive review, that some useful changes to legislation and policy can be achieved within a reasonable time frame.

The management difficulties of administering many existing policies are acute and appear to be growing more rather than less difficult. Management solutions, however, ought not to be confused with fundamental policy decisions, which must, of necessity, be made by those with political responsibility to the Indian groups and the country as a whole. There is a tendency in the present circumstances for any large organization to generate one study after another when the political will and initiative is not present to propose and implement solutions to recognized problems. Evidence of this tendency is the fact that there are currently some thirty policy reviews under way in the Department. For the reasons stated below, I think major problems can be delineated and solutions to problems in the area of lands, revenues, and trusts can be well under way before the end of this decade. I therefore encourage swift completion of this comprehensive review and implementation of recommendations, which will include timely decisions by the Minister and the government on the political aspects of matters.

3. Indian Land Issues

(a) Indian Lands Act

An Indian Lands Act has been proposed in draft form. While it is widely felt that this is a useful change, difficulty has been encountered

in finding the political impetus and the necessary time to devote to its passage through Parliament. The present Act is not a very comprehensive one for the present era. It can be made to work for less developed bands, but it tends to be a bit "horse-and-buggy" for more developed bands. A comprehensive Lands Act would seem to make good sense. Land is, as I have said elsewhere, the foundation of Indian economic development.

The extent of a statutory vacuum relating to land issues is made apparent by the proposed contents of the draft Indian Lands Act which include:

(a) how, and by whom, title to Indian lands should be held;
(b) the nature and extent of band powers over the control, management and administration of their lands;
(c) the nature and extent of the Crown's responsibilities with respect to reserve lands;
(d) the legal capacity of bands and band executives;
(e) the acquisition by band members of rights in reserve lands, and the better definition of those rights;
(f) transfer or other disposal of individual rights in reserve lands;
(g) alienation of band lands to non-Indians;
(h) the taking without consent of reserve lands by third parties;
(i) the system for registering interest in Indian lands; and
(j) the control and management of monies (capital and revenue) generated from the granting of rights or interests in reserve lands.

Many of these subjects are dealt with rather lightly in the present Act. I think a separate Act would make for greater clarity and better definition of the respective interests of the band, the Department, and individuals in reserve and surrendered or "designated" lands.

If these subjects can be addressed in a separate Indian Lands Act, then many of the provisions relating to land in the existing Act could be repealed. Land issues are important to Indian bands and individuals, and a separate Act should also make it easier for borrowers and lenders and their solicitors to deal with conveyancing and security issues if the subject-matter is contained in one statute rather than scattered about a general statute, as is the case in the present Act. I therefore would be inclined to press on with this initiative. I think it would create a better environment for land development by those bands that are well situated for development activity and I do not see it as harmful to the status quo for less favourably situated bands.

(b) Reserve Land Registry

The various briefings I had regarding the present system of land holdings under the Indian Act indicated that there is much need for

improvement in the existing Land Registry system. The Act provides for the establishment of a Land Registry system in fairly rudimentary terms:

> 21. There shall be kept in the Department a register' to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession, and Certificates of Occupation, and other transactions respecting lands in a reserve.
>
> 55. (1) There shall be kept in the Department a register, to be known as the Surrendered Lands Register, in which shall be entered particulars in connection with any lease or other disposition of surrendered lands by the Minister or any assignment thereof.
>
> (2) A conditional assignment shall not be registered.
>
> (3) Registration of an assignment may be refused until proof of its execution has been furnished.
>
> (4) An assignment registered under this section is valid against an unregistered assignment or an assignment subsequently registered.

In 1983, the Land Registry was automated and I have the impression that reasonable progress is being made on this front. As there is a wide range in the needs of less developed and more developed bands, the Department has had to be sensitive to these differing needs. For largely historical reasons, the use of the provincial registry systems appears to be unacceptable to a majority of Indian groups. It must also be recognized that there are some fundamental differences between tenure under the Torrens system and that created under the Indian Act. There has been some past use of the provincial system in British Columbia

The Department is cognizant of the fact that a number of bands are involved in what is termed "buckshee leasing". A buckshee lease is an irregular (and unregisterable) lease of reserve lands. Chief Sophie Pierre from the Kootenay Tribal Council said that to her knowledge one rural band wants little to do with the Indian Land Registry system and finds it can operate satisfactorily with irregular leases. This may be a feasible solution in a rural area, but obviously it will not work for developments requiring financing. A primary reason for the use of buckshee leases would appear to be the perceived bureaucratic hurdles imposed by the Department under the present system.

Leasing applications and the transfer and assignment of leases are generally subject to approval by the Minister. Longer-term leases require Department of Justice advice. As a result of recent court experience, the Department is being cautious and is closely analyzing longer-term leases. Business opportunities may be lost because of the time constraints imposed by the bureaucratic structure. What was not clear to me, however, was whether this was a good or a bad thing. In the

experience of many bands, businessmen who are not prepared to wait for the required analyses and approvals are often businessmen with whom it would be best not to deal. On the other hand, in the business world, opportunities often must be seized upon without delay and development opportunities may be lost if no adjustment in the time required to review and evaluate proposals is made. My impression is that the present registry system is quite overextended and should be upgraded to make it less arcane and more responsive.

The present Act is not adequate with respect to the registration of interests in lands. Obviously, if an Indian Lands Act were to be passed, it should include more comprehensive provisions in this area. But even without legislative amendment, I think the registration system can be improved administratively and technically. At one time I was inclined to think some form of integration into the provincial systems would be best, given that local lawyers and business people would be familiar with the local system. But I doubt that this solution is achievable and I believe that historical and political realities militate in favour of upgrading the Registry.

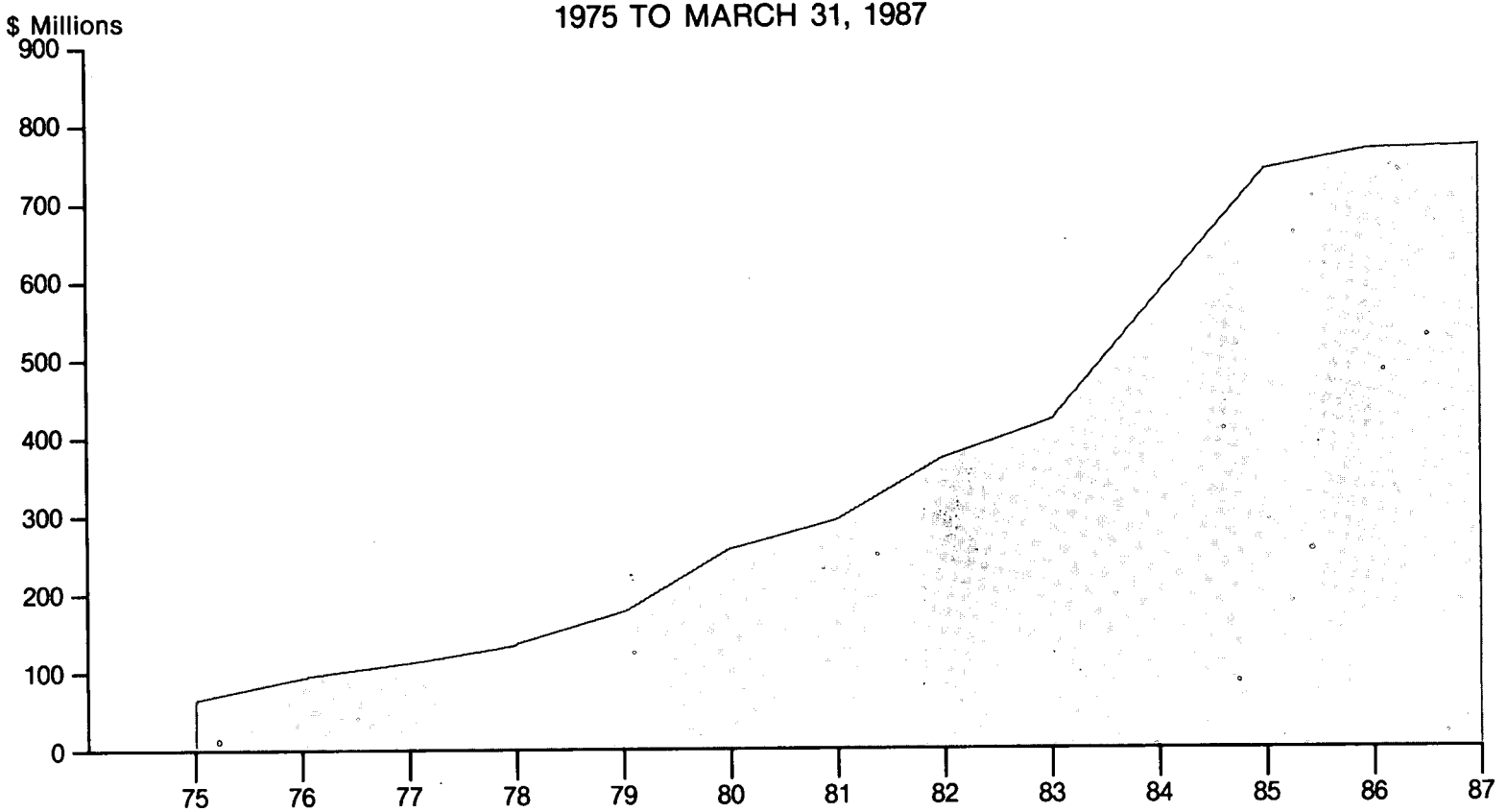
4. Indian Monies

The Department is presently faced with internal and external pressure for a liberalization of the treatment of Indian capital monies. There was some pressure to pay out capital monies to bands when long-term rates paid on trust funds by the government were low. This has been the case particularly with some Alberta bands which possess large sums of capital money generated from oil and gas revenues. Capital monies were transferred to the Samson Trust Company, but a few years later the Department decided that the Minister could not delegate his trust functions to a trust company and that such payments were outside the scope of the Act.

The dramatic increase in the Department's role as trustee is evident from the following graphs:

TRUST FUNDS

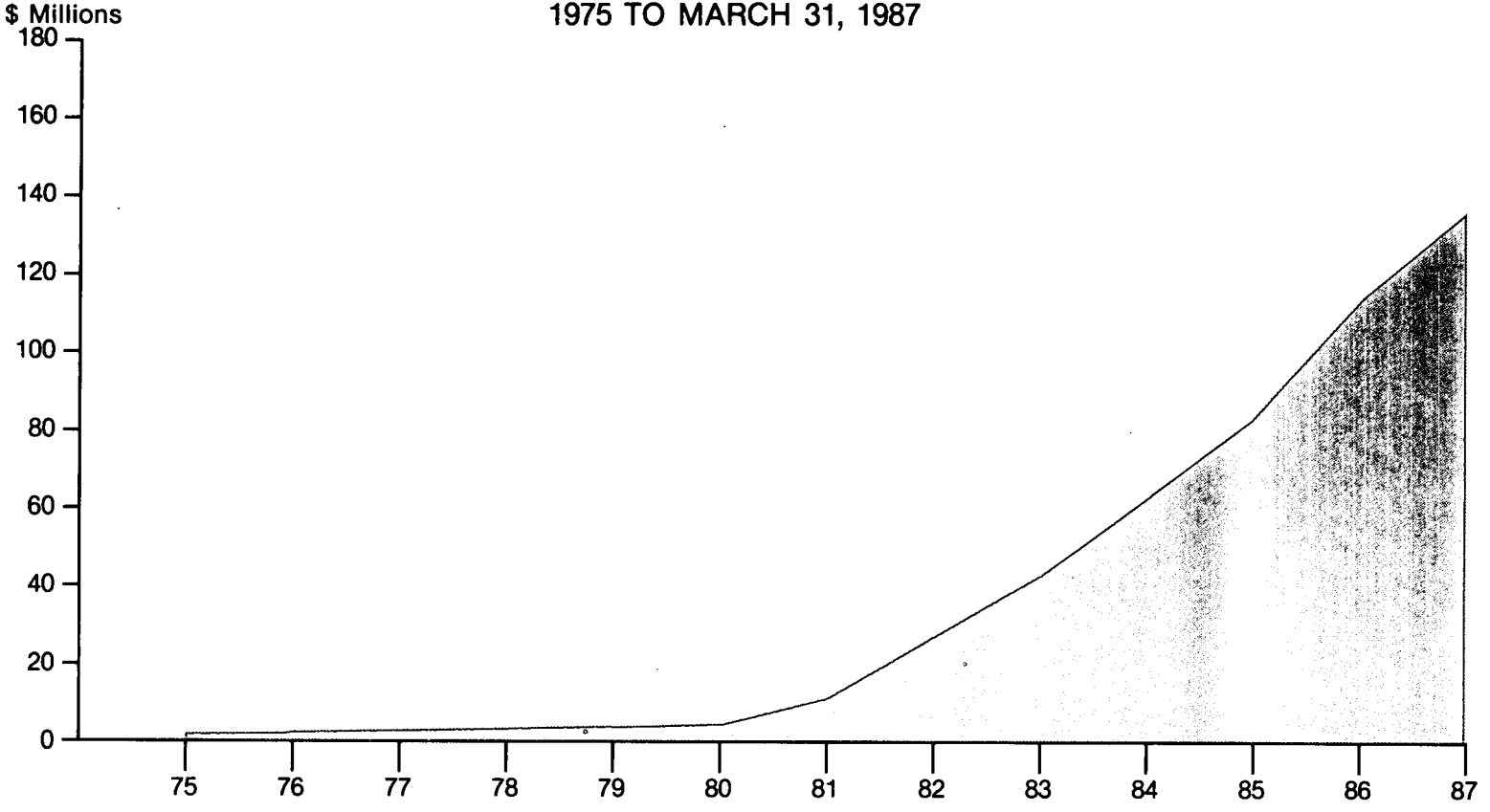
TREND OF INDIAN BAND FUNDS ON DEPOSIT
1975 TO MARCH 31, 1987



— Dept. of Indian Affairs

TRUST FUNDS

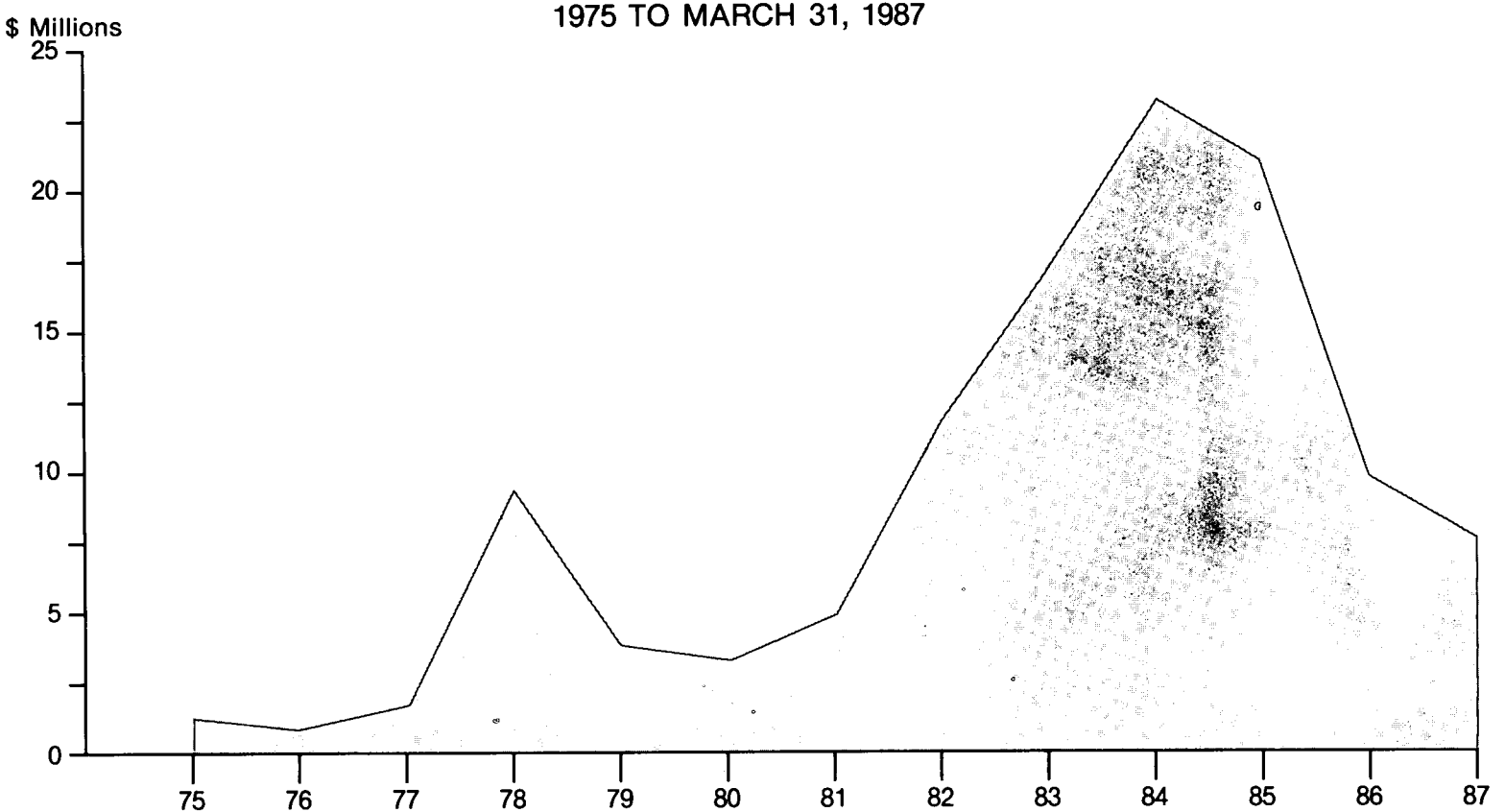
TREND OF INDIVIDUAL MONEYS ON DEPOSIT
1975 TO MARCH 31, 1987



— Dept. of Indian Affairs

TRUST FUNDS

TREND OF MONEYS HELD IN SUSPENSE
1975 TO MARCH 31, 1987



— Dept. of Indian Affairs

The *Penner Report* of 1983 recommended that the Minister not be liable for capital monies transferred to bands. The *Neilson Report* of 1985 recommended that the Department improve its management and conduct of its monies-handling functions.

I was told that the vast majority of bands want greater flexibility in disbursement of their capital money and in the application of those monies to various projects. Pressure of this nature is substantial from B.C. and Alberta Indian bands and is expected to increase if assets increase as a result of litigation over land claims and related law suits.

The Department has continued to be cautious concerning the investment of capital monies. Because of the importance of these funds to the band members who depend upon them, the caution is understandable. I was told that the Department of Justice has rendered an opinion that the term "expenditure" under Section 64 of the Indian Act does not permit the Minister to invest capital monies outside of the Consolidated Revenue Fund. I have discussed some of the considerations arising from the Guerin case elsewhere in this Report. The past cannot be changed, but it is clear that the Department is more alive to its possible legal liability than formerly. This awareness is positive to the extent that the Department is more diligent in safeguarding the interests of Indian people, but there is a danger that undue apprehension will result in a paralysis in decision-making. Guerin, like all judgements, must be looked at in the context of the particular facts found in the case. The fact that liability was found there does not mean that timely decision-making by the Department is at an end or that every expenditure or lease proposal should be analyzed to death. At times during the course of the Inquiry, I got the distinct impression that the Department was over-reacting to Guerin.

The extent of per capita distributions of capital money to Indians has increased dramatically. In 1985/86, one hundred and nine million dollars ($109,000,000) in capital funds were transferred to Indians, primarily in Alberta. In 1986/87, it is contemplated that there will have been seventy million dollars ($70,000,000) in per capita distributions of capital to Indians.

Presently, distributions of minors' capital money are limited to a stipulated amount per capita per year. The concern in relation to such distributions is whether payments to minors should be based on need or whether the band should be entitled to ask for them as of right. Advice received from legal counsel to the Department has been to the effect that requests for distribution should be related to the needs of the infant rather than to the fact that there are monies available for possible distribution.

There could be social difficulties arising out of the pressure on minors to obtain per capita distributions through early marriage or other means

of bypassing the protections against capital distributions to minors. Minors are minors, whether they are Indian or non-Indian, and the experience of the law is that the showering of too much money on the young is pernicious to their welfare. This is an area that has to be closely monitored by the Department and the bands concerned to ensure that the interests of minors are properly safeguarded.

The possible taxability of capital monies is also a concern because the payment of capital monies may expose the bands to paying taxes on interest earned off reserve lands. For this reason, the headquarters of an Indian trust company incorporated in Alberta was transferred to a reserve. Capital, like land, is a patrimony. Its proper use and conservation is a joint concern of the Department and bands, and I speak elsewhere of some issues that ought to be addressed in this area.

5. Downsizing and Devolution

Downsizing and devolution of services are two major changes that have occurred in the Department of Indian Affairs in recent years. Downsizing refers to the reduction in Department staff levels, while devolution refers to the transfer of responsibility for delivery of services to the bands themselves. These two processes are related in that they have been occurring simultaneously. The Department has sought and obtained substantial additional funding from the Treasury Board for the cost of transferring the administration of services to the bands. Arrangements whereby bands receive funds for both the actual cost of services and the cost of administration have been one result of reform, and it appears to be present policy to maximize alternative funding arrangements to the fullest extent compatible with the willingness and ability of bands to receive funds under such arrangements.

A brief history of the transfer of programs and services has been summarized as follows:

Prior to 1956	The Department delivers services directly to individual Indians.
1956	Limited funding provided to Indian band councils for the establishment of school committees.
1956–64	More transfers of funds from the Department to bands for the management and delivery of programs (e.g. education).
1964	The Department received Cabinet approval for a policy respecting the funding of Indian community development plans.
1964–79	Over 30 separate authorities received for program transfers.

1968	Grants to Bands Policy formulated.
1979	Treasury Board approves the first set of Terms and Conditions for contributions to Indian bands and organizations.
1986	Seventy-five per cent of Indian and Inuit Affairs Program budget administered by bands (59%) or provinces (16%). The Department, therefore, administers 25 per cent of services.

The transfer of specialized advisory services to bands or tribal councils has increased rapidly in recent years without any significant alteration of program policies. The preconditions for transfer have been worked out on a policy basis with the Department, whose role has decreased as devolution has proceeded. Since the concept of devolution involves the transfer of programs to non-government employees, and since devolution is an option for both parties, a growing Departmental concern has been the need to adequately assess whether the groups applying for devolved powers are prepared to undertake the necessary responsibility, and also to review whether material problems occur in respect of the powers which have been transferred. The devolution process is desirable and should be encouraged, but a measure of restraint and understanding on the part of both the Department and bands is called for — the Department's task is not rendered any easier by the fact that there is a considerable degree of diversity between the development levels and aspirations of different bands in different regions of Canada.

The issue of whether services should be transferred to individual bands rather than to tribal councils or similar groups of bands is a current topic of debate between bands and the Department. For some specialist roles, many bands do not have a sufficient level of activity to support a full-time person and, of course, specialized personnel who are available and can work satisfactorily with the band governments can be hard to find. There have been less than ten land management transfers across the country. Somewhat less than ten per cent of the bands in Canada are presently in possession of Section 53 (management of surrendered lands) and Section 60 (management of band lands) authority under the Act.

The factors which the Department has taken into account in considering transfers include the desire of a band for such powers, changes within the political structure in a band, technical competence, liquidity of a band's resources, and the perceived risk level to the Department. The Westbank experience illustrated some of the issues that can arise when transfers occur. I encourage the Department to move as quickly as it can in this area — there may be teething troubles but increased responsibility is, in my view, a positive step for Indian people.

There has been no downsizing of the Department with respect to the lands, revenues, and trusts functions and apparently none is planned. This seems sensible to me, as it would be false economy to try to run a shoestring operation in an area of such vital concern to all bands. These functions will alter with time, but given the likelihood of greatly increased development of Indian lands, I think that the need for Departmental advisory resources will grow despite some decrease in direct administrative functions.

I have been advised that the first comprehensive alternative funding arrangement was recently concluded with a West Coast band. It has been negotiated to cover a three-year period with block funds provided for all the federally funded functions of the band. As with any initiative, there have been difficulties with the implementation of alternative funding arrangements. I think that this sort of arrangement is the likely order of the future and it will be necessary to endure a certain amount of trial and error until the most acceptable solutions are found.

The Department is in the first year of a five-year comprehensive services transfer plan, during which a total of two hundred and eighty million dollars ($280,000,000) will be spent on devolution, including incremental costs, front end costs, and salary conversions.

After having prepared and submitted proposals for the transfer of services to bands and tribal councils, the Department appreciated the need for a comprehensive framework for such service transfers. Indeed, the Treasury Board at one point refused approval of further transfers until a comprehensive plan was put in place. The plan is ambitious. The Corporate Management Plan of April 1987 defines transferable programs as follows:

> Transferable programs and services are those so indicated under current legislation, program authorities and policies. This includes nearly all programs and services within the Indian and Inuit affairs program but excludes the Minister's residual responsibilities under the Indian Act and other legislation, as well as remaining administrative and management functions, including the administration of financial transfers to Indian bands.

The transfer program specifically did not address policy issues, Indian child care agencies, management development programs, the Indian economic development fund, and other similar programs already in place.

The downsizing and devolution processes are intended to be financially neutral in the sense that the funds anticipated to be expended by the Department are in fact transferred to the band or tribal councils for the purpose of administering the same services.

Since devolution involves a sacrifice of some efficiencies of scale and involves a considerable degree of transference and education, the expected costs of transfer exceed the costs of present administration. It has been recognized that devolution of a program may require additional funding and standards for increases have been set. This process is not a means by which Native peoples will either be encouraged or permitted to obtain additional funding indirectly when such funds are unavailable through direct grant or other programs. The success of the downsizing efforts can be overemphasized by not having regard to the high degree of downsizing directly attributable to the transfer of educational services. Outside those services, downsizing has been reasonably modest.

6. Self-Government

Part IV of the Commission's Terms of Reference instructs me to have regard for the "established policy of supporting and strengthening Indian self-government on Indian lands". Before proceeding, I wish to comment on the meaning of that term.

Self-government as a concept was dealt with in submissions before me by numerous members of the Department, both past and present. While the general concept of self-government as the transfer of legislative and executive authority to Indian bands and tribal councils is clear, the expression or understanding of the concept varies widely.

Almost all members of Indian groups who appeared before me spoke of the right to self-government and some spoke of the right of self-determination. Chief Mathias said to me that:

> True Indian self-government must, and can, only be founded upon a legal and political relationship that recognizes Indian nations as nations. True self-government cannot be granted to Indian peoples under the Indian Act. Nor can it be based on a relationship whereby the ultimate authority over issues that are critical to the survival of Indian nations rests with non-Indians.
>
> Indian self-government can only have legitimacy if it is founded upon the constitutional recognition of Indian governments and Indian jurisdictions as a third order of government. . . .
>
> Moreover, Indian self-government can only be legitimate if the form and jurisdictions of the respective governments are determined through negotiations that culminate in treaties. Treaties represent the true government to government relationship that has historically existed, and is necessary for legitimate Indian self-government.

The concept of self-determination is, of course, a concept in public international law. Article 1(2) of the U.N. Charter proclaimed that one purpose of the United Nations was to "develop friendly relations among

nations based on respect for the principle of equal rights and self-determination of peoples . . .". This right is expressed in Article 55 of the U.N. Charter and has been confirmed by that body on a number of occasions.

The definition of the right of self-determination is as broad and embracing as the definitions of self-government:

> All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development. (Declaration 1514 (XV) December 14, 1960)

Self-government is an emotive phrase like "liberty, equality, fraternity". It can mean different things to different people. Clearly, it denotes freedom and responsibility. The concept of self-government has been much to the fore in recent constitutional discussions. The delicate political question is always how to afford maximum freedom without undue Balkanization.

I have from time to time used the term self-direction rather than self-government. Some of the Native claims clearly fall outside the scope of any modern state's ability or willingness to permit autonomous governments within its structure. I think, however, that the Indian people's desire for self-direction for the purpose of ensuring their uniqueness as peoples can be well accommodated within the Canadian Constitution and Canadian culture. In the absence of constitutional amendments removing Section 91(24) from the Constitution Act, 1867, Parliament will remain sovereign in respect of the governance of Indian affairs in this country. However, Parliament may delegate substantial aspects of that sovereignty to the Indian peoples themselves so that they can direct their own affairs. I think it should be acknowledged, however, that this is because the Indian peoples are part of Canada rather than because of their separateness. Ultimately, under the Constitution, Parliament is responsibile for ensuring that the powers vested in Indian people will accrue to their benefit. That responsibility cannot be abdicated and, accordingly, self-government or self-direction is a process which must be administered by the Department in consultation with the Indian people, taking into consideration the capabilities of the bands or groups seeking additional powers. The process is an evolving one and I think it is desirable that Indian people have the necessary freedom and authority to achieve the best use of their lives. The move to self-direction and away from any degree of dependency is always to be encouraged. The Department has recently established an Assistant Deputy Minister of Self-Government as both a practical and symbolic elevation of the importance of the policy within the Department.

I think it is vital that there be a statutory structure for conferring self-government on Indian bands and tribal councils. The issues of

devolution of services and self-government are, of course, integrally related. As already noted, devolution should help promote conditions which will assist bands in acquiring the personnel, expertise, and experience to ensure a successful transition to self-government. With respect to self-government, however, the terms of the Indian Act are not consistent with the surrender or delegation of ultimate authority by the Minister to Indian governments. I was told that approximately 40 proposals for self-government have been received and are currently under consideration. The Department estimates that 125 to 130 bands are presently interested in obtaining some degree of self-government.

The two bands which have succeeded in obtaining self-government are those covered by the Sechelt Act, S.C. 1984–85–86, c. 93 and the Cree-Naskapi (of Quebec) Act, S.C. 1984, c. 18. Some comment is appropriate regarding each of these Acts.

The Sechelt Act covers virtually any service concerning Indian land and peoples. This Act created a fully mature Indian government operating generally like a municipal government relative to the legislative jurisdiction of the federal and provincial governments. The Act required enabling legislation from both the federal and provincial governments to fully realize its purposes.

In relation to financing, the Sechelt peoples have received block transfers of funds fixed upon the cost of services in a base year and escalated by factors related to population and the Consumer Price Index. The Sechelt community is entitled under the arrangement to allocate the funds as they see fit, and pursuant to these arrangements the Council has been required to define its accountability to the Sechelt people. The Sechelt Constitution has in practical terms required the Council to obtain the advice and consent of the members for proposed expenditures at an annual or special band meeting called for that purpose. As I have said elsewhere, this new financial responsibility puts increased pressure on a band executive to manage band finances effectively.

The Cree-Naskapi Act essentially takes the Cree-Naskapi peoples out of the Indian Act, but is reasonably limited in its provisions. Health services have been transferred to the Province of Quebec and education services are being funded and supported by a separate Board of Education.

The Department cannot be precise, but it estimates that approximately 15 to 20 bands will be in a position to assume self-government within the next five years. Co-ordination with provincial legislatures is, in some cases, anathema to the bands and, in others, difficult to obtain given the present provisions of the Act. Of course, federal-provincial

relations are not always unruffled and it is to be expected that there will be a fair measure of friction in provincial-Indian relations for years to come. This is simply a fact of the political process.

Different bands have indicated different desires in relation to the fundamental incidents of land title. I was informed that the Inuvialuat will be adopting a fee simple concept of property and that the fee simple is proposed to be vested within the government itself rather than through any third party. As a consequence, however, other forms of protection for the long-term interests of the members with respect to the land have been substituted. I deal in some detail with land issues later.

PART B

Scope of Possible Changes

Scope of Recommendations

Many of the witnesses referred to the quite broad scope of Part IV of the Terms of Reference. Chief Mathias stated that any Royal Commission looking into Indian affairs considering recommendations as broad as those contemplated by Part IV ought to hold hearings across Canada and consult with all bands and all national Indian groups. Certain members of the Department expressed concern that the evidence before this Commission did not justify sweeping recommendations for change.

I recognize that many of the issues investigated relate to the local and individual circumstances of the Westbank Indian Band. One must always be careful in moving from the particular to the general. Matters discussed in submissions relating to Part IV of this Commission were not proved in any formal sense. I found the Westbank background material valuable in giving some concrete context to certain issues considered at the Part IV stage. Several factors have caused me to make recommendations regarding general matters concerning the Act and Departmental policy.

During the course of the hearings and submissions, it became clear that many of the difficulties discussed before the Commission related to fundamental problems arising from the Act or its administration. During the Part IV hearings, it became possible to better distinguish problems unique to Westbank. There is little debate about the appropriateness of the Indian Act to present circumstances: people seemed to agree that serious difficulties have been and are presently being experienced. There was a lack of consensus as to whether this was because of the general thrust of the Act or specific defects in the legislation exacerbated by the passage of time since changes to the legislation have occurred. Current debate concerns the processes and solutions which might be adopted to overcome the widely acknowledged problems.

There has not been a Royal Commission to study Indian affairs in the recent past. As its major task, this Commission examined issues raised about the Westbank Band, its governance, and issues relating to lessees on the Westbank Reserves. While I am keenly aware that many problems encountered at Westbank may be of a purely local nature, the history there can be helpful in pointing to areas where weaknesses exist in statutory provisions or Departmental policy. The Westbank Band

was, and is, quite active in the economic sphere and some of its controversies over the past decade could be faced by other bands in varying degrees as they become more active in business. It would be regrettable if the information gleaned from this Inquiry was not used to try to decrease the likelihood of future difficulty in other instances. I heed the caution of Chief Mathias. In an ideal world, one would have time for the widest study and consultation. Then one could recommend on a very wide spectrum and in greater detail. But time and resources are finite. I have heard enough that I feel confident in addressing certain aspects of the Act and Departmental policy. It must be remembered that I did not range the country far and wide, but I did have a quite concentrated course of learning about one band and the Department — the Inquiry perforce illuminated many areas of interest to bands and individuals beyond the confines of Westbank. I do not intend to refrain from any activity under my mandate in Part IV, but I bear in mind that my mandate is not unbounded.

I noted earlier that several policy groups are presently considering changes to the Indian Act and Departmental policies, and that a wide-ranging review of lands, reserves, and trusts is presently proceeding under the direction of the Office of the Comptroller General. My recommendations are intended to enhance and complement such endeavours. I have tried to address problems which in my opinion are so systemic and clear that they cannot fail to be a concern to many bands in Canada and to persons concerned with the administration of Indian affairs.

Summary of Submissions

Submissions concerning the issues raised by Part IV were invited from all significant Indian organizations in British Columbia and their views were received formally as well as informally. As well, the views of many individuals, both Indian and non-Indian, were made known to me during the course of the Inquiry.

(a) Department of Indian Affairs and Northern Development

Members of the Department urged that this Commission recommend improvements in discrete areas such as:

(i) definition and enforcement of spousal rights upon marriage breakdown;
(ii) per capita distributions to minors;
(iii) Indian land registry;
(iv) the definition and expansion of band taxation powers;
(v) the creation of a clear policy and statutory structure for devolution.

The Commission was also asked to consider carefully whether the Department should remove itself from Indian affairs at the operational level at the same pace as has been the trend in recent years. It was suggested that so long as the Department is responsible for the review of substantive policy questions such as money issues, it requires regular local contact with the bands involved. While the closure of local offices has solved political controversy in many areas, it has not been always a happy experience for those dependent on the local services. Some local offices have been de facto reopened by the assignment of staff without declaring them to be, in fact, local offices. The last ten years have been transitional, certainly in British Columbia, and I think that if there is found to be a need for greater local presence, no one should be afraid to call a spade a spade. Modern communications have made it easy to operate from central locations, but a knowledge of actual conditions "in the field" is often valuable in being sensitive to potential sources of controversy.

The role of settlement monies in the economic futures of bands was addressed by many, and concern was expressed that such monies not be a one-generation payment, but rather the foundation for a band's economic future. People were anxious to ensure that capital be preserved by provisions in any settlement to insulate the monies from too easy alienation. This is a thorny problem. I think bands must be given a fair measure of freedom to run their own operations, but if a band is clearly not advanced, then the Department must play a more aggressive role in seeing that a prudent financial course is charted.

Many people urged upon the Commission the process of statutory reform which had its premature end in Bill C-52. In their view, it is important to pass similar enabling legislation to allow bands to exercise self-government free of the restrictions and antiquated structure of the existing Indian Act.

The Commission carried out quite a detailed review of the procedures applicable to Indian band by-laws. It was suggested that, with respect to taxation by-laws, there should be a procedure to allow some by-laws to be set aside by the Minister or some other independent authority so as to avoid the difficulties of taxation without representation. I gather that certain present proposed legislation is addressing the matter in part through an advisory board to review tax issues. Perhaps a form of review by the Minister or a board would be workable, but I would also want there to be an opportunity to appeal to the courts.

Counsel for the Department provided a written submission outlining recommendations which were felt to be justified by the evidence and submissions heard during the Inquiry. While the Department was careful to point out that there should be some limitation on the scope of recommendations made by the Commission, it was submitted that recommendations could be made along the following lines:

(i) There ought to be more extensive and flexible provisions for the devolution of powers. The Department submitted that a provision that the Minister delegate his functions to the band by agreement is the most desirable solution to this difficulty.
(ii) The by-law powers of bands ought to be expanded as suggested in the Kamloops amendments.
(iii) Band governments should have jurisdiction over conditionally surrendered lands within the boundaries of reserves as suggested in the Kamloops amendments.
(iv) The Indian Land Registry should be upgraded and the powers and duties of that office should be specified in greater detail.
(v) The Department should clarify policies as to the length and conditions of leases for the economic development of reserve lands.
(vi) There should be sufficient funding allocated to cope with the needs of Indian bands for training and support services while they are assuming devolved powers.
(vii) The Criminal Code should be amended so that band chiefs and councillors could be subject to a criminal sanction in the same way that non-Indian governmental officials are subject to such sanctions for misbehaviour in office.
(viii) Bands should be required to hold funds attributable to minors in trust so that funds would be safeguarded for the benefit of the minors when they attain their majority.

All of these submissions have merit and I address many of them later. The forthright way in which the Department acknowledges the extent of its difficulties indicates a likelihood of constructive change. Troubles cannot be overcome until they are recognized as such. Whatever the past history of the Department, it is clear that there is a desire to take steps to enhance the position of Indian people. The Department recognizes that it cannot be oblivious to the interests of non-Indians, but it is clearly of the view that its prime responsibility must be for Native aspirations.

(b) Assembly of First Nations

The Assembly of First Nations appeared before me through Chief Joe Mathias of the Squamish Indian Band. The Assembly of First Nations expressed its reservations about this Commission being vested with the broad powers enumerated under Part IV, and pointed out that the problems of the Westbank Indian Band were fundamentally local in nature. In its submission, the objectives of this Commission were limited to a purely local inquiry.

Chief Mathias' submission suggested that Part IV was too broad and vague to allow for meaningful Indian input and that a wider-ranging Inquiry would have to be established before fundamental reforms could

be made. In this submission, the implication in Part IV that the Department has any role in supporting and strengthening Indian self-government is not well founded. Chief Mathias submitted that the Indian Act is hundred-year-old legislation rooted in both a colonial and a racist mentality.

As I have already stated, Chief Mathias submitted that Indian self-government must be founded on a legal and political relationship that recognizes nations as nations. In his words:

> True self-government cannot be granted to Indian peoples under the Indian Act. Nor can it be based on a relationship whereby the ultimate authority over issues that are critical to the survival of Indian nations rests with non-Indians.

The objectionable features of the Indian Act highlighted by Chief Mathias relate to its limited jurisdiction, provision for ministerial vetoes, and the power of Parliament to amend the Act.

He expressed the view that Indian self-government can only obtain legitimacy if it is founded upon a treaty which arises out of a constitutional recognition of Indian governments and jurisdictions as a third order of government in Canada.

Chief Mathias also stated that the problems of past mismanagement affect every Indian band in Canada, and that the existing specific claims process is inadequate and underfunded in its ability to deal with these disputes. This, according to his submission, is the cause of increasing litigation against the Department.

(c) Kamloops Indian Band

Chief Clarence "Manny" Jules of the Kamloops Indian Band appeared before me in his personal capacity. He outlined the procedure by which he was able to obtain the consent and support of the vast majority of Indian bands in Canada to the amendments known as the Kamloops Amendments.

Chief Jules gave some background information about the Kamloops Band. He noted that, as with many bands, the Kamloops Band had lost some of its reserve lands between 1900 and 1930. As early as 1932, the Band commenced leasing Reserve lands to non-Indians. Until the 1950's, many people in the Band occupied a communal village. At present, as a result of allotments made primarily in the 1950's, most of the arable land within the Kamloops Reserve is subject to Certificates of Possession held by approximately 40 people. The Band has an unemployment rate of approximately 60 per cent, but the Band government is moving aggressively to promote employment.

Within the Kamloops Band there is a considerable measure of accountability between the Band Council and the members, including the provision of audited statements to Band members concerning the Band's financial affairs. The Band Council is often asked questions arising from these financial statements. In addition, the Band has a financial manager.

The leasing which has taken place on the Kamloops Reserve has been for the purpose of farming, logging, and industrial park leases. There were approximately nine surrenders of band lands up to 1980. The largest surrender occurred in 1960 for the purpose of developing the Mount Paul Industrial Park. As a result of the absence of funding, and the absence of the jurisdiction to levy taxes for the purpose of providing municipal services, it took over 20 years to install street lighting, municipal roads and other services in the industrial park.

According to Chief Jules' submission, Indian reserves tend to be isolated and exist in a type of purgatory in relation to municipal government. He stated that one problem is that band councils lack clear jurisdiction over surrendered lands. He felt strongly that it is necessary to have jurisdiction over both surrendered and non-surrendered band lands.

Chief Jules expressed the view that under the Act the Minister should retain a fiduciary responsibility relating to financial transactions involving surrendered lands. He agreed, however, that if power was devolved to the band, it could then be argued that the band would have to accept greater responsibility.

According to Chief Jules, the long-term impact of economic decisions is fundamentally a band decision. With respect to conflict of interest issues, he said the situation in his Band is that there are four councillors and one Chief. It is a council procedure that no Chief or councillor can participate in decisions involving their immediate family. Chief Jules stated that he and most members of the council are related in one way or another to most, if not all, of the Band members. He himself is related directly or by marriage to all but one or two families in the Band. I have spoken elsewhere of conflict of interest issues. This is one of the thorniest issues that faces Indian bands. Eternal vigilance seems to be demanded to ensure that controversy is avoided in this area and the familial nature of bands always makes this a difficult problem in band government, according to Chief Jules.

The Kamloops Band charges a five per cent administration fee for the administration of locatee leases. In Chief Jules' view, the taxation of Indian peoples by band councils may eventually become politically palatable as bands develop and achieve a stronger economic base. In his experience, while the band council presently has that power under

Section 83 of the Act, it has not been an acceptable political position to date to use taxation powers.

Chief Jules felt that the council's power to impose taxation on non-Indians using lands for commercial purposes will have to be administered responsibly to avoid Indian bands pricing themselves out of the market. While he accepted that there was an inherent tension in taxation without full electoral representation, he felt that, ultimately, market forces would restrain Indian governments when they were inclined to be too aggressive.

The Kamloops Band seeks to maintain contact with non-Indian lessees through a leaseholders' association which meets annually, as well as through continuing close relationships with individual leaseholders. There will often be tensions between landlord and tenant and in Chief Jules' opinion, it is vital that communications between the parties be preserved.

In his experience, the main obstacle to statutory or political reforms is the absence of a coherent political will on the part of the federal government and Indian people. He feels it is necessary to develop a consensus for change at the band level on a topic-by-topic basis. This would suggest that the Commission recommend that a timetable of reforms based upon priorities and prospects of success be prepared and urged upon government. According to Chief Jules, that timetable should include the following:

1. taxation powers;
2. land management powers;
3. land registry system;
4. zoning;
5. control of land at the band level; and
6. control of education at the band level.

In his opinion, the bands and band councils suffer from the absence of any legislative mandate to do much of what the federal government handles on their behalf. He felt it might be useful to have enabling legislation to allow bands to opt into systems in which there is a legislative framework for those functions they assume from the federal government.

Another concern Chief Jules expressed is that additional funds are required in order to carry out devolution or self-government schemes. For self-government by the Kamloops Band in terms of land management, the Kamloops Band had prepared and presented a budget of $80,000 per annum for land management purposes under Section 53 and Section 60. The Department approved only $30,000 for these purposes.

(d) Westbank Indian Band

In his Part IV submission to me, Chief Louie of the Westbank Indian Band stated that the recommendations made should be related to the fact that this Commission was basically a B.C. Commission.

He noted that there is a great disparity between bands' needs, aspirations, and endowments, both with respect to people and natural resources. He expressed support for the Kamloops Amendments and the opinion that Westbank needs its own separate statutory structure of self-government. He said that Westbank's concept of self-government is not altogether the same as the Sechelt model. He noted as an aside that the process of developing a tailor-made statute can be complicated and expensive. I comment on this problem later and suggest a possible solution.

Chief Louie said that self-sufficiency is a part of self-government and presupposes the ability to raise revenue from whatever sources. He felt it was important to learn lessons from the Alaska experience. He said land claims could be a powerful tool for self-sufficiency of Indian bands.

Chief Louie dealt with what he perceived to be certain day-to-day problems of administration under the Indian Act with respect to the time and resources available. He said some of these difficulties are as follows:

(i) the Act must embrace bands that require great attention and involvement by the Department as well as bands which require virtually no intervention;
(ii) the by-law taxation powers promoted by the Kamloops Band should be adopted;
(iii) bands should be given clear jurisdiction with respect to surrendered lands;
(iv) the system for the expenditure of capital monies should be better defined;
(v) the land registry system can and should be improved;
(vi) There should be protection for bands which pass zoning by-laws analogous to the protection afforded by Section 972 of the B.C. Municipal Act, R.S.B.C. 1979, c. 290.

Chief Louie stated that approximately 80 per cent of his time is spent on land management matters, and that in the 1985/86 fiscal year approximately 100 transactions occurred on surrendered lands. Chief Louie also asked that I recommend the restoration of land management powers to the Westbank Band and the provision of adequate funding for the administration of those powers.

(e) Kootenay Indian Area Council

Chief Sophie Pierre of the St. Mary's Band, accompanied by Chief Paul Sam of the Shuswap Band, appeared before me on behalf of the Kootenay Indian Area Council. She strongly urged that I endorse the recommendations of the Special Committee on Indian self-government, otherwise known as the *Penner Report*.

Chief Pierre urged that I recommend that Parliament occupy the field of legislation in relation to Indians and then vacate that area of jurisdiction to recognized Indian governments. The legislation recommended by the *Penner Report*, it will be remembered, included the following:

(i) the enactment of an Indian First Nations Recognition Act, committing the federal government to recognize Indian governments accountable to Indian peoples;
(ii) legislation authorizing the federal government to enter into agreements with recognized Indian First Nation Governments as to the jurisdiction that each Indian government wished to occupy;
(iii) legislation under the authority of Section 91(24) of the Constitution Act, 1867, designed to occupy all areas of competence necessary to permit Indian First Nations to govern themselves effectively, and to ensure that provincial laws would not apply on Indian lands except with the agreement of the Indian First Nations' governments.

Chief Pierre submitted that it is important that the Penner recommendations regarding the scope of powers allowed to First Nations be adopted. Those recommendations included provision that full legislative and policy-making powers be vested in the Indian Nations and that full control over the territory and resources within reserve boundaries be provided to First Nations' governments. The *Penner Report* recommended that the exact scope of jurisdiction should be decided by negotiation with representatives of the First Nations and that the First Nations governments should at least have the authority to legislate in such areas as social and cultural development, including education and family relations, land and resource use, revenue-raising, economic and commercial development, and justice and law enforcement.

Chief Pierre also emphasized the Penner recommendations relating to providing a better economic base for First Nations by providing such additional lands and monies as are necessary to ensure their self-sufficiency. In her submission, accountability of the First Nations must be primarily to their own constituents, and accountability to the federal government should be limited to the use of public funds.

With respect to the particular circumstances of the St. Mary's Band, Chief Pierre had several interesting observations. Principal among these was the degree to which this Band operates its affairs without regard to the provisions of the Indian Act. In particular, leases of Band lands tend to be buckshee leases on a sharecropper basis. Chief Pierre stated that this is linked to the inefficiencies in the administration of the agricultural leases by the Department, and unhappy experiences which the Band members had in the 1950's and 1960's.

Chief Sam, also of the Kootenay Indian Area Council, submitted to me that a troubling problem for the Shuswap Band is the need for lands and monies to accommodate the increase in population due to the expansion of membership under Bill C-31. He expressed frustration at the delay in receiving monies which were promised to bands that opened their membership to new members under Bill C-31.

Chief Sam stated that many of the water licences in favour of the Band had fallen into default as a result of the administration by Departmental officials in the 1950's and the 1960's. As a consequence, his Band had numerous difficulties in relation to water supply. He adverted to this as an example of what was felt to be neglect of Indian interests in that area.

The Necessity of Reform

A complex legal structure such as that existing under the Indian Act should not be changed unless it is demonstrably inadequate. Witnesses before the Commission agreed that any reform of the Indian Act is likely to attract a considerable degree of political debate and possibly controversy. Nevertheless, nearly all groups affected by the Indian Act are opposed to certain of its provisions in one way or another. The degree to which the Act has become archaic is one reason why reform has become more rather than less difficult.

Since the basic philosophy of the Act is considered outdated, minor reforms seem inconsequential; yet major reforms excite such great concern that they are perceived to be politically unattractive. The patriation of the Canadian Constitution, culminating in the Constitution Act, 1982, provided for constitutional recognition of aboriginal rights. The precise delineation of these rights remains to be worked out. The position of most of the national groups representing status Indians in Canada now appears to be that any future reforms should take place on a constitutional level rather than by Parliament acting pursuant to its legislative authority under the Constitution Act, 1867. Yet the evidence of the difficulties at Westbank has led me to conclude that some reform of the Act or of the legislative structure of Indian affairs would assist the federal government to better fulfil its mandate of government in this area. Such changes are not likely to be a satisfactory global solution to

the question of the position of Indian people in Canada, but I think some useful progress can be made in specific areas.

The Indian Act and Departmental Practice: The Widening Gyre

In several important respects, the provisions of the Indian Act and Departmental practice have diverged to such an extent that some Indian Affairs policies lack sufficient statutory foundation. This is not surprising, given the relative antiquity of the Act and the dramatic changes that have occurred since 1975 in the direction of Indian affairs. This comment does not apply to all of the many policies and programs administered by the Department throughout Canada. However, the areas of deficiency are important ones — lands and monies — and in these areas there is a very real danger that the federal government is operating outside a proper statutory basis. Mr. Fred Walchli, former Regional Director General in B.C., commented on the difficulties that he faced in trying to implement the devolution policies of the Department as a first step towards self-government:

> Well, we do not have, and did not have at the time, a legislative base for Indian self-government. All the authorities — that were available to us were derived from the Indian Act or from government policy or from certain decisions made by the Treasury Board.
>
> In a sense it would have been desirable to have a proper legislative base. We did not have it. So, the approach the Department was following was to use the authorities of the Indian Act to the extent that that was possible, to use policies that were approved by Cabinet and eventually Parliament, and to use the Treasury Board to give certain authorities to bands to manage money.
>
> So, the approach we were following basically said we will transfer the management of programs to Indian control. We will provide administrative overhead support to pay for their staff. We will permit the passing of by-laws in order to provide some kind of legislative base at the band level. We pursued those kind of avenues.
>
> So, basically we explored every possibility to develop what could be called Indian self-government, to give them the authority and the power where possible to manage their own affairs, to manage the funds, to make their own decisions.
>
> My mandate was to push that for all it was worth. We were to use whatever authorities we had to transfer responsibility and power to the Indian band councils. That's what we did.
>
> (Transcripts: Volume XXXVI, pp. 5024–5025)

It was often expressed to me in the hearings that a "liberal" or "creative" interpretation of the Act had been adopted. It was usually in a positive direction. The comments serve, however, to show that the garment of the Act is being stretched, and worn by the Department in ways not contemplated by its draftsmen.

Many of the witnesses testified to the archaic character of the Indian Act. Chief Clarence "Manny" Jules of the Kamloops Band referred to

the fact that dealings in lands are characterized as "surrenders" by the Act. That term is not appropriate and the word has unfortunate connotations. The government appears committed to change it. I endorse that commitment.

The fundamental property concept in the Act is that assets are held by the Crown for the benefit of individual band members or of bands as a whole. Slightly in excess of one billion dollars is presently held in trust by the Department in favour of Indian bands. Savings accounts for minors, accounts for adopted Indians or Indian children, and estate accounts are other examples of the active trust responsibility of the Minister.

The Minister's dominion over property relating to Indians is far-reaching. Lands in a reserve are held by Her Majesty. The Minister is responsible for the management, sale, or other disposition of surrendered lands (Section 53). Virtually all land transactions require the Minister's involvement. Wills executed by an individual Indian are subject to the Minister's approval (Section 45(3)) and distribution of property on an intestacy is provided for in the Act. The Minister is authorized to operate farms on reserves (Section 71). There is scarcely any aspect of the economic life of an Indian band or its members in which the Minister (Department) is not assigned an active (and hence potentially intrusive) role.

The principal significance of this framework is that while there is an elaborate structure in the Act relating to the areas of Indian government to be carried on by the Crown, very little is spelled out as to the band government's responsibility. Yet today the trend is away from government by the Department to government by bands or band associations such as tribal councils. It is rather as if colonial laws were all that a newly independent republic possessed. The emphasis would be wrong. That seems to be the case with legislation pertaining to Indian affairs.

The government's established policy of supporting and strengthening Indian self-government on Indian lands is thus in conflict with the underlying philosophy of the Indian Act, which remains paternalistic and intrusive in the lives of Indians. But I am not an advocate of undue change. It may be that fundamental alterations ultimately can be achieved by the constitutional modes proposed by certain Native leaders. I simply observe that it has not yet been achieved and because of the fundamental nature of certain of the proposed changes, speedy resolution may not be the order of the day. There are problems existing today. It would be good to address them today. Amendments to existing legislation may not make a perfect world, but they can help make a better world for those affected by the current legislation.

Departmental policy and practice has travelled a considerable distance on the road towards Indian self-government, with significant devolution of federal powers and programs to Indian bands and tribal councils. The significant downsizing of the Department and hence its abilities to administer programs has been matched by an expansion of resources to bands and tribal councils to perform similar functions. From a situation where virtually all programs and services were administered by the Department as late as the mid-1960's, some 75 per cent of the Indian Affairs budget is now administered by bands or provinces. This entire process has, however, proceeded without significant statutory alteration.

The treatment of Indian capital monies illustrates the difficulties that the Indian Act presents for current Departmental policies. The provisions of the Act relating to money are not detailed and comprehensive. The fundamental distinction for administrative purposes is the distinction between Indian and non-Indian monies. In relation to non-Indian monies paid out of the Consolidated Revenue Fund, the Department has moved towards block funding of federal programs and has encouraged the devolution of Departmental programs to band councils or tribal councils.

The Act defines Indian monies as "all monies collected, received or held by Her Majesty for the use and benefit of Indians or bands". The Indian Act does not define or provide much assistance in defining non-Indian monies, and the definition of Indian monies is not of great assistance as the phrase "collected, received or held" is extremely broad. Given that all contracts relating to land are executed by the Crown, monies paid under most leases are, in all likelihood, Indian monies.

The distinction between revenue and capital is one which has a broadly understood meaning in the accounting profession. It is not necessarily the same as that contained in Section 62 of the Indian Act. The Department has adopted a somewhat flexible definition in the distinction between capital and revenue, often with an eye to the Indian Act's limitations in respect of the band's powers over capital monies. For instance, it appeared that in determining what portion of the Westbank cut-off monies was to be treated as capital, a restrictive definition of capital was adopted. The statutory distinction between revenue and capital, combined with the band's powers under Section 69 to control its revenue monies, creates an inevitable tension between the band and the Department regarding the characterization of monies as revenue rather than capital. Because it is often desirable to denote funds as "revenue", there can be a measure of artificiality imposed on transactions. Inadequate legislative provisions, like hard cases, can make for bad law and doubtful precedent.

Section 64 of the Act contains the provisions permitting the expenditure of capital monies. Section 64(1) states that:

> With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital monies of the band. . .
> [for a variety of construction and purchase objectives]
> (k) for any other purpose that, in the opinion of the Minister, is for the benefit of the band.

Departmental policy now is to allow bands as great a role as possible in determining the direction and expenditure of capital monies. This policy seems desirable and ought to be encouraged.

A difficulty which arises out of Section 64 concerns the Department's practice of paying capital monies to the band under Section 64(1)(*k*) for purposes defined and supervised by the band. The Department's policy of granting band councils greater responsibility in this area conflicts with the statutory provision that the Minister "authorize and direct the expenditure of capital monies". The general provision under Section 64(1)(*k*) is tied and limited to purposes that ". . .in the opinion of the Minister. . ." are for the benefit of the band. The listing contained under Section 64(1)(*b*)-(*j*) suggests that such expenditures must be related to specific projects and objectives both authorized and directed by the Minister and the Department. Nothing in Section 64 expressly allows the band to undertake responsibility for the collection, investment, and reinvestment of capital monies. The thrust of this section is out of step with what is in fact happening.

The difficulty with the conflict between the terms of the Act and Departmental policy is that capital monies are for the benefit of all members of the band. The statutory provisions under the Indian Act, however archaic, appear to be directed to protecting the interests of band members in capital monies. By receding from the statutory role of authorizing and directing the expenditure of capital monies, the Minister and the Department may find themselves subject to attack from dissenting band members who become unhappy with the results of the application of sums of capital money. Such complaints have been voiced and may become the subject of litigation against the Department.

For present purposes, I point out only that the treatment of monies under the Act creates a statutory obstacle to the structure which the Department considers advisable for the treatment and funding of Indian government. Departmental policy has departed so far from the scheme of management provided for under the Act that I think it fair to say that the Department is operating more on the basis of policy than pursuant to the legislation. Ron Derrickson commented to me during the hearings that at times it appeared that the administration of Indian Affairs was "all policy and no law". Certainly in this area that comment would be applicable. I do not criticize the Department for fostering the policy of giving greater authority to bands, but because Departmental practice has moved beyond the apparent statutory boundaries, there is a

danger that legislative reform will become less of a necessity as those structures of the Act which are inconsistent with current policy are ignored rather than changed. Any serious divergence between Departmental practice and statutory authorization has several unacceptable consequences for the conduct of Indian affairs; some of these are:

(a) growth of a perception on the part of Indian groups that what cannot be obtained directly under the Indian Act can often be obtained indirectly by seeking an alteration in Departmental practice;
(b) continuing difficulties occasioned to officials of the Department responsible for the administration of Indian Affairs — what are the limits of authority?;
(c) an inadequate public debate within Canada as a whole relating to the proper treatment of Indians under the federal jurisdiction relating to Indians and their property.

At the same time, the legal responsibility of the Department relating to the administration of Indian lands and monies has become recognized as having significant private law consequences. In Guerin v. The Queen [1984] 2 S.C.R. 335, 55 N.R. 161, mentioned above, the Supreme Court of Canada held that the Minister, in relation to a conditional surrender of lands, had a fiduciary duty to band members to ensure that a reasonable rate of return was obtained for the rental of certain lands. I have been advised that a number of claims are being advanced against the Department based on alleged breach of such fiduciary duty. As many as 300 actions are said to have been commenced against the Department since the decision was handed down in Guerin, and as many as 2,000 potential claims involving breach of fiduciary duty, aboriginal land claims, and treaty claims have been identified. It has been estimated by the Department that the liabilities of the Crown may be in excess of a billion dollars with respect to these actions. With increasing awareness of legal remedies, suits against the Department become more likely for any perceived wrongdoing. A lack of congruence between policy and statutory provisions can lead to later problems. If the Act is out of step with desirable practice, the Act should be brought into line so that initiative is not stultified.

Some of those who appeared before me referred to the fundamental nature of the fiduciary duty of the Minister in relation to administration of the Indian Act. Few witnesses were prepared to accept any abatement of this fiduciary duty towards Indian lands or monies. The existence of such a duty in the past is a fact. Whether there will be any changes in the future consequent upon the changing relationship between the Department and individual bands remains to be worked out.

The Department, for understandable reasons, has adopted the position that the informed consent of a band or band council regarding proposed economic activities approved by the Minister is an answer to any subsequent allegation of breach of fiduciary duty. Whether or not this is so in all cases, the process of devolution is seen as being an honourable means by which future litigation between the bands and the Minister may be avoided. The Department and bands are endeavouring to arrive at a consensus on this topic. I am sure some agreements will be reached. In other cases, litigation may be the answer. It must be acknowledged that no one suggested to me that the right already existing be abridged or curtailed in any way. The concern is for the future.

I think the Department's concern about the ambit of the Guerin judgement has a reasonable basis. The fundamental change of perspective wrought by that decision is the acknowledgement that in its dealing with Indian lands, the Department is acting as a private trustee, fiduciary, or agent of the band. In this sense, the Minister is no longer just politically responsible. As Mr. Justice Dickson said in Guerin at page 170 (55 N.R.):

> [34] In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty, it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> [35] The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
>
> [36] An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the Indian Act. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.

Several sections of the Act confer powers on the Minister to deal with, approve, or reject proposals concerning lands and monies. While the law undoubtedly will evolve, I think Guerin has dramatically altered the economic consequences of misadministration under the Act. Obviously not all cases will succeed. In a recent decision, Apsassin et al. v. The Queen, Unreported, November 4, 1987, the Federal Court

denied the very substantial relief claimed against the Crown. In that case, Addy J. held that on the facts there had been a valid consent to the surrender for sale of reserve land which much later was discovered to overlie large amounts of oil and gas.

The evidence in the Apsassin case demonstrates the difficulties occasioned to all parties in dealing with such claims. The surrender took place in 1948 and many potential witnesses had died prior to trial. The living witnesses were nearly all elderly. Since many surrenders occurred prior to 1950, it is to be expected that these difficulties will be common. The learned trial judge followed the Guerin judgement and held that there had been a breach of duty, but he found against the plaintiffs on major issues of liability and limitations. He said at page 28 of the Reasons for Judgement:

> I must hasten to state however, that, wherever advice is sought or whenever it is proferred, regardless of whether or not it is sought or where action is taken, there exists a duty on the Crown to take reasonable care in offering the advice to or in taking any action on behalf of the Indians. Whether or not reasonable care and prudence has been exercised will of course depend on all of the circumstances of the case at that time and, among those circumstances, one must of course include as most important any lack of awareness, knowledge, comprehension, sophistication, ingenuity or resourcefulness on the part of the Indians of which the Crown might reasonably be expected to be aware. Since this situation exists in the case at bar, the duty on the Crown is an onerous one, a breach of which will bring into play the appropriate legal and equitable remedies.
>
> Where there does exist a true fiduciary relationship such as in the case at bar, following the 1945 surrender, the same high degree of prudence and care must be exercised in dealing with the subject matter to which the fiduciary duty relates, as in the case of a true trust (refer Guerin et al. v. The Queen, supra at page 376). The test to be applied is an objective one: good faith and a clear conscience will not suffice. It is also similar to a trust in another respect: where a trustee is in any way interested in the subject matter of the trust, there rests upon him a special onus of establishing that all of the rights and interests both present and future of the beneficiary are protected and are given full and absolute priority and that the subject matter is dealt with for the latter's benefit and to the exclusion of the trustee's interest to the extent that there might be a conflict. A similar onus rests on the Crown in the case at bar regarding the equitable obligation which it owed the plaintiffs.

Concerning the consequences of self-government for bands, the Apsassin decision highlights the obvious: if a band gives its informed consent to any dealing in its land or monies, or conducts the transaction itself, then the Department, subject to statutory impediments, is not likely to be fixed with liability if decisions later turn out to be unfortunate or erroneous.

Whatever the full extent of the doctrine reflected in Guerin, it seems likely that the existence of these substantial liabilities will, in the near future, make some changes in the Act a government priority. The amount of potential liability already apprehended by the Department cannot be reconciled with granting self-government without a future abatement in the legal liability that has existed to date.

Counsel for the Department suggested that Guerin should be looked at in context. By that I think he meant it had to be viewed in light of the particular (and somewhat unusual) facts that were found to exist in that case. The courts can and will work out the ramifications of that decision based on the various fact patterns that come before them in future cases. It would be unfortunate if considerations arising from that case paralyzed progressive action on behalf of the Department.

In order to minimize the likelihood that the Department will feel unduly constrained by fears of being sued, I think it is important that the Act be brought into accord with desirable practice. Cases such as Guerin and Apsassin have simply highlighted the need for the Department to proceed prudently and in conformity with the law. To the extent that practice diverges from the wording of the statute, the Department is placed at risk. Because of the dramatic alteration in perceptions occasioned by the recent decisions, statutory reform has become imperative. Failure to do so may be a serious impediment to continued momentum toward self-government.

Indian Ambitions and Statutory Obstacles

Notwithstanding the Department's gradual development of self-government as a fundamental policy in its administration of the Indian Act, Indian bands, tribal councils, and national groups have experienced a degree of frustration in obtaining what they regard as the necessary attributes of self-government. A large obstacle to greater self-government is the present statutory structure of the Indian Act. Many Departmental policies and practices have been changed in terms of the fundamental limitations arising from the Indian Act. But there have been occasions when the Department has not been prepared to accommodate Indian groups because of statutory limitations. In this sense, therefore, the Indian Act represents a substantial statutory obstacle to the fulfilment of the Department's policy of and the Indian groups' desire for self-government.

Many Indian groups have taken the position that the Indian Act itself is, as a whole, archaic and unworkable, and that the only appropriate reform is a constitutional amendment. Any such reform would, of course, result in the repeal of the current Indian Act and/or the replacement of it by constitutional arrangements arrived at by Indian

people and governments. It is apparent that Indian ambitions cannot be achieved without a significant change to the Indian Act.

Furthermore, Indian ambitions for self-government are also hampered by an inadequate structure for Indian government under the Act. In other words, it is not only the Act's assignment of responsibilities that is troublesome; the Act's inadequate definition of band government and its duties and responsibilities means that changes should provide a coherent legal structure to underpin Indian government as well as to address the transfer of responsibilities.

The Structure of Reform

As I have already indicated, there is a substantial division of opinion among those concerned with Indian affairs policy as to the method by which changes can best be effected. This issue is obviously fundamental to the question of change and my views are as follows.

A. Constitutional Agreement

In 1982, in the process which resulted in the Canada Act (1982) and the patriation of the Canadian Constitution, Indian groups succeeded in having express constitutional recognition of the existence of aboriginal and treaty rights. Section 35 of the Constitution Act, (1982) states as follows:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

As literature on the subject shows, the legal interpretation and effect of Section 35 continues to be the subject of considerable political and legal controversy. The constitutional conferences convened pursuant to Section 37.1 of the Constitution Act, (1982) (now lapsed) resulted in no concluded constitutional arrangements being made between the Indian peoples and the federal and provincial levels of government. I heard the result of those conferences referred to as a "stand-off" and a "stalemate". The governments, federal and provincial, have no further express constitutional requirements to consider constitutional amendments in this area. Several national Indian groups have concluded that reform of the Indian Act pursuant to the federal responsibility for Indian affairs

under Section 91(24) of the Constitution Act, (1867) is not a politically desirable objective and that the only acceptable reform would be new constitutional arrangements with the federal and provincial governments. This is not only because of a general desire for self-government, but also because of the trend towards demanding recognition of the right to be considered sovereign peoples. Because of the necessity for constitutional amendments passed pursuant to Section 39 of the Constitution Act, (1982), the constitutionalization of a structure for the regulation and government of Indian affairs has become substantially complicated by the involvement of the provincial governments. At the same time, the emerging concept of Indian self-government makes it evident that as a matter of policy, many Indian groups do not want to participate in or initiate reforms by Parliament under Section 91(24) of the Constitution Act, (1867).

It is not possible at the present time to assert with any degree of confidence what will be the outcome of future constitutional conferences. But the possibility of future constitutional agreement should not necessarily preclude progress on specific statutory reform. There has been a quite dramatic change in Departmental policies and funding practices in the past ten years. The federal government has a present constitutional responsibility in relation to the government of Indian affairs. That responsibility cannot be ignored simply because alternate arrangements may, at some point in the future, be arrived at by all those responsible for constitutional amendments. As it is widely acknowledged that the Indian Act is not in accord with the realities of the present situation, I recommend that legislative reforms be initiated and pursued by the federal government acting under its existing constitutional authority. As I noted above, I have a great concern that if this is not done, the current fear of exposure to liability will cause a slowdown in desirable Departmental initiative. This would not be in the interest of those chiefly concerned, the Native Indians of Canada.

B. Legislative Changes

A significant issue relating to the structure of any changes is whether they should proceed on a case-by-case basis or whether the federal government should seek to effect a wholesale revision of the Indian Act. The alternatives available to the federal government and the desirability of different courses of action can be briefly summarized.

(i) Legislative Patches to the Indian Act

Amendments are in the process of being made relating to band council powers and responsibilities with respect to by-laws and taxation. A national consensus emerged within a brief period supporting those amendments. There was sufficient support to give the measures some

legislative priority. Compared to changes which will affect the basic structure of the Indian Act, such reforms are feasible and should be pursued. Many of the reforms discussed in earlier parts of this Report and outlined below can be effected in omnibus legislation that will bring the Act into closer accord with modern practices. The result will be a proper legislative underpinning for current practice and policy. Such changes should be regarded as the minimum necessary to avoid the sorts of problems that have occurred and are likely to occur in future if no action is taken.

(ii) Alternative Statutory Schemes

One of the most innovative changes in Indian affairs suggested in the past fifteen years has been the concept of enabling legislation which would permit bands that are dissatisfied with the structure of the Indian Act to accept options relating to either (a) self-created mechanisms of self-government involving provincial and federal enabling legislation, such as the Sechelt Indian Band Self-Government Act, S.C. 1984-85-86, c. 27 and Sechelt Indian Government District Enabling Act, S.B.C. 1987, c. 16, or (b) enabling legislation which would be an alternative to the Indian Act, such as Bill C-52. There is merit in both approaches. With respect to individual statutes providing for self-government for individual bands, little comment is required. As noted earlier, it is estimated by the Department that 15–20 bands could pursue this route in the next five years. This process can be made available to bands to create a structure of self-government expressly tailored to their unique circumstances. No encouragement is necessary, for it is clear that a number of bands will pursue this process in the near future. The main drawback that I see is the large number of separate statutes — what about amendment? Will a future government balk at the idea of as many separate statutes as may be required? And, as Chief Louie of Westbank noted, the exercise of putting a separate statute in place is time-consuming and costly.

The idea of alternative statutory schemes for Indian government reached its high point in Bill C-52, which was designed to provide an alternative scheme to that presented by the Indian Act. Such an alternative could be opted into by bands wishing to avoid the constraints of the Indian Act. The Bill was drafted and placed on the parliamentary order paper without substantial consultation with major Indian groups. Since bands would not be compelled to opt into the new structure, the Minister apparently considered it appropriate to pursue this avenue without the more time-consuming process of consultation occurring beforehand. Each band was to be granted a broad area of self-definition in relation to its constitution under the proposed Act. The Bill failed passage because the government of the day was defeated in a general election.

Certain obvious defects of the Indian Act can be addressed by selective legislative amendment. On the other hand, an alternative statutory scheme, such as Bill C-52, aimed at creating a more up-to-date structure for Indian government would be an option available to bands who wanted to pursue it. Some people want change. Some do not. Modest alterations to the present Act (probably coupled with the enactment of a separate Indian Lands Act), plus an innovative optional statute such as Bill C-52, should satisfy both constituencies to the extent possible short of full self-government obtained by treaty or constitutional agreement. I am not optimistic that the latter is likely to happen in the immediate future. It may never happen. The present climate calls for some changes and I think the less dramatic ones can be achieved.

PART C

Recommendations for Interim Changes

I have decided to make specific recommendations for change in three principle areas. First, I make several recommendations intended to rationalize and clarify the structure of statute law and policy governing Indian lands. Second, I make a number of recommendations concerning sections of the Indian Act and practice relating to monies. Third, I make several recommendations relating to the powers and responsibilities of Indian governments and the Department's role in the process.

In relation to land, I have endeavoured to make recommendations which reconcile the patchwork of provisions in this area, with a view to creating an atmosphere of certainty, fairness, and opportunity. In relation to Indian monies, I have urged that the protective provisions of the Indian Act be adhered to and that fundamental change receive legislative support by means of self-government to be undertaken at a band's option. Finally, in relation to Indian governments, I recommend that their powers be enhanced, and that this enhancement take place in a framework of openness and accountability to band members.

Some of the difficulties which have been identified give rise to reasonably short-term solutions. In the event that some of the all-embracing proposals for reform are immediately acted upon, these short-term remedies would no longer be necessary. Some bands may wish to opt out of the present system. To accommodate this, I recommend that the present Act be amended and that new optional legislation be put in place. New comprehensive legislation should substitute, for the existing structure, an optional structure which would enable bands to assume devolved powers over federal programs and to exercise self-government or self-direction, which has been sought for some time. Appropriate amendments to the present Act would abolish some of the shortcomings and inconsistencies within the present structure. Bands wishing to stay within the existing Act would have a better version to work with.

I think it important to keep these two processes separate. If, as was agreed by virtually all of the parties before me, the Indian Act cannot be amended to eliminate its inherent paternalism, then I think it important that the differences between the present structure and the new structure be clearly demarcated by law and practice. Bands that are comfortable with the present system should continue to have the assurance and support of that system. Bands which want to undertake greater governance of their own affairs should be able to assume greater

powers and, of course, greater responsibilities. A number of bands have both the capacity and the desire to assume those powers and responsibilities and I think it is incumbent upon Parliament to provide a suitable structure within which those ambitions can be realized.

Whether self-government is realized by way of constitutional amendment or statute, either specific to individual bands or generally, it is clear that the process will take time for even the most advanced bands who already have a plan of action. There are, meanwhile, some changes which appear to me necessary regarding the present legislation pending the arrival of a form or forms of self-government. The process of devolution, which was begun more than ten years ago and continues today, suffers in several aspects from lack of a legislative base. The process of devolution has been very useful in preparing Indian bands for greater self-direction. I hope and expect that the following suggested changes will bring the statute law more into accord with present policies aimed at strengthening and supporting Indian initiatives for self-government.

Land Matters

A. General Issues of Land Title and Tenure

The present Act has a regrettable lack of clarity concerning land tenures, title, and other interests in land. The legal title to reserve lands is vested in the Crown, but the beneficial interest in such lands resides in the band for whose use and benefit the reserve has been set apart. The band's interest in the reserve lands is held in common for all band members. This communal interest is affected by the provisions of Section 20 of the Act, which allows individual band members to acquire an interest in a portion of the reserve. An individual locatee who holds a Certificate of Possession acquires certain rights of use and occupation which may be transferred to another band member by sale, devise, or descent. These rights can override any interest of the band in the land covered by the Certificate of Possession (Boyer v. A.G. Canada (1986) 65 N.R. 305, at 311). Cultural forces apparently have created the perception on reserves that the holder of a Certificate of Possession is the holder of something approaching a fee simple or absolute title to the lands.

There appear to be several inconsistencies in how the Indian Act delineates the individual interest and the band interest in the same land. For example, the band may, by a vote of its members, surrender its reserve lands absolutely or conditionally, including lands that are held under a Certificate of Possession. At present, conditional surrenders for leasing are made. The holder of the Certificate of Possession (known as the locatee) may be compensated for improvements on the land, but it is uncertain whether he has the right to be compensated for his loss of use

of the land. A locatee is prohibited from disposing of his interest to a non-member (Section 28), and may be forced to turn over his interest to the band if he ceases to be entitled to reside on the reserve (Section 25). On the other hand, by Section 58(3) of the Act, a locatee may apply to the Minister to lease the land for his sole benefit, and band council and other band members may have no right in law to approve or disapprove of that lease — Boyer v. A.G. Canada above. When the Minister, acting for a locatee, enters into long-term leases, such as a 99-year lease for residential development, a substantial issue arises as to whether this is an effective avoidance of the surrender process. Lands under such leases are clearly alienated for a lengthy period and if substantial portions are so leased, the reserve may lose its character. I adverted to this sort of issue earlier in this Report when discussing a proposed lengthening of the head lease at Mt. Boucherie Mobile Home Park.

The Boyer case in the Federal Court of Canada addressed a locatee lease issue. A band member sought approval of a 21-year locatee lease of land intended to be used for a full-service marina. The band administration opposed the lease and refused consent. The Minister effected the lease. The band administration sued. The band's position was that such a lease improperly avoided the surrender process, but Marceau, J. of the Federal Court of Appeal rejected that submission. His Lordship did say, however, that a longer term might involve a violation of the intent of the statute:

> When a lease is entered into pursuant to s.58(3), the circumstances are different altogether: no alienation is contemplated, the right to be transferred temporarily is the right to use which belongs to the individual Indian in possession and no interest of the Band can be affected (I repeat that of course I am talking about interest in a technical and legal sense; it is obvious that morally speaking the Band may always be concerned by the behaviour and attitude of its members). In my view, when he acts under s.58(3), the duty of the Minister is, so to speak, only toward the law: he cannot go beyond the power granted to him, which he would do if, under the guise of a lease, he was to proceed to what would be, for all practical purposes, an alienation of the land (certainly not the case here, the lease being for a term of 21 years with no special renewal clause); and he cannot let extraneous consideration enter into the exercise of this discretion, which would be the case if he was to take into account anything other than the benefit of the Indian in lawful possession of the land and at whose request he is acting. The duty of the Minister is simply not towards the Band. (supra, at 311–12)

The Court held that the 21-year lease did not infringe the surrender requirements and sustained the lease. The result could have been different if the lease had been long-term and amounted to a form of absolute alienation of the land.

In some respects the interest of a locatee is similar to the interests of a holder of a fee simple interest. The surrender provisions of the Act and the legal authority of the band to surrender locatee land notwithstanding the wishes of a locatee creates a measure of uncertainty about the precise interest of the holder of a Certificate of Possession. With the growth of commercial and residential leasing on reserves, such collisions of interests will become more common and it would be desirable to address them now so that the position is clarified.

Another difficulty with respect to the present land regime is that of administering the Act. So long as there are inconsistencies and uncertainties, there will be administrative difficulties. Absence of clear band jurisdiction over surrendered land has created great uncertainty as to regulation of business enterprises on surrendered lands. Coupled with the absence of a taxation power, the normal municipal efforts to create an environment conducive to the development of industrial or business activities is lacking on most reserves. Some of these difficulties will be ameliorated by the Kamloops Amendments. These proposed amendments do not, however, address all of the uncertainties concerning land tenure that inhere in the present statute.

Another difficulty of administration concerns the Minister's involvement in almost all dealings with land. The Minister is often required to exercise discretion where there is a conflict or potential conflict between the collective and individual uses of the land. The Department historically has been responsive to cultural shifts. Recently this has favoured the collective interests of the band as expressed by band councils. It places the Department in a most invidious position if it tries to reconcile the locatee's interest and a band's interest in lands. If there is a degree of uncertainty, it tends to furnish ammunition to both sides to indict the Department. The clearer the demarcation, the less room for controversy.

Perhaps the most fundamental difficulty in relation to the development of band lands is attracting private financing. Bands such as the Westbank Band should have the opportunity to grant security over their lands so that good development is encouraged. Indian people appear unanimous in their desire to preserve in the band, ultimate title in band lands. However, as noted by several witnesses, some Indian people want greater freedom to mortgage their property. Such financing, of course, carries with it the consequences of default. Indian or non-Indian businesses located on band lands will, like businesses elsewhere, fail on occasion. Lending institutions will not advance monies without some assurance that they can deal freely with the security interest being granted to them. Accordingly, steps must be taken in the case of long-term leases to afford lending institutions a clear method by which they can execute upon the remaining term of any lease and thus realize on the property that was posted as security for a loan. The present Act is less than perfect in its delineation of the respective interests in lands and it fails to provide for realization.

I recommend that more detailed legislative provisions be enacted to clarify the different interests in Indian lands, in order to enhance the ability to obtain financing for projects on Indian lands.

The proposed Kamloops Amendments (which I deal with later in more detail) would extend the definition of "reserve" to expressly include conditionally surrendered (designated) lands and at the same time stipulate that the prohibition against mortgaging Indian real property on a reserve would be relaxed. This would not affect the underlying band interest, and would permit a leasehold interest to be mortgaged and subject to a form of execution. At Westbank, many of the developments on the reserve lands were by way of locatee lease. If a lender takes security on a locatee lease, he must be able to realize on his security should the borrower default on the secured loan.

The Toussowasket mobile home park development at Westbank illustrates potential problems that can arise regarding security on locatee leases. The locatee decided to develop his land through a company which he controlled (Toussowasket Enterprises Ltd.). His company took a locatee lease on the property and offered that leasehold interest as security to lenders. Evidence adduced before the Inquiry indicated that there were problems with one lender's security because the development lacked proper access. The mobile home park went into receivership. The Band Council refused to approve any assignment of the leasehold interest by the holder of the security. At the time, it was Department policy to request approval from the band council before permitting any assignment of a leasehold interest in reserve lands. The current Department policy on assignments of leasehold interest apparently has changed. This policy is set out in the *Land Management and Procedures Manual*:

> 6.6.1(d) Band Council Consent. It is a matter of program policy to obtain the written concurrence of the Band Council, and the Locatee where applicable, to the proposed disposition. Some Bands and some Locatees have required that assignees, sub-lessees, mortgagors etc., pay considerable sums to individual Indians as a condition precedent to their recommendation for approval of a proposed transaction between two non-Indian holders of an interest under a lease. There is no provision under the Indian Act to support such a practice. Obtaining the written concurrence from Band Councils and Locatees is a policy of courtesy to the beneficial users of Indian Reserve land, and the Minister or his representative has no authority to capriciously refuse approval of such dispositions of leasehold interest without firm and substantial reasons, none of which comprise a failure to pay for concurrence from Bands or individual Locatees. Where there are substantiated reasons for disapproving a proposed disposition or encumbrance of leasehold interest, such reasons and recommendations must be submitted to the Minister or his delegated representative for consideration. Where a Band Council or Locatee does not, for any reason, provide concurrence or substantiated reasons for non-

> recurrence within a reasonable period of time, having regard for the circumstances, a letter over the signature of the Regional Director General should be forwarded to the Band Council outlining that the Minister may not, unless specifically authorized by the terms of the head lease, arbitrarily refuse his approval and registration of the documents evidencing the disposition of the leasehold interest.

As long as the above procedure is followed, it would appear that a secured creditor who is attempting to realize on his security by assigning the leasehold interest to a third party will be successful. However, the events at Westbank demonstrate that substantial pressure may be placed on the Department to deny a secured lender full freedom to realize on his security.

I have considered whether anything needs to be done where bands have authority to manage their lands. I think that in cases where new enterprises are being established on such lands, all must clearly understand who they are dealing with and who will be able to provide such safeguards as are deemed necessary. Where the Department is contemplating the grant of authorities to a band on whose reserve(s) there are a number of tenants, it would seem a sensible precondition to require the band to covenant with the existing operators to not unreasonably refuse consent to dispositions. That seems to be a method to prevent future controversy.

I recommend that the current Departmental policy regarding band council approval of dispositions relating to locatee lands be continued, and that the Department discourage councils from creating administrative delays in the approval of such dispositions, especially concerning realization of security interests.

B. Locatee Leases

The pattern of land holding across the country varies from region to region. While allotments are used by approximately 80 per cent of the bands in B.C. and 80 per cent of the bands in the Maritimes, fewer than 20 per cent of the prairie bands have used them as a means of dividing land. Many of these differences stem from cultural traditions, but they also arise out of the economic circumstances of the band. Allocation of land to locatees was very much the norm at Westbank.

By leasing his land pursuant to Section 58(3) of the Indian Act, a locatee may receive substantial personal benefits. In many cases, locatee lands are leased for many years. Depending on the kind of development, a long-term lease may be required in order for developers to secure adequate financing. The present policy of the Department is to allow locatee leases up to 21 years in length, subject to approval by the band council. Leases over 21 years require a band vote for approval. This appears analogous to the requirement for band approval to surrenders.

The Department also encourages bands to establish a revenue-sharing policy whereby some percentage of the rent received by a locatee accrues to the benefit of the band.

In the Boyer decision discussed above, the Court considered the conflict between the band's communal interest in all of its lands and the individual interest of a locatee. The band argued that the locatee lease provisions were inconsistent with the surrender provisions of the Act and, because a locatee lease was a disposition of band lands, the band wanted to have final say about whether a locatee lease would be granted. The Court held that since the specific provision in the Act governing locatee leases (Section 58(3)) excluded any role of the band or band council in granting the lease, the band council was not entitled to any veto power. In the case of a locatee lease, the individual interest prevailed over the general interest of the band in all its lands. The only caveat the Court placed on this reasoning was to the effect that if the term of a lease was so long as to amount to an alienation of the land, then surrender considerations could arise.

At Westbank, the Band membership held a vote on the issue of locatee leases and revenue-sharing. A large majority of the eligible voters voted in support of the following resolution:

1. That the terms and conditions of individual Locatee leases on our Reserves need only be approved by the Band Council and not by a majority of Electors.
2. That the Locatees leasing their land under Section 58.(3) of the Indian Act should be entitled to receive all the rentals from such leases and should not have to pay any percentage to the Band.
3. That neither the Band nor the Department should interfere with a person's personal and fundamental right to provide for his/her children in the manner he/she considers appropriate.

The Department has apparently abided by the wishes of the Westbank Band as expressed in that Band vote held on February 21, 1980. The first item of the Band resolution appears to overrule the present national policy of the Department to require a band vote on any locatee lease that exceeds a term of 21 years. I think that a major consideration underlying this Departmental policy is a fear of potential liability based on an allegation of breach of fiduciary duty.

I believe that the policy of the Department should be to require a band vote to approve locatee leases only for leases over 45 years. A policy requiring locatee leases exceeding 45 years to receive the support of a majority of band members would allow members to become fully informed about long-term development proposals and to consider the possible consequences of any such proposed development. Because a long-term lease will affect the use of band lands for many years, it is appropriate that the membership at large be given some input into the

decision to lease. When band lands are leased for long terms, a conditional surrender is required and the surrender provisions of the Indian Act require a band vote on the terms of any conditional surrender. A locatee lease for 99 years is as much an alienation of band lands as is a conditional surrender for 99 years. While the band interest in locatee lands is residual in nature, there is a vital interest of band members to be addressed if the nature/character of the reserve is to be altered. The democratic process demands that band members should have some say in such matters.

I understand why the Department is nervous about leasing matters. Nonetheless, I think locatees need a measure of freedom. At some point, their absolute rights collide with wider band interests. In Boyer, 21 years was not regarded as an alienation. My sense is that 45 years is roughly the transition point. I believe that amendment of Section 58 may be necessary to achieve the object suggested and to put the matter beyond controversy. Bands opting out (as adverted to earlier in the Report) of the Indian Act will have to consider whether they wish to adopt a more or less stringent approach to this question. This is the sort of issue that will be of concern to more developed or advanced bands. It only arises where Certificates of Possession are in existence. David Sparks said:

> Westbank, and through the Okanagan Valley, there are a large number of location certificates. There are a large number of location certificates on certain reserves in the south end of Vancouver Island. There are virtually no location certificates in either Manitoba, Saskatchewan, or Alberta, or Northern Ontario. There are a large number of location certificates on reserves in southern Ontario, and also a fair number in the Maritimes.
>
> It's a pattern, and I don't know why it goes that way.

Is it any accident that many areas where there is a preference for Certificates of Possession are areas of more valuable land? If the above suggestions are adopted, I think a workable compromise between band interests and individual interests can be effected.

One further matter deserves mention. A pre-paid long-term locatee lease is not economically different from a sale, but its use may permit individuals to avoid the surrender process and the economic consequences of surrender. In order to fund band management of reserve lands, I think that band governments have the right and obligation to seek a portion of lease revenue to compensate for the band's loss of its residual interest in leased lands. This can assist self-government to be realized in its fiscal as well as its administrative respects.

I recommend that the Department encourage bands to consider the implications of long-term locatee leases on band revenues.

C. Land Leasing

The negotiation and setting of rents on leased reserve land was a source of controversy and conflict at Westbank. The majority of land leases there stipulate that rent be reviewed at five-year intervals. Under the terms of the lease contracts, the Minister or his authorized representative was designated as the authority to determine the rent. If a party was not satisfied with the rent as determined by the Minister, he could appeal to the Federal Court. However, typically, before a lessee could appeal to the Federal Court, and pending its decision, he was required to pay such rent as had been determined by the Minister or his authorized representative. In order to ensure that the rent review process works well, it is important that the parties have a rent fixing procedure that is both efficient and fair.

In the recent past at Westbank there has been some confusion concerning just who has the power to fix or determine rents — the Band Council or the Minister as represented by an official of the regional office. This confusion may have been contributed to by the Department's policy of devolving additional administrative functions to Indian bands. Pursuant to the terms of the 1977 Agreement, the Department of Indian Affairs agreed that the Westbank Band Council would, inter alia:

> Negotiate with lessees and permittees as to revision of rentals, new rentals and enforcement of terms and conditions in agreements.

Then Chief Ronald Derrickson not only negotiated with lessees but also undertook to determine rental rates on a number of occasions. In one case, Mr. Derrickson purported to determine the rent for one lessee at figure X. Two years later, the Department purported to determine the rent on the same lease in a higher amount. The matter remains unresolved even though these events occurred in the early 1980's.

It seems to me that it would be beneficial for all parties if in ordinary cases a single authority for determining the rent could be clearly spelled out and adhered to. Because of the nature of reserve land, all leases are made in the name of the Crown. The Minister or his appointed agent is given authority to fix or determine the rent. This appears to be a contractual matter agreed to by the contracting parties. Because the Crown holds reserve land for the benefit of a band, the Minister has a duty to act in the best interests of the band or band members with regard to any land transactions (Guerin v. The Queen (1984) 2 S.C.R. 55 N.R.161). As noted above, the Minister also appears in the usual case to have a contractual right or duty to determine rent according to the terms of the lease. These duties need not be in conflict. By setting the rent according to the terms of the lease, the Minister or his authorized representative is acting according to law. Clearly, it is in the best interests of the locatee or the band to have the rent determined

according to law. Therefore, by setting the rent pursuant to the terms of the lease, the Minister or his authorized representative will never on that account be acting contrary to the Indian interest. However, the person setting the rent must have a scrupulous regard for the economic welfare of the locatee or the band, as the case may be.

How is the Minister or his authorized representative to arrive at an appropriate rent? There must be sufficient expertise available to enable them to properly determine the rental figure for the succeeding period. The Lands, Revenues and Trusts (L.R.&T.) branch of the Department is responsible for managing Indian lands. Because of the crucial importance of the reserve land base to the social and economic well-being of Indian people, it is essential that the L.R.&T. branch have access to professional advice from persons with special expertise and training.

I recommend that the Department of Indian Affairs employ contract counsel to deal with matters such as lease negotiations and litigation arising therefrom.

Such a resource group of experienced professionals should be empowered to act on behalf of locatees in the negotiation process and in other matters involving the use and management of land. Normally, such services should be available to bands and locatees through band councils. The lawyers in the first instance would liaise with the council on the matter. This would allow participation by both the locatee and band council in the negotiation and rent-fixing process. Access to appraisal and legal expertise is necessary if the interests of Indian people are to be properly protected. In cases where the parties could not agree on a rent before the contractual deadline, it would still be the duty of the Minister or his authorized representative to set the rent. They would determine the amount having regard to the best advice and information available. If the Department has the ability to draw upon the expertise of a skilled group of professionals specializing in leasing matters, the Minister will be better informed when determining rents. This is not to say that L.R.&T. are not served by good and dedicated people today — I simply say that the growing complexities of Indian economic affairs demand more sophisticated resources.

By their nature, most land transactions require legal expertise. At the present time the Department of Indian Affairs, like all federal government departments, depends generally upon the Department of Justice for legal advice. For a variety of reasons, the Department of Justice is not always best suited to deal with lease negotiations and litigation. I note certain material that was placed before the Commission (A Review of Land Management and Development Policies, Nov. 21, 1983 in Exhibit 198). This material was produced by a special steering committee chaired by Mr. Gilbert Joe of the Sechelt Band. The

report of the committee contained, among other things, the following comments:

> The Role of the Federal Justice Department in Band Affairs Should be Restricted to the Absolute Minimum Necessary "for Saving Harmless the Crown".
>
> From the information available to this Committee, it would appear that the Regional Office of the Department of Justice was first brought onto the scene in the early part of 1972. By Pink Circular No. 979 dated March 29, 1972, Larry E. Wight, Regional Director of Indian Affairs, British Columbia Region, announced to his program managers "that all future legal services from this Region will be obtained in Vancouver". Mr. Wight spoke of "this new working relationship" and mentioned that "this pilot program for the British Columbia Region" would be watched very closely in Ottawa ". . . as a model on which to base the direction of legal services in other Regions". Finally, he urged the ". . . proper use of our new Legal Advisors for the British Columbia Region". Attached to this Policy Circular was a copy of Mr. Wight's letter to the Justice Department confirming that legal assistance would be required in a number of specified areas including land transactions, negotiations for "major projects", resource agreements and assistance in the drafting of Band by-laws.
>
> In answer to an enquiry from the Union of B.C. Indian Chiefs, N.D. Mullins, Q.C., Director of the Justice Department's Vancouver Regional Office, wrote in February 1973 explaining his view of his Department's duties and responsibilities "in relation to Indian reserve land and Indian matters in British Columbia". Perhaps the most illuminating paragraph from Mr. Mullins' letter is the following:
>
> > To expedite our processing of Indian land matters, I find it easiest to look on Indian reserves as land which belongs to the Crown, that all alienation of the title to Reserve lands by lease or otherwise must be done in the name of the Crown, and all actions to enforce rights in relation to the Reserves should be brought in the name of the Crown. The legal service functions of the Department of Justice are not and ought not to be political in nature and thus we try to avoid becoming involved in such problems as claims of aboriginal title, or that Reserve lands are held by the Crown in trust for the Indians.
>
> In responding to the specific questions submitted by the Union, he summarized his comments as follows:
>
> > 1. In the final analysis we must take our instructions from the Department of Indian Affairs and Northern Development.
> >
> > 2. Title to Indian reserves is vested in Her Majesty and it is Her interests which we must preserve and protect. However, Her primary interests in such lands is that they be used for the benefit of Indians and consequently that is also the interest of the Department of Justice.
> >
> > 3. We can best perform our legal functions if we have direct dealing with the Indians and Departmental officials during the whole program of economic development of Reserve lands.

> Mr. Wight circulated a copy of this letter with his Pink Circular No. 1012, commenting that "... the services being provided by the Department of Justice are fairly clearly defined in their letter and we should regard this as their role in handling land matters until further clarification is received.." However, he cautioned against involving the Justice lawyers in all negotiations as he did not consider their Regional Office to be "adequately staffed to fill this role for some 400 or 500 land transactions yearly" although he did believe it to be "a good idea for major developments." John Ciaccia, Assistant Deputy Minister of Indian Affairs, was not necessarily even convinced of this. In a discerning directive of "cautionary remarks" to Mr. Wight, he agreed that cases should be referred to Mr. Mullins for his review but that Regional Indian Affairs should retain the prerogative of referring to D.I.A. headquarters any opinions that were not appropriate to their Department's relationship with Indian people. In Mr. Ciaccia's words: "Our responsibility is to service the needs of the Indian people, whereas Justice is responsible for saving harmless the Crown. Therefore, conflicts of interest are possible..."
>
> ... The Justice Department must be relegated to its only proper role, that of acting solely as legal advisor protecting the interests of Her Majesty. Until we can achieve self-government, our principal objective, the intrusion of the Justice Department lawyers into our affairs should be kept to the absolute minimum necessary for them to protect the Crown...

In addition to the foregoing conflict considerations, the Department of Justice is often not called upon until lease disputes have reached the litigation stage; undue time may be consumed while the assigned lawyer familiarizes himself with the salient aspects of the case. Clearly, the Indian interest is not always identical to the concerns of the Crown, as the comments quoted above illustrate. Thus, involvement of the Department of Justice as advocate for a band or locatee may not be appropriate. The Indian client may not always feel that the Department of Justice is working only in his interest. Such a perception makes the task of counsel nearly impossible. Where there is the possibility of divided allegiance, the better course is to take steps to resolve the conflict. There is always going to be a possible conflict in having Justice act as the lawyer in these matters — the suggestion I am making appears to me to be a practical method of avoiding the conflict and ensuring fair and competent handling of land issues.

Under the proposed system, both the locatee (band), and the lessee (or counsel for the lessee) would have the benefit of dealing with professionals devoted solely to the resolution of issues arising from leases on reserve lands. The lessee would know who he was dealing with throughout the negotiation process. The locatee (band) would receive expert advice; and the availability of such expertise at an early stage of negotiations should promote a timely and fair resolution of issues. Of course, if a locatee (band) wished to turn to outside advisers, he (it) should be able, at his (its) own expense, to do so.

If rental issues cannot be resolved and the matter proceeds to litigation, a court will be the ultimate arbiter. It can award costs to the successful party. In a case where a locatee or a band has unreasonably insisted that the rent be set at an unrealistic figure and has pursued the matter unsuccessfully in court, the Crown should have the ability to seek recovery of any costs awarded against Her Majesty. These cases probably would be quite rare because in many instances the Crown might feel that there had been a legitimate issue to be tried and would not seek recovery of costs. But in order to deal with instances of unreason or intransigence, the remedy should be available.

As I said above, land is a crucial underpinning to the well-being of Indian people. Money and resources expended in the better utilization of this precious resource will be handsomely repaid. I make these suggestions with a view to increasing the efficiency of utilization of the Indian land resource.

D. Management and Control of Reserve Lands

The Indian Act provides for the transfer of some of the Minister's powers over the management and control of reserve land and surrendered reserve lands to a band. The Department is of the view that by Section 53 of the Act, a band may assume management and control over its conditionally surrendered lands. Section 53 reads as follows:

> 53. (1) The Minister or a person appointed by him for the purpose may manage, sell, lease or otherwise dispose of surrendered lands in accordance with this Act and the terms of the surrender.
>
> (2) Where the original purchaser of surrendered lands is dead and the heir, assignee or devisee of the original purchaser applies for a grant of the lands, the Minister may, upon receipt of proof in such manner as he directs and requires in support of any claim for the grant and upon being satisfied that the claim has been equitably and justly established, allow the claim and authorize a grant to issue accordingly.
>
> (3) No person who is appointed to manage, sell, lease or otherwise dispose of surrendered lands or who is an officer or servant of Her Majesty employed in the Department may, except with the approval of the Governor in Council, acquire directly or indirectly an interest in surrendered lands.

Although Section 53 does not specifically provide that the Minister may delegate his powers of management of surrendered lands to a band or band council, in practice this is often done. The section contemplates that the Minister may appoint a person for the purpose of managing, etc., surrendered lands. At Westbank, the Minister appointed the Band Council to manage its surrendered lands. There is, however, some uncertainty as to whether the section in fact permits the Minister to appoint a body such as a band council.

I recommend that Section 53 of the Indian Act be amended to specifically authorize the Minister to appoint a band council to manage surrendered lands of the band.

Under Section 53(3) any person who is appointed to manage surrendered lands is prohibited from having any interest in those surrendered lands. The prohibition does not make sense when a band council has been appointed to manage the surrendered lands. That subsection therefore should be consequentially amended to except a band council from the general prohibition. Members of council would of course continue to be subject to the general law concerning conflict of interest.

Pursuant to Section 60 of the Act, a band may be granted the power to manage and control its own lands. That section reads as follows:

> 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 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).

It should be noted that the right to manage and control reserve lands can be granted to the band as opposed to a band council. Section 2(3) of the Act states that when a power is conferred upon a band, it must be exercised pursuant to the consent of a majority of the band's electors, and when a power is conferred upon a band council, it must be exercised pursuant to a majority vote of the council quorum. The current practice of the Department is to require the band to vote on the request to obtain Section 60 land management powers. If the band wants to delegate its powers to the band council, it expresses that wish in the vote. This was done at Westbank when the Band received Section 60 powers. The Act does not expressly permit a delegation of powers from the band to the band council. In addition to the problem created by the legal principle that a delegate cannot subdelegate his powers, the statute seems to indicate quite clearly that a power conferred upon a band by any provision of the Act can be exercised only by a majority of the band's electors. It seems to me reasonable that certain powers of management and control over band lands can be more conveniently handled by the band council. However, because reserve lands are set apart for the benefit of all band members in common, and because the land base is so crucial to the economic well-being of band members, it is important that the membership at large should have a voice in major decisions affecting reserve lands. Therefore, I do not recommend that the wording of Section 60 simply be changed to allow the Governor in Council to bestow the power of management and control on a band council directly. If those powers are to be transferred from the Minister, they ought to be transferred to the band as a whole.

I recommend that Section 60 be amended to specifically allow an Indian band to further delegate some or all of its powers of management and control of reserve lands to the band council. The terms of any subdelegation should specify the limits of authority bestowed upon the band council and stipulate in what circumstances a band vote should be held on decisions relating to the management or control of reserve lands.

E. Allotments

An issue that can cause controversy among band members is the question of land allotments. As I have noted elsewhere, land forms the great underlying economic base for Indian people. Accordingly, any dealing in that precious commodity very much affects their well-being. Later in this Report I suggest that band councils should prepare an annual report to keep band members properly advised of band business generally.

I recommend that all land allotments be specifically noted in the annual report prepared by any band.

Special care must be taken where there is an allotment of land being made by a band to a member of the band executive or to a member of the immediate family of an executive member. In those instances, it would seem desirable to provide notice to band members of the proposed course of action so that the matter may be raised before the band council in somewhat the same method that certain zoning matters are raised before municipal councils. I doubt that I could analogize band government to a municipal government generally, but it does seem to me that the sort of procedure used in municipal zoning matters (dealing with land) would be a useful model in the case of allotments to band executive members or their immediate families.

It seems undesirable to require that there be a formal band vote held for such allotments because that could be overkill in matters not of sufficient general interest to call for the consideration of the whole band. But, it may well be the case that certain individuals in the band would be interested in or object to the proposed allotment. In order to ensure that there be no foundation for an allegation of favouritism or undue influence, such allotments should be raised in public before the band council for the benefit of interested parties. There ought to be sufficient notice given to all band members of any proposed allotment, together with sufficient details of the proposal, to enable members to reach an informed decision on the issue.

I recommend that fair public hearing procedures relating to allotments to band executive members and their immediate family be provided for either by statute or by regulation.

A simple remedy for failure to follow such a procedure would be to make provision for a court to declare an allotment void if the appropriate procedure had not been followed. Obviously this would have to be subject to some limitation period. The court should be endowed with the power or discretion to excuse good faith exceptions or procedural errors of a minor nature. There must be a balancing of the interests of fairness and the operative necessities of band government.

I recommend that a right of appeal be provided regarding an allotment of lands to a member of the executive or an immediate family member of such executive, and that a court be entitled to declare an allotment void for failure to follow the prescribed procedures, with the discretion to dismiss appeals where any error that occurred was made in good faith or was of a minor nature.

F. Land Registry

A general refrain by many witnesses was that the present system of registration under the Indian Act needs improvement. The Act itself provides for the establishment of a Land Registry system in simple terms:

> 21. There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting land in a reserve.
>
> 55. (1) There shall be kept in the Department a register, to be known as the Surrendered Lands Register, in which shall be entered particulars in connection with any lease or other disposition of surrendered lands by the Minister or any assignment thereof.
>
> (2) A conditional assignment shall not be registered.
>
> (3) Registration of an assignment may be refused until proof of its execution has been furnished.
>
> (4) An assignment registered under this section is valid against an unregistered assignment of an assignment subsequently registered.

For reasons which are largely historical, the use of the provincial registry systems appears to be considered unacceptable by most of the Indian groups involved. There has been some use of the provincial system in British Columbia.

The Department recognizes that a number of bands issue "buckshee" leases. A "buckshee" lease is an unregistered lease of reserve lands. The primary reason for the use of "buckshee" leases would appear to be the perceived bureaucratic requirements of the Department under the present system. Lease applications and the transfer and assignment of leases are subject to approval by the Minister. Long-term leases under current policy require Department of Justice advice. If it is perceived that the registration system is too expensive or unwieldy, there will be a

tendency to try to operate outside the system. This is not the best practice because of the inherent illegality of these "buckshee" leases. The Registry system must be made more accessible and efficient so that it can be utilized by bands at varying stages of development.

I suggest below that a separate statute dealing with Indian land is needed. The Department seems to be of the view that legislative change is necessary with respect to land. The present Act is quite skeletal in its provision for land registration. It appears to me that a major interim measure required is additional funding to upgrade the present system in Ottawa. I think the system must be enhanced because I have no basis for believing that integration into the provincial systems is likely soon.

I recommend that additional funding be provided to improve the operation of the Indian Land Registry and that the necessary regulations for its more effective operation be enacted.

G. An Indian Lands Act

I have noted difficulties with the present Indian Act and policy relating to the system of land interests, locatee leases, the management of lands, allotments, the granting and administration of leases, and the Indian Land Registry. Indian land matters are dealt with quite sparsely in the present Act and as I mentioned in Part A of Section II, an Indian Lands Act has been proposed. I believe that such an Act should be passed. I hasten to say that this is consistent with the process of self-government. Such a statute would address a multitude of existing issues and would afford a coherent legal structure for all bands across Canada. I think the present statutory provisions are too rudimentary for the age in which we live. As I said earlier, such an approach should be of assistance to the better utilization of Indian lands.

I recommend the enactment of a comprehensive Indian Lands Act.

Indian Monies

A. Revenue Monies

The Indian Act defines Indian monies as: "all monies collected, received or held by Her Majesty for the use and benefit of Indians or bands". The Act further distinguishes capital and revenue Indian monies in Section 62:

> All Indian moneys derived from the sale of surrendered lands or the sale of capital assets of a band shall be deemed to be capital moneys of the band and all Indian moneys other than capital moneys shall be deemed to be revenue moneys of the band.

By Section 69 of the Act, the Governor in Council may by order permit a band to control, manage, and expend its own revenue monies. There is no equivalent provision to grant a band control over its own capital monies. Naturally, Indian bands prefer to have control of their monies. I noted earlier that the lack of any provision to allow bands to control their own capital monies had led to pressure on the Department to categorize monies as revenue rather than as capital.

Any power to manage and control revenue monies that may be given, pursuant to Section 69, is given to a band and not to the band council. In this respect, Section 69 is similar to Section 60, referred to above. I was told that most bands have been granted the power to control their own revenue money under Section 69. In practice, however, the day-to-day management of revenue monies is undertaken by the band council as opposed to the band as a whole. It makes sense that the power to manage and expend certain sums of the band's revenue monies should be delegated to the band council, which is charged with the day-to-day administration of band affairs. As counsel for the Department of Indian Affairs submitted to me, it does not make sense that a band vote should be required every time that it is necessary to purchase a new box of pencils for use at the band office. Still, I think it important that the band members should have adequate input on the expenditure of resources which belong to the band as a whole. For example, I was told that some bands hold a vote on a proposed annual budget and authorize the band council to undertake the expenditures indicated in that budget. This seems to be a reasonable way of providing the band members with general input while allowing the band executive to make day-to-day decisions regarding the expenditure of specific funds. I think that with respect to major investments of band funds, the band membership should be consulted prior to the investment and their support should be obtained. Failure to do so in certain cases at Westbank fuelled much controversy. Such failure in any band is a potential source of trouble.

My recommendation regarding Section 69 is similar to my recommendation regarding Section 60 in that I believe that the power should continue to be granted in the first instance to the band as opposed to the band council. However, Section 69 should be amended specifically to allow for the band members to subdelegate certain of those powers to the band council. It would be up to individual bands to decide what terms of limitation, if any, to impose, but possible terms of the subdelegation could limit the band council's power of expenditure to certain dollar amounts or require band approval in potential conflict of interest situations.

I recommend that Section 69 of the Indian Act be amended to allow a delegation of power by the band to the band council, subject to such terms and conditions as are deemed fit by the band.

B. Capital Monies

As noted in the submissions before me, the Department is faced with pressures for change and a liberalization of the treatment of Indian capital monies. These pressures are evidenced by the demands for transfers of capital monies, and by the requests for per capita capital distributions under Section 64(1)(a) of the Indian Act.

As I noted earlier, there was pressure to pay out capital monies to bands during a time when long-term rates paid by government on trust funds were low. This sort of controversy continues to simmer to the present day, and there is considerable debate concerning the role of the band and the role of the Minister in dealing with capital funds. The Act here, too, is quite paternalistic and rudimentary in its treatment of this subject. It is out of step with economically advanced bands. A significant number of bands want more flexibility regarding the use of capital money on band projects; those wishes should be satisfied as much as possible. There is considerable tension about this issue between wealthy bands and the Department and early resolution of this tension is desirable.

Section 64 of the Indian Act contains provisions permitting the expenditure of capital monies:

> 64. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band.
>
> (*a*) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;
>
> (*b*) to construct and maintain roads, bridges, ditches and water courses on the reserves or on surrendered lands;
>
> (*c*) to construct and maintain outer boundary fences on reserves;
>
> (*d*) to purchase land for use by the band as a reserve or as an addition to a reserve;
>
> (*e*) to purchase for the band the interest of a member of the band in lands on a reserve;
>
> (*f*) to purchase livestock and farm implements, farm equipment, or machinery for the band;
>
> (*g*) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;
>
> (*h*) to make to members of the band, for the purpose of promoting the welfare of the band, loans not exceeding one-half of the total value of
>
> (i) the chattels owned by the borrower, and
> (ii) the land with respect to which he holds or is eligible to receive a Certificate of Possession,
>
> and may charge interest and take security therefor;
>
> (*i*) to meet expenses necessarily incidental to the management of lands on a reserve, surrendered lands and any band property;

> (*j*) to construct houses for members of the band, to make loans to members of the band for building purposes with or without security and to provide for the guarantee of loans made to members of the band for building purposes; and
>
> (*k*) for any other purpose that in the opinion of the Minister is for the benefit of the band.

Department policy now is to allow bands a greater role in determining the direction and expenditure of their capital monies.

One difficulty with Section 64 is the Department's practice of paying over capital monies to the band under Section 64(1)(k) for purposes which are defined and supervised by the band. The Department's policy of granting band council greater responsibility in this area conflicts with the statutory directive that the Minister "authorize and direct the expenditure of capital monies". As I have said before, by surrendering its statutory role of authorizing and directing the expenditure of capital monies, the Minister and the Department may leave themselves open to legal attack.

From the Westbank experience, I think it can be said that the Department has on occasion taken an expansive view as to what constitutes revenue monies as opposed to capital monies. I know that the motivation was sincere, but there is a danger that the Department can be too easily persuaded to follow a course that may properly require full band consideration. I think it important that the Department recognize its responsibility to band members so as to ensure that revenue monies are truly only those monies which are not related to or arise out of capital assets.

Several concrete examples of this conflict between capital and revenue emerged at the hearings. With respect to a matter in Ontario, it was said that a settlement of an aboriginal rights claim was characterized as being 90 per cent revenue monies. That allocation relative to the settlement of an aboriginal or fiduciary claim may well be the result of a desire to avoid the strictures of the present Act concerning capital monies.

With respect to Westbank, the Band wished the compensation monies for the highway project on Reserve 10 to be classified and paid as revenue monies to the Band. The written agreement between the Department, the Ministry of Highways, and the Band contemplated that those monies could be treated as revenue monies. The Department was reluctant to have the monies so treated, but the episode displays the pressures and pitfalls in this area. I see no reason why Indian bands should not be given greater control over the management and expenditure of their capital monies.

I recommend that the Indian Act be amended to allow bands to more effectively control and manage their capital monies.

Any new provision could be similar to that found in Section 69; however, I believe that safeguards should again be included to protect the interests of all band members. It would not be wise to allow a band council which may represent a small portion of the band's current political and social thinking to have untrammelled governance of the assets that could be the major basis of the band's economic future. Therefore, in order to afford some measure of protection to the capital assets of the band, I think that any amendment should stipulate that bands could only expend capital monies on capital projects. Such a stipulation would be consistent with the philosophy underlying the present Section 64.

Evidence adduced at the Inquiry revealed that many bands do not treat capital and revenue monies separately once they have received authorization for the expenditure of capital monies pursuant to Section 64. If bands are to be given the right to control and manage the expenditure of their own capital monies, they must account for these monies separately from their revenue monies. A suggestion that might be considered is whether it would be advisable for there to be an officer similar to a provincial Inspector of Municipalities. Such an officer would have a similar responsibility to ensure that bands' capital monies were separately accounted for and expended only for the purpose of capital projects.

Section 64(1)(a) allows for a per capita distribution to members of the band of an amount not exceeding 50 per cent of the capital monies derived from the sale of surrendered lands. This per capita payment is in no way related to capital projects of the band. The subsection is an anomaly among the several other subsections, all of which are related to capital projects. As I have noted in Appendix A to this Report dealing with statutory history, the original purpose of the per capita distribution was to encourage bands to alienate (sell) their reserve lands. Originally, the permitted yearly per capita distribution was only 10 per cent. It was raised to 50 per cent in an effort to encourage Indian bands to surrender their lands for sale. Today it is unusual in the extreme to have reserve lands surrendered for sale. Both the Department and Indian people are firmly opposed to such sales. The rationale for the practice of paying per capita monies has thus been wholly repudiated and is in fact contrary to present policy. The per capita payments practice therefore needs to be re-examined.

The reason having vanished, why should per capita distribution remain one of the permissible expenditures of capital monies? The underlying philosophy of the per capita payment — to encourage Indian bands to sell their reserve lands — is repugnant to the interests and the aspirations of Indian people today. The legal maxim that when the reason ceases, the law should cease seems to be applicable here. If a band chooses to make a per capita distribution of its monies to individual band members, such a payment could be made out of the revenue monies of the band.

I recommend that the provision permitting a per capita distribution from a band's capital monies be repealed.

I would like also to see the money (and the responsibility therefor) transferred to bands. Occasionally bands might decide to authorize per capita payments, but it should be recognized that this would be unusual. A good analogy would be the provisions in a will enabling trustees to encroach on capital for the extraordinary expenses of a beneficiary. The danger with per capita payments as a matter of course is that the practice can destroy the corpus of the fund too quickly. What is left for future generations?

C. Band Financial Accounting and Disclosure

It is not unusual for Indian bands to have a great many transactions with individual members of the band. Because of the familial nature of a band, it is also not unusual for there to be a wide spectrum of interrelationships between band members, either by blood or marriage. Because of this fact, it is obvious that many transactions could be described as not being at arm's length. This situation is simply a fact of life in a great many bands. Counsel for the former Band executive at Westbank brought out in cross-examination the fact that in a number of bands, one or two large families may be very substantial property owners and may also have a dominating influence on the political direction of the band.

When bands were not engaged in any significant way in economic enterprise, those close relationships did not pose the sort of problems that can arise today in a modern band which is more active economically. As land becomes more valuable — Westbank is a good example — serious questions can arise as to dealings in that land. Allegations may be made that the band is preferring one person or one group of persons over another. It may be thought that the Chief and council show favouritism to a certain group within the band. This favouritism could take the form of the allocation of housing, the allocation of development funds, or access to opportunities for band- or Department-funded employment. Undoubtedly there is a legitimate area of patronage that may be utilized by government at whatever level. But there is also a duty to be fair, as well as the duty of any government to ensure that those governed can have access to a sufficient range of information to dispel suggestions that there is corruption in band administration. The democratic process demands no less.

It was suggested during the Inquiry that in order to obviate conflicts of interest in band government some new set of guidelines or rules would have to be designed and put in place. I doubt that any new or particular code needs to be formulated or promulgated. Simplicity is a great virtue in these matters. It is a bit like the message in the Gospels

— it is not that the standards are unknown — the difficulty is in having proper standards observed.

Due regard must be had to the nature of a band and band government. Bands vary quite widely in size and economic activity. We should not be looking for something that would unduly hamper the efficient operation of band government, nor would one wish to discourage capable people from running for positions as band Chief or band councillors. Many instances can afford an opportunity for possible conflict of interest. Certain of these matters will be more theoretical than real, and it is necessary that we limit ourselves to those that are truly matters of some substance. It appears to me that the first order of business in considering this question is the area of band reporting. To me, this encompasses two areas — financial statements and an annual report to band members. I heard evidence from a number of accountants who gave evidence before the Commission. Mr. William Kinsey, C.A., an experienced investigative accountant, served as an adviser to the Commission. An extensive amount of material was filed during the Inquiry relating to accounting practices and financial statements of Indian bands.

Mr. Patrick Lett, an individual with wide experience in band auditing, gave evidence before the Commission. He has long thought that band accounting standards could be improved across Canada. This is a new and developing area and obviously no wholly perfect guidelines can ever be devised. Also, since government is moving towards what is known as alternative or block funding arrangements, there has to be some flexibility of approach by those in the accounting profession to ensure that the whole process is kept understandable and that unnecessary detail is avoided. One criticism that Mr. Kinsey has found valid is that financial statements of bands often tend to be too diffuse. By that, I mean that there is multiplicity of schedules. This can cause much difficulty to the average band member who wishes to have a meaningful appreciation of just what is the state of band finances. I set out hereafter a detailed commentary on some of the defects that are noted to exist relative to current accounting practices, coupled with suggestions for practical improvements to ensure that greater clarity may be achieved in the future.

Concerning the question of fuller disclosure to band members of the operations of their governing body, it appears to me that there should be disclosure of a number of items that are of concern generally to members of the band. In format, I would urge that a type of annual report be published for band members. Such a report should be sent or delivered to every band member of adult age. This is a vital necessity of democratic government in Indian communities, and questions of economics should not be allowed to impede a proper flow of information. I cannot think that the cost of any such report would be very steep, but I believe that it would be a legitimate item for the Department to

fund in each and every case so that there would be no fiscal excuse for the failure to have this sort of information disseminated to the constituents of each band. There are certain sensitive items that might well be deemed not necessary to be disclosed. For instance, when dealing with social welfare issues, this Commission endeavoured to exercise a measure of discretion. This is not the sort of payment I would be concerned about or that any band member need be much concerned about in dollar terms, and it is the sort of area where reporting of sums received would add nothing to the information dissemination process but would simply be material to titillate the curious.

The general rule should be that there is full disclosure of all transactions between the band, the Department, and individuals in the band where economic considerations of any substance are involved. With regard to a band executive, I should think that there ought to be a disclosure of honorariums or salaries received, expenses reimbursed, and allied items such as car leases, subsidized housing, and like benefits. While I do not wish to impose unduly onerous burdens on anyone inclined to run for public office in the Indian community, there is now a wide range of disclosure requirements in non-Indian legislative bodies, and as Indian communities have increasing self-direction and self-government, those sort of requirements become more needed for the proper operation of such governments.

Another area in which disclosure is desirable is that concerning real estate acquisitions and disposals when the band is dealing with band members or when a member of the band executive is dealing in land. I would not think that transactions wherein the band is acting on behalf of a locatee on a lease matter would be of materiality requiring disclosure. A disclosure rule would, of course, apply when dealings occurred between the band and people who were members of the executive or who were immediate relatives of members of the executive. Obviously, because of the wide familial relationships in many bands, it would not be sensible to have these matters pursued to undue lengths (second cousins and the like), but clearly where dealings occur with close relatives of a council member or Chief, such dealings can be of material interest and ought to be disclosed to band membership.

The principle underlying this concept is that a measure of publicity is the life-blood of democracy. The experience of mankind is that if individuals know that their acts are going to come under public scrutiny, they will be less likely to act contrary to the broad public interest. The best form of control is obviously self-control and it is a truism that self-control can be fostered and encouraged by the certainty that one's actions will not go unnoticed or unremarked. It will cause those charged with the conduct of public affairs to act truly in the public interest. At the same time, it is obviously undesirable that peoples' private lives be dissected in excruciating detail and that the task of governing be

thereby rendered so unattractive that capable people are discouraged from seeking elective office.

I perceive no insuperable difficulties if this approach is taken to the question of appropriate disclosure of business matters relating to bands and individuals. Any enforcement mechanism should be kept simple. It would be a very simple matter to have inserted in the Act the requirement that once a year the band executive publish a report setting out these matters. Failure by band council to do so could be made subject to a modest penalty along the line of summary convictions matters — I doubt that most fair-minded band councils would have any objection to this sort of disclosure in any event and I would think that the need for enforcement by prosecution would be quite rare.

I have addressed the above remarks chiefly to the question of any possible conflict of interest. It seems to me that before I leave the subject of reporting generally to band membership, I should refer briefly to some matters that I touch on elsewhere in the Report. These concern significant financial transactions of the band. It appears to me that if a significant sum of band capital is being expended or invested, that is a matter that calls for input and direction from the band. One would expect that when such issues arose there would be convened a meeting of the band membership. Such a meeting would precede the actual implementation of the investment or undertaking under consideration. It seems to me that it would be appropriate that in any annual report addressed to the band membership there should be set forth in some detail how the project was implemented and the results to date of the action taken or investment made.

No analogy is ever perfect, but in casting about for some effective method of ensuring that band members were kept up-to-date with regard to occurrences affecting their lives, I considered how it was done in other organizations. A number of self-governing professions send out an annual report to their membership. This seems to me to be a useful way to keep members up-to-date on events occurring in their organization. As Indian bands and tribal groupings become more self-governing entities, I think that there will be an increasing necessity for the executive to keep membership informed in a timely way as to what is happening vis-à-vis their government. Steps will also have to be taken, as I have noted, to ensure that proper standards of disclosure are in place.

It is apparent to me that Indian bands and Indian governments will become more active and prominent in this country. It may be too soon to say that they are "self-governments", whatever that somewhat emotive term may mean, but it is clear that, increasingly, band councils and tribal councils will be more significant forces in the lives of Indian people generally.

The Department of Indian Affairs and Northern Development is becoming a less active presence in their lives. In earlier days when the Department was more or less the whole show, there were certain checks and balances that rested upon that Department as an arm of government. It was subject to ministerial responsibility, for one thing. Also it was subject to certain examination or auditing by parliamentary committees or by entities such as the Auditor General. As the Department ceases to be the main governing authority for Indian people, it appears to me that a new system of checks and balances will have to be devised to ensure that the new mode of government is fair and is seen to be fair. I think a government that is truly responsible has gone a great distance towards being an appropriate and fair government. At the end of the day, individual bands must decide on what is acceptable behaviour for their government. But electors can only make rational choices in this area if there is enough material available to make an informed choice.

It will, of course, be up to the individual voter of the various reserves to satisfy himself or herself as to who is an appropriate candidate for government. If the voters, having the raw material, namely information to work with, cannot make the appropriate choice, then that is a problem that they will have to grapple with like any other democratic group. It appears to me that if this mode of operation is followed, namely disclosure in an ample manner of band business and of matters that could be said to be possible conflict of interest situations, then there will be little opportunity for the fuelling of controversy and conflict on reserves.

I recommend that statutory provision be made for an annual report to be furnished by band councils to band members. I further recommend that the Department follow up any such legislation to ensure that band members are kept apprised of the activities of their government.

I saw a considerable amount of controversy at Westbank. There was a surfeit of rumour. This may largely have been caused by the rapid escalation in economic fortune of that band and its expansion in terms of economic and political power. Perhaps this experience at Westbank was rather exceptional and many other bands will not see such dramatic change. However, we cannot ignore the fact that Indian economic life is going to become more active and more significant, and we must now endeavour to fashion certain tools to aid in coping with the stresses and strains that are bound to arise in future. Obviously it would be highly undesirable to have a Commission frequently appointed to inquire into matters concerning individual Indian bands. Royal Commissions ought not to be invoked if other methods can be utilized. If structures can be put in place that can ensure an orderly democratic process, then opportunities for conflict and controversy could be reduced to a minimum. It appears to me that if the sort of structure and reporting

system that I have recommended in general terms is put in place, then there will be a mechanism whereby the searchlight of publicity will have a salutary effect on local Indian government at the grassroots level.

D. Band Accounting Matters

In this section I have not made specific recommendations because I think this is an area where recommendations must be developed by people with specific accounting expertise. I set out the following discussion for study and hopefully for implementation of the suggestions it contains.

Some problems concerning the financial statements of the Westbank Indian Band are ones that may arise for other bands as they enter into more extensive and varied business ventures. To understand the problems of financial reporting for Indian bands, the Commission sought, and was given, access to "mock-ups" of financial statements of other Indian bands. Mock-ups were copies of financial statements from which the particulars of the band and the dollar amounts were removed. By this device, the method of accounting was made apparent and the privacy of the respective bands was preserved. The Commission accountant, Mr. William D. Kinsey, C.A., had access to certain financial records of the Westbank Indian Band, and the Department of Indian Affairs provided to the Commission accounting materials and information. Mr. Kinsey has been of considerable assistance to me in addressing the questions of possible improvements in the accounting and disclosure areas.

Accounting guidelines on a national basis have been supplied to Indian bands. I understand that some regional supplements or modifications have been authorized from time to time. The first guide seen by the Commission was the Department's *Guide to Year-End Band Audits, 1979–80* (Exhibit 43, Section 1). The main guide now available is *Accounting Guide for Indian Bands in Canada* which was reissued in January 1987 (hereinafter sometimes referred to as "the 1987 *Accounting Guide*"). This was the first update done since November 1980. At about the time the Commission was looking into the question of financial reporting, the Department issued an *Audit Guide for Alternative Funding Arrangements* (hereinafter sometimes referred to as the "*AFA Guide*"). This latter guide was based on work that had been done for the Department by the Ottawa office of Coopers and Lybrand, and is intended to apply to bands opting for funding under the New Alternative Funding Arrangements Program.

Accounting for Government Funding

When the Government of Canada supplies monies to organizations or individuals, it does so by way of grants or contributions. A grant could

be loosely defined as an unconditional payment without an audit requirement. There is a greater formality associated with contributions. Contributions are payments made subject to conditions. Contributions are generally the subject-matter of a written agreement and payments made thereunder are subject to audit. The funding for Indian bands heretofore has been made primarily under contribution agreements. The monies supplied thereunder have to be used for the purposes for which those monies were designated and recipients are required to substantiate that use.

Following upon the Penner Report and some studies made by the federal government, the Department has now established new methods of financing and reporting for some bands, i.e., the alternative funding arrangements mentioned above. Under those arrangements, a sum of money is given to a band to cover a wide range of expenditures. The band determines how the money will be spent and is not required to refund any portion of it. Similarly, any overspending remains the band's responsibility: the Department will not add to the amount agreed. Alternative Funding Arrangements are expected to be agreed upon for periods as long as five years after the initial phase-in period. It is thought that the new program will result in greater financial flexibility for Indian bands entering into those arrangements. It has become necessary to establish a new system of accountability for the money supplied. It appears to me that this new approach to funding is consistent with the encouragement of greater self-direction of bands. Reporting requirements are being simplified but, of course, a heavier responsibility will rest upon band executives to be effective financial managers.

This change marks a significant departure from the previous system of funding Indian bands. One band has made an Alternative Funding Arrangement, and others are expected to do so shortly. The *AFA Guide* lays down new and more easily understood accounting and disclosure standards. It is thought that the report required under the Alternative Funding Arrangements, a "Financial and Statistical Return", will supply the Department of Indian Affairs and Northern Development with the data it requires, i.e., information to show public funds were spent for appropriate purposes and to give some assurance of band solvency. It is hoped also that the new standards will supply band members with adequate information to allow them to be informed judges of the band management and its performance. As the role of the Department as overseer of band finances abates, the task of seeing that funds are properly utilized and distributed devolves more and more to band executives and band electors.

A number of the approaches taken in the *AFA Guide* would alleviate some of the obscurity the Commission found in statements it examined. I feel that some of the approaches to accounting found in the *AFA*

Guide could usefully be adopted even by those bands that do not choose to opt into Alternative Funding Arrangements.

From the study made by the Commission accountant, it does not appear that all bands are consistently following the accounting guidelines established by the Department. As a result, some worthwhile standards of disclosure are treated as optional or ignored; for example, while the Department guidelines call for the disclosure of salaries, honoraria, and travel expenses, the Commission found that those matters were not always disclosed. I think they need to be disclosed on the basis that the electors should know these facts.

I believe that many of the suggestions in the *AFA Guide* are capable of application to band accounting and reporting generally. Under the Alternative Funding Arrangements, compliance with the accounting and disclosure standards is mandatory. Mandatory compliance has not been required under the existing system. I have been advised that all new contribution agreements will also contain a requirement that there be compliance with the accounting guide. It would appear that uniform standards can be established for bands funded under both the old and the new arrangements, and it seems quite feasible for a new guide to be prepared incorporating the suggestions of the *AFA Guide*, the 1987 *Accounting Guide*, and the recommendations of this Commission.

Fund Accounting

Governments at all levels keep their books on what is known as the "fund accounting" basis and Indian bands follow the same practice. Fund accounting presumes that money received for a particular purpose (or a group of similar, related purposes) is kept separate in its own "pot" until paid out for its intended purpose. Properly handled, this makes it easy for the funding agency to determine if funds were spent in the manner originally stipulated.

As practised, fund accounting for Indian bands has the following characteristics, some of which are disadvantageous.

(a) Monies intended for a number of distinct purposes are often deposited in the same bank account, as though many little pots were emptied into a larger one. This makes it possible (and more likely) that some money intended for a particular purpose will be spent for another purpose. The discipline of separate "pots" has been eroded, and may be lost. Money may be spent for something "temporarily" with the good, but unrealized, intention of paying back that money from another source.
(b) Fund accounting considers all incoming monies as revenue and all outgoing monies as expenditures (not expenses). A result is that expenditures having a long useful life (e.g., buildings and

major machinery) are simply written off when acquired, not over the years in which they are expected to be useful. There is no recognition of their lasting value. Since revenue for a period of time and the expenses relating to that same period are not "matched", you cannot know whether the organization is "profitable" in the normal commercial sense. This does not matter for non-profit activities (e.g. governments). It does matter, and hence is unsuitable, for commercial operations where profitability should be measured.

The Use of Fund Accounting for Indian Bands

The concepts of fund accounting have been adopted in the Departmental guides and the system prescribed has evolved to meet the Department's need for knowledge. Compliance with the rules of the Department appears to be no guarantee of easy comprehension by band members. The accounting guides have, perhaps understandably, been directed towards matters for which the Department has direct responsibility, i.e., ensuring that bands apply the monies supplied by the Department for the purposes designated.

In the financial statements perused by the Commission accountant, it was found that there was a proliferation of separate Statements of Revenue and Expenditure as part of those financial statements. The Westbank Band's statements generally comprised some 28 to 30 statements. The financial reports of other bands often contained more, and one band had as many as 126 supplementary statements. I am not sure whether I should characterize that as an embarrassment of riches or a plethora of minutiae! It would seem that most of the information in the multitude of statements was set out for purposes of the Department. The problem so many separate statements causes is that the supply of such detail in the financial statements to band members may constitute serious information overload.

A significant issue concerning the presentation of financial statements was raised by the Westbank Band's former auditor. That was the question of whether or not it would be desirable to integrate the reporting of the various commercial ventures with the reporting of the Band by way of consolidated statements. The Westbank Band has been as commercially active as perhaps any Canadian band (save for those bands that draw substantial revenue from oil and gas). In the world of commerce, one often sees the financial statements of groups of corporations prepared on a consolidated basis. In consolidated statements the operations of all entities are considered as one, i.e., the revenues are amalgamated and the expenditures are amalgamated, and internal transactions between the corporations are eliminated. In the words of a Canadian Institute of Chartered Accountants glossary, consolidated statements "ignore the separate legal identities of the

companies and show the financial position and operating results of the group as one economic unit".

The consolidated statements did assist in showing the Band's overall financial situation; however, they did not enlighten the reader on the confusing array of intercorporate, interentity, and interfund transfers. Perhaps the consolidation of the Band and the corporate accounts cannot lead to meaningful results because of the different accounting bases utilized, i.e., the fund accounting used by government and non-profit organizations on the one hand, and the traditional commercial accounting bases used for profit-oriented operations on the other.

To some extent, the method of accounting must be a question of professional judgement. Whatever method is used, the performance of the subsidiaries should be shown to band members. To the extent possible, the standards contained in the *Canadian Institute of Chartered Accountants Handbook* should be adopted.

Reference has already been made in the Report to misconceptions created by financial statements in instances where monies were shifted from one fund to another. We have seen elsewhere how the use of this practice at Westbank beguiled the Regional Director General and the Regional Director of Economic Development. Reallocation of monies or resources between activities (sometimes called "transfers between funds") should not be described as revenue of one fund or activity and the expenditure of another. This can lead to double counting and is a potentially confusing feature of many financial statements seen by the Commission. In some statements, the accumulated surplus of a fund at the end of a year was shown as part of the fund's revenue for the next year. This can be misleading about the actual revenue of a fund for a particular year.

The new *AFA Guide* reflects a form of disclosure which avoids the likelihood of misapprehension. Page 23 of that guide is reproduced at the end of this section. It is a reproduction of a sample statement of revenues and expenditures. Transfers between funds are not treated as revenues or expenditures of the fund. Operating results are shown exclusive of those transfers. The transfer between funds is reported after arriving at the excess of revenue over expenditures or vice versa. Put another way — those transfers should be shown "below the line" as illustrated in the *AFA Guide*.

Notes to Financial Statements

The notes to band financial statements and statements of its unincorporated and incorporated activities should clearly disclose the accounting principles and policies applied in preparing the statements. This is particularly necessary because Indian band accounting policies and

principles are somewhat different from those in normal commercial practice. Further, the provision of adequate notes can be of great assistance to the non-professional reader.

The following examples, with appropriate amendments, are models for some of the notes for band financial statements.

Note 1: Significant Accounting Principles

(i) These financial statements are prepared in accordance with generally accepted accounting principles as set out in the *CICA Handbook* except as modified by the *Accounting Guide* issued by the Department of Indian Affairs and Northern Development, issued [date/or revised to date]. These principles are:

   (a) "Fund accounting" concepts apply, and the statements are prepared on an accrual basis.
   (b) Capital assets (fixed assets) are shown as expenditures. Capital assets acquired after [date] are valued at cost and included in the Capital Asset Fund. (See Note (v) below.)
   (c) Depreciation of fixed assets is charged directly against equity in capital assets and is not included in expenditures for the year.

(ii) Investments, including band-owned or controlled corporations, are shown at cost, except where written down to a lesser amount due to a decline in value, other than a temporary decline. (See also note (iv) below.)

(iii) Income from investments is recognized when received or when receivable by the band.

(iv) These statements include band activities other than those conducted through corporations. The activities included are:

   (a) [provide details]
   (b) [provide details]
   (c) [provide details]

   Activities not included, and the reason for their exclusion are:

   (d) [provide details]
   (e) [provide details]

(v) The capital asset fund consists of capital assets (fixed assets) acquired after [date], together with capital assets previously acquired and specifically identified. Depreciation is charged directly against equity and is therefore not included in expenditures in the year.

(vi) "Funds on deposit with Indian Affairs" represents capital and revenue monies held on behalf of the band. The "statement of changes in funds on deposit with the Department" shows the amounts received by the band and for which the band is accountable.

Note 2: Significant Accounting Policies

(i) Investments have been recorded at the lower of cost or market.
(ii) Depreciation has been charged at the following rates. [provide details]
(iii) Funding received under Departmental agreements is considered revenue when related expenditures are made. Such amounts received but not expended are considered as deferred revenue or amounts repayable to the Department depending on band management's best judgement. Where a loss has been incurred in Department funded activities, the loss is considered to be for the band unless in the best judgement of the band management, the amounts are recoverable from the Department. Such amounts are listed in Note [X] to these financial statements.

There are many other matters that may be an appropriate subject for notes. Those matters are well known to members of the accounting profession and include such things as overdue loans and advances (bad debts), related party transactions, band guarantees, litigation, subsequent events, contingent liabilities, and corrections to prior period earnings. These matters need not be discussed further here because, at a minimum, the same principles of disclosure should apply to Indian bands as are commonly applied to non-Indian commercial enterprises.

For corporations which are owned by or are affiliated with Indian bands, similar considerations would apply. Corporation notes should reflect the following principles:

(a) Normal, i.e., *CICA Handbook* accounting standards, will apply.
(b) The equity method of accounting for investments in subsidiary and affiliated corporations will apply. (This is in contrast to the cost basis which is suggested for band statements.)
(c) Decline in investment values, other than temporary declines, will result in appropriate write-downs of those investments.
(d) Where consolidated statements are utilized, the basis for consolidation will be disclosed, the names of the consolidated corporations will be provided, and the names of those not consolidated will be given, together with the reasons for not consolidating them.

Supplementary Disclosure

Financial statements in and of themselves will not provide all the information which the reader should have. The Department already asks for some supplementary disclosure. Under the 1987 *Accounting Guide*, the following supplementary information is required:

(a) Schedule of Fixed Assets costing over $500 showing individual assets and the following when available: year of acquisition, cost, year of disposition, and proceeds.

(b) Schedule of Debts (other than housing loans) owing to the Band Operations Funds, showing the individual debtor for each of the following classes:

(1) Council members
(2) Officers and other employees of the band
(3) Band members.

(c) Schedule of Housing Loans showing names of individuals and amounts of housing loans owing to the Band Operations Fund.
(d) Schedule of New Homes or Major Renovations showing names of individuals who received new homes or major renovations to existing homes during the fiscal year and showing total dollar amount per person.
(e) Schedule of Salaries, Honoraria, and Travel paid to officers and employees of the band.
(f) Schedule of Accounts Receivable, Aged.
(g) Schedule of Accounts Payable Outstanding, Aged.
(h) Schedule of Contingent Liabilities.
(i) Schedule of band leases showing names of individual lessees and amounts of annual rent. This schedule should also indicate the amount in arrears (aged when applicable) as of the date of the balance sheet.

Aside from what the Department requests, it seems to me that individual band members should be given this information. It also seems to me that the following additional matters should be the subject of disclosure to band members:

(a) Payments and benefits made or given to or for council members, band staff, or their immediate families.
(b) Details of any business acquired by the band or its subsidiaries directly or indirectly during the year. This should be accompanied by a brief description of the consideration paid and sufficient details to adequately inform the band members of the nature of the transaction.
(c) Details of allotments of land made during the year together with a statement of the proposed use by the locatee.
(d) Other real estate transactions to which the band is a party.

Some bands are reluctant to supply the Department with information which is felt to be none of the Department's business. It would seem that the Department has two areas of concern that require it to obtain financial data. One is to see that public funds are appropriately spent. The other is to be aware of any impending insolvency of a band. The AFA guidelines should achieve the Department's ends. However, quite apart from the Department, the band members have a need for knowledge, and each band member should have available to him or her

adequate information about the band's business activities. There may be times when commercial prudence requires confidentiality, resulting in a delay in the release of information, but in due course band members have a right to know what their government is doing. If adequate information is given to them, responsible self-government is more readily attainable and the Department's role, perceived by many to be paternalistic, can be reduced.

Auditors

Under the current practice of the Department, the auditor's client is the band and not the Department. The audit engagement letter should be prepared by and originate with the auditor rather than the band. This is consistent with normal audit practice. It ensures that the audit engagement is placed on a proper basis from the outset. It is reasonable that the auditor should be authorized to make disclosure to the Department or to other funding agencies of information that concerns the Department or such agencies. Appropriate wording should be included in the engagement letter.

It would seem to me desirable that auditors have the right to attend band meetings at which financial statements on which they have reported are scheduled to be discussed. It goes without saying that the auditor must be independent of the band, council, management, and staff, and of any commercial activities owned or operated by the band.

Where feasible, there should be the equivalent of an audit committee. The inclusion of members outside the band council could provide a somewhat different and valuable perspective on band affairs. There may be individuals in the band who do not feel that they can take on the duties of being a full-time councillor or Chief, but who have valuable skills that could be applied in dealing with financial matters. This is a potential resource, the use of which should be considered by bands. With the growth of self-government, increased use of band personnel is going to be necessary in order to look after functions formerly provided by the Department. The financial management function is vital and all available resources should be utilized.

General Observations and Recommendations

The Commission has the following observations and recommendations to make regarding accounting, auditing, and disclosure:

(a) Band members should be entitled to clear, easily understood financial statements covering all band activities, including band-owned or controlled businesses, whether incorporated or not. There is no reason why band members should not have access to

the type of information that is available to public company shareholders or that the public can find out about government-funded entities.

(b) Financial statements alone are not sufficient to provide appropriate disclosure. Supplementary information is required. Much of this information should be provided in an annual report to band members. Specific recommendations on such reporting are made elsewhere in this Report.

(c) Financial statements and schedules prepared for the Department are unlikely to be in the form most suitable for disclosure and presentation to band members. The Department's need for knowledge is not always the same as the band members' need. However, the documents supplied to the Department should be available to band members on request.

(d) Financial information for all band entities should be included in annual financial statements and annual reports. Such information should be provided to band members well in advance of any band meeting where the information is to be discussed. Where feasible, the necessary materials should be mailed to individual band members or families. However, if the material is too bulky, it could be made available at the band office.

(e) Consistent accounting principles and auditing standards should apply regardless of the size of the band or its method of obtaining Departmental funding.

(f) The Department should provide the accounting, auditing, and other disclosure standards in a practical, as well as a theoretical, sense. Band administrators and auditors ought not to have to guess or devise their own methods. Without consistent standards, inconsistencies and misinterpretations are almost bound to occur. The Department should provide a repository of knowledge that helps bands and their auditors to solve their accounting and disclosure problems. Those problems are common to many bands and such a service can be provided without destroying the privacy and anonymity that is desired by bands.

We are in a transitional period. The Department's role is receding but the necessary concomitant is an increased level of awareness and participation by band members. I think the foregoing suggestions will assist that process. I believe a policy of better disclosure can go a long way towards reducing the possibility of unease and unhappiness arising from misinformation or a plain lack of information. As I have said elsewhere, fact is a powerful antidote to rumour.

SAMPLE INDIAN BAND
STATEMENT OF REVENUES AND EXPENDITURES
AS AT MARCH 31, 19X6

	Operating and Maintenance Fund		Restricted Funds (note 7)		Total	
REVENUE	19X6 $	19X5 $	19X6 $	19X5 $	19X6 $	19X5 $
Federal government grants and contributions	2,265,000	1,560,000	–	100,000	2,265,000	1,660,000
Provincial government grants and contributions	40,000	–	80,000	–	120,000	–
Other	25,000	10,000	–	–	25,000	10,000
Deferred revenue	2,330,000	1,570,000	80,000	100,000	2,410,000	1,670,000
	–	–	(50,000)	–	–	–
	2,330,000	1,570,000	30,000	100,000	2,360,000	1,670,000
EXPENDITURE						
Operating and maintenance (schedule)						
Social Development	800,000	700,000	–	–	800,000	700,000
Education	250,000	230,000	–	–	250,000	230,000
Economic development	150,000	170,000	–	–	150,000	170,000
Band management	300,000	250,000	–	–	300,000	250,000
Maintenance of capital facilities	40,000	80,000	40,000	–	80,000	80,000
Interest expense	5,000	5,000	–	–	5,000	5,000
Debt repayment — principal	35,000	–	–	–	35,000	–
Capital outlays	770,000	40,000	–	100,000	770,000	140,000
	2,350,000	1,475,000	40,000	100,000	2,390,000	1,575,000
EXCESS (DEFICIENCY) OF REVENUE OVER EXPENDITURE	(20,000)	95,000	(10,000)	–	(30,000)	95,000
TRANSFERS BETWEEN FUNDS	(10,000)	–	10,000	–	–	–
EXCESS (DEFICIENCY) OF REVENUE AND TRANSFERS OVER EXPENDITURES	(30,000)	95,000	–	–	(30,000)	95,000
ACCUMULATED SURPLUS (DEFICIT) — BEGINNING OF YEAR	90,000	(5,000)	–	–	90,000	(5,000)
ACCUMULATED SURPLUS — END OF YEAR	60,000	90,000	–	–	60,000	90,000

SOURCE: *Audit Guide, Alternative Funding Arrangements*, Indian and Northern Affairs Canada, 1986, p. 23.

E. Abuse of Office

In his submission to me, counsel for the Department of Indian Affairs asked that I recommend that the provisions of the Criminal Code dealing with abuse of office by public officials be amended to include band chiefs and councillors. Section 111 of the Criminal Code deals with the offence of breach of trust of office. It reads as follows:

> 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.

Band members should be afforded the same protection against breach of trust by public officials as is afforded other electors by the Criminal Code. As I have previously noted in my recommendations regarding disclosure, adequate publicity should provide a powerful check on any potential abuse of official power. However, should an abuse of power occur, there should be in place the necessary sanctions. This would provide a mechanism for investigation of allegations of wrongdoing and an avenue for dealing with misbehavior in office.

I recommend that the Criminal Code be amended to include band chiefs and councillors as persons within the category of "official".

Indian Government

A. Band Constitutions

The provisions in the present Act dealing with the structure of Indian government are sparse. There is provision for elections and for band votes in relation to surrendered lands, but not for a band constitution. The provision by which bands may operate in accordance with "custom" appears to have introduced a substantial degree of uncertainty. The customs which bands incorporate may be of recent vintage and have little or no cultural significance. The Sechelt Act and proposed Bill C-52 permitted bands to develop their own constitutions subject to certain required subject-matters and the approval of the Governor in Council. Each provided for recognition of a band as a legal entity with full legal powers.

Once it is accepted that significant areas of authority have been or are going to be devolved to band councils under either the existing Indian Act or under a self-government statute, it becomes important that the relationship between the council and band members become better defined. Some band constitutional format seems to me a sensible method for this definition.

It was apparent from the submissions placed before me that there was substantial variety in the contents of by-laws promulgated by various

bands. I had the opportunity to review the procedures and practice followed by the Kamloops Band as a means of evaluating the adequacy of those in force at Westbank. In my view, devolution must be accompanied by express and articulated terms of accountability placed upon band councils. The movement today is away from Department control towards self-direction by bands — a corollary of this is the need for better communication between a band executive and band electors. In this way, band government can be truly responsible.

Some aspects of devolved powers should be vested in the band as a whole rather than in the band council. Examples would be important decisions relating to the expenditure of substantial capital funds, the budgeting of revenue monies, and the management of lands. I note, however, that not all bands will want or need a constitutional framework. The levels of economic and political sophistication of different bands differ quite widely. To give maximum flexibility, I believe some provision should be made in the present Act for a form of constitution for bands wishing to remain under the terms of the present statute. Bands opting for new legislative arrangements will always need a constitutional framework. There is a continuum here that covers a considerable diversity of needs and aspirations — I want to encourage the highest degree of flexibility possible in order to let the individual band do what best suits its electors. If this approach is adopted, I think that progress towards self-government can be made at a pace that is comfortable to all participants. As a general rule, in order to allow for some Department input and advice in this transitional period, any band constitutions passed should be approved by the Governor in Council.

I recommend that legislation be put in place to allow bands to enact comprehensive constitutions which provide for band government and demarcation of authority between band councils and band members.

Voting Rights

One other issue that will have to be considered is whether the franchise should be restricted to members residing on the reserve, having regard to the effects of Bill C-31. Is it fair that members of the band should be disenfranchised simply because there is no space on reserves to accommodate them? This may be particularly a problem where the Chief and council in a highly charged political atmosphere are in a position to exclude individual members from occupation of the reserve.

The eligibility of voters in band elections is presently governed by Section 77 of the Act:

> 77. (1) A member of a band who has attained the age of eighteen years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting purposes consists of one section, to vote for persons nominated as councillors.

> (2) A member of a band who is of the full age of eighteen years and is ordinarily resident in a section that has been established for voting purposes is qualified to vote for a person nominated to be councillor to represent that section.

I was told that some bands tend to the view that residency on the reserve ought not to be a requirement of the franchise. I was also told that in the past some bands had rejected the election provisions of the Indian Act and reverted to a "customary" election system in order that they could allow non-resident band members to vote in band elections. When a band operates according to "custom", the band members do not have the safeguards that are generally incorporated into a statutory scheme governing elections. If the residency requirements of Section 77 are forcing some bands to operate outside the election provisions of the Indian Act, perhaps it would be preferable to amend the Act to allow bands a choice with respect to the residency requirement. This problem is coming very much to the fore as a result of the increase in band membership consequent upon Bill C-31. Again, bands should be given maximum flexibility, but I think it is desirable that election procedure be governed by some definite rules. The Act provides a structure. The danger with "custom" is that there may be a government of men and not a government of laws. I believe the present Act must be amended to make it possible to waive the residency requirements.

I recommend that bands be given the express power to waive residency as a condition of the right to vote under the Indian Act.

B. Taxation

As noted earlier in this Report, there is currently a proposal to amend the Indian Act in order to endow bands with the power to impose taxes on residents of conditionally surrendered lands. Band councils presently have the authority under Section 83 of the Act to tax interests in land located on a reserve. Because of the possible distinction between reserve lands and surrendered lands, it is perceived that the power under Section 83 may well not extend to surrendered lands. Therefore, the Kamloops Amendments include a provision to expand the definition of reserve to include conditionally surrendered lands. I do not intend to go into detail regarding the proposed Kamloops Amendments. I approve of the initiative taken there and think that the amendments sought should be supported.

There is a need for care and caution with respect to the impact of the change on non-Indians holding interests on band lands. Existing commitments must be fairly honoured, always bearing in mind that change is inevitable. Lessees on reserves are not different from people subject to municipal laws — these too change. However, there must be an orderly process for such people to have input before and not after

decisions are effected. This was one of the irritants at Westbank — unilateral action can result in people feeling that they are being abused.

The Department has recognized that conferring taxation powers on band councils can give rise to an apprehension on the part of non-Indian lessees that they may face taxation without the usual safeguards. It is as basic as the complaint that underlay the American Revolution — "no taxation without representation". This issue must be slowly (and fairly) resolved if controversy is to be avoided.

It may be that the taxation regime will be seen as a source of revenue to bands, and that band government will be perceived as not responsible, in the popular democratic sense, to industrial users of band lands. Chief Jules noted, however, that each band will be subject to the ultimate test of the marketplace, and that if a band taxation regime is inequitable, then that band will not be able to attract desirable tenants to band sites.

The proposed amendments include a taxation advisory board to provide for fairness in the taxation scheme. It was my impression from testimony I heard, however, that the questions which the advisory board will be asked to decide may not relate to the level of taxation, but rather to the fairness of the assessment values in the area. Any such board could have a further role in relation to the approval of by-laws by the Minister or Governor in Council under the Act. The composition and procedures of any such board is not yet fully worked out.

It is difficult to see how the Department will be able to review the level of taxation in any tax law proposed by a band without becoming embroiled once again in the central tensions relating to the Indian aspiration for self-government. On the other hand, to a businessman looking to long-term return on substantial capital investments, if taxation policy forced him to leave the investment and assets he had put into his venture, he would obviously view the system as seriously flawed. Uncertainty regarding land tenure and the reach of band legislation has led to some businesses locating developments on band lands which are not capital-intensive and which can be removed at short notice. It is generally to the advantage of bands to have a system which is perceived as being orderly and fair. Where there is certainty and a perception of equitable dealing, better-quality development proposals can be attracted. A level playing field attracts a better class of developer.

I do not see how some taxation problems can be avoided. While death and taxes are certain, history has not shown either to have a high degree of popularity. It will be a challenge to band councils to provide some assurance to the market-place that taxation levels will be set fairly and responsibly, and that businessmen will not be exploited after a significant commitment of capital and resources on Indian lands. In practical terms, any business establishing long-term capital investment on Indian lands will seek contractual undertakings from the band

councils relating to taxation by the band. Rents paid to locatees or to a band can be much affected by the level of taxation imposed by the band. Thus, individual locatees will have a vital interest in taxation issues and this is doubtless a healthy balancing device in the system. In the long run, the market-place must govern, but in the transitional period, there must be Departmental input through a board or agency to ensure that matters are dealt with efficiently and even-handedly. Implementation of legislative initiatives provided for in the Kamloops Amendments will be a testing process for self-government.

If certain difficulties experienced at Westbank are to be avoided, any system put in place must be clearly understood by those subject to it. In present circumstances, this means that measures must be taken to ensure that businessmen are made aware of such risks and uncertainties as may be attendant upon capital investments on Indian reserve lands. No doubt, band governments will be anxious to provide a climate which will adequately respond to the legitimate concerns of businessmen to create a fair and predictable atmosphere for the conduct of business enterprises. The Department should foster this approach, as it represents opportunity for economic progress.

I recommend that the Kamloops Amendments be supported and that the Department furnish technical and advisory assistance to bands to enable the spirit of the Amendments to be realized.

C. By-Laws

Counsel for the Westbank Band noted that there is no specific provision in the Indian Act which protects bands that undertake to enact zoning by-laws. In his submission, he suggests that there ought to be an equivalent provision in the Indian Act to Section 972 of the British Columbia Municipal Act (R.S.B.C. 1979, c. 290). That section provides:

> 972 (1) Compensation is not payable to any person for any reduction in the value of that person's interest in land, or for any loss or damages that result from the adoption of an official community plan, a rural land use bylaw under this Division or the issue of a permit under Division (5).
>
> (2) Subsection (1) does not apply where the rural land use by-law or by-law under this Division restricts the use of land to a public use.

Counsel submitted that before any band council could safely exercise its by-law powers with respect to zoning, it would be necessary to have statutory protection against claims for injurious affection. If development on reserve land is to proceed in an orderly fashion, some kind of official plan or zoning legislation is usually needed. It seems only fair that band governments should have protection against legal action analogous to that provided by Section 972 of the British Columbia

Municipal Act. However, I also believe that it is essential that all parties who may be affected by zoning decisions of the band council be given an opportunity to air their views before decisions are made. Counsel for the Westbank Band observed that there is no provision in the Indian Act or in regulations that establishes a procedure for the enactment of by-laws. I believe that certain safeguards, such as notice requirements, should be established either in the statute, or by regulation. As noted earlier with respect to decisions of council regarding land allotments, an appropriate remedy for failure to follow the established procedures would be to make provision for a court to quash an improperly enacted by-law.

I recommend that mechanisms be adopted to provide that the by-law powers and legal immunities of a band be similar to those governing municipalities relative to land zoning and land management.

D. The Department's Role after Devolution

Experience suggests that the Department's role after devolution will become more residual in its character. The tension between the Department's role as supervisor and its role as an advocate for Native rights is becoming more apparent with the downsizing of the Department and the increased devolution of programs and services to Indian governments.

I think it important that there be efforts to separate the support and supervisory functions within the Department. In some cases, difficulty has arisen because a number of functions have been exercised by one person. In a broad sense the government is often placed in a conflict position because while it is responsible for improving the position of aboriginal people, at the same time it must also have regard to the interests of all Canadian people. That problem is not unique, however, in any federal system where there are different needs and aspirations of various regions. Those problems can be, and will be, worked out in the normal political process. At the Departmental operating level, however, it can impose considerable hardship on individual officials to operate simultaneously as advocate and watchdog. There is obviously no perfect solution to this dilemma, but with the increasing complexity of Indian affairs, a conscious effort must be made to separate the roles to the maximum extent possible. I am sure that the current internal review referred to earlier will address this issue. I simply flag this as an area that needs to be recognized in the interim. Policies should be developed to minimize these conflicts.

I recommend that the Department implement policies which separate the supervisory functions and the advocacy functions within the Department. To the greatest extent practicable, supervisory functions of the Department should be exercised by individuals other than those responsible for support or advocacy functions.

PART D

Recommendations for Long-Term Changes

In Part C, I dealt with the question of specific changes to existing statutory provisions and policies. I now consider what might be recommended in terms of a new statutory structure to facilitate Indian self-government. In this context, I deal with the need for a statutory basis for self-government and the general form and contents of any such statute.

Statutory Basis for Self-Government

A great many Indian groups are not satisfied with the continuation of the Department's role in Indian government. As was mentioned by many who appeared before me, there is a tremendous spectrum of opinion among the bands in Canada relating to what degree of self-government they seek. It is usually the case that the wealthier bands have been at the forefront in this respect and have strained the capacity of the present system to provide for their aspirations. The process of self-government is heavily constrained at law by the terms of the Indian Act. The Sechelt and the Cree-Naskapi groups were able to have statutes fashioned to deal with their own unique circumstances.

From the experience of the recent past, it seems clear that Indian bands will continue to assume an increasing amount of self-direction. They will have to deal with the everlasting issues of lands and monies. They may also face increases in activity because of the accession of new members, the settlement of court claims, and a general increase in the level of economic activity. These matters will have an impact in greater or lesser degree on different bands, depending on location and numbers, but the trend or tendency towards greater self-government is inexorable.

For many bands, however, the Department's financial trust or fiduciary responsibility recognized in Guerin v. The Queen is a principal concern in relation to the process of devolution or self-government. A large number of claims have been advanced along the lines of the Guerin decision and also a number in relation to aboriginal title. It may be that substantial sums of money will be awarded to some Indian bands in Canada. Any such funds would form part of a band's capital base in the future. Land settlements may affect future development on Indian lands. A larger land base is said to be necessary to provide adequate support for the growing numbers of Indians resulting from an increase in lifespan and the potentially dramatic results of Bill C-31 (An Act to Amend the Indian Act, S.C. 1985, c.27) which gave Indian status to a

large number of people formerly not of that status. Chief Sam of the Shuswap Band told me that he did not have the land base to accommodate the large number of people who he anticipated were going to become members of the Band. Many bands have these worrisome problems.

A Report to Parliament published in June 1987 provides objective support for this concern. For example, applicants for status in B.C. number 16,582, as compared with an existing population of 62,393; that is a potential increase of 26 per cent. The figures for Canada are similar in that 90,051 applications have been received compared with an existing population of 355,321, for a potential increase of 25 per cent. Since an unknown number of applications are yet to be received, and since only a small fraction have been processed, the impact of these numbers has yet to be fully felt. Funds allocated to accommodate the financial consequences of Bill C-31 will constitute assets to be utilized in the structure of Indian government.

The importance to Indians and to their economic future of claims against the federal government have caused many groups to be cautious concerning any process of reform which would result in a diminution of the federal government's fiduciary responsibility under the Indian Act. That appears to me to be a legitimate concern. Any legislative changes will have to pass the test of not altering the status quo ante. It would clearly be unfair to try to rewrite the past. It would be unwise not to try to utilize the lessons of the past to do better in the future.

I believe that many of the problems which occurred over time at Westbank either have been or will be encountered by a great many bands in Canada in the future. The rapidity with which problems arise is usually directly linked to the pace of economic change. There are significant differences in the economic prospects of bands in Canada. But that is not surprising. There are significant differences in the economic prospects of many citizens of Canada. A band whose land adjoins a major urban centre is like someone who had the good luck to have his great-grandfather settle on a farm near a large city. Land of modest value later becomes a pearl of great price. As the country grows, a number of bands will be more a part of the economic mainstream. To facilitate economic activity it would be helpful to overhaul some of the more obvious deficiencies of the Indian Act. The Westbank Band is in the forefront of developing bands, but the numbers of bands more active in economic life in Canada is going to show a marked increase before many years pass. Unless the structure of this ancient Act is improved upon, I think that certain difficulties, perhaps in part exemplified at Westbank, will persist in the future. I doubt that any perfect Act can be devised but to do nothing is a counsel of despair. Improvements can and should be made.

Accordingly, I came to the conclusion that I should make some recommendations with respect to possible changes to the institutions and structures relating to self-government. I think governments, Indian and non-Indian, should proceed with all deliberate speed to enhance the position of Indian people in society. It is good for Native people to have pride in their history and background. But they are part of the fabric of Canadian life and we cannot have Indians and non-Indians occupying two solitudes in this vast, rich land.

The underlying concern of the Indian Act remains valid for many Indian people, namely that their precious land heritage not be eroded. But the Act can be improved to make a transition to a more self-directed mode of life a realizable and orderly process. We should encourage changes of direction but I have a distaste for change merely for the sake of change.

Private Acts or Enabling Legislation?

The only successful changes relating to self-government so far have been the Sechelt Act and the Cree-Naskapi Act. The Department of Indian Affairs has continued to negotiate with respect to specific bands in relation to the passage of specific legislation. This is obviously the only course open to it unless steps are taken to pass a general enabling statute to provide a structure within which self-government could be devolved to other bands. The creation of individual statutes for individual bands is one process which affords a means by which self-government is possible. The disadvantages are that the process involved in creating a unique statute is complex and difficult and amendment of the statute could be a problem in the future. From the Department's perspective, the creation of almost 600 private Acts is a daunting prospect. It was clear to me from the submissions made that the cost and burden on Indian bands relating to the achievement of a specific statute can also be a substantial obstacle to achieving self-government. While I do not say that individual Acts should not be passed, I think it desirable that there be a general enabling statute which would permit creation of self-governing Indian groups within a general statutory structure such as that contemplated in proposed Bill C-52. Large or relatively well-off bands may want to look to an individual statute, but there should be an easier and less costly method for smaller and less well-off bands to obtain the benefits of greater self-direction.

In view of my support for enabling legislation, I think it is important to look at proposed Bill C-52 in some detail. This enabling legislation passed first reading but lapsed due to a general election. The draft Act commenced by giving legal recognition to bands which held a referendum seeking recognition as an Indian nation in accordance with the regulations passed pursuant to the Act. The Minister was empowered to enter into an agreement to defray the costs incurred in seeking recognition as well as the costs of activities undertaken in preparation

for the exercise of powers by Indian nations and their governments after recognition.

Section 6 of the Bill required an Indian nation to meet certain conditions before recognition. These included:

(a) the existence of a written constitution providing for Indian government with executive and legislative functions consistent with the Charter;
(b) the constitution was to state the membership code, the accountability of the government, clear democratic processes, the publication of laws, the protection of individual and collective rights, the provision of an independent system for reviewing executive decisions, a system of financial accountability, and a mechanism for dealing with abuse of power.

The recognition of the band as legally constituted was to occur by an order issued by the panel constituted by the Act for the purpose of supervising this process.

By Section 9 the constitution of the Indian nation would have been given legal effect. Section 9 also provided for amendments to the Indian band constitution and Section 12 required the Indian band to conduct itself in accordance with its constitution.

Section 13 of the Bill conferred legal capacity on an Indian nation, although its lands could not be pledged, mortgaged, or hypothecated for security. The lands would have continued to be held by the Crown for the use and benefit of the new Indian nations. The legal aspects of title in the Indian Act would, by and large, have continued in force.

The objects of the Indian nation as stated in Section 15 of the Bill included the plenary power to govern the lands and peoples within the territory described by the constitution.

The legislative power of the Indian nation prescribed by Section 16 included power to legislate with respect to education, taxation, charges for public services, voting procedures, membership, imposition of fines, and penalties for breach of laws passed by an Indian nation, and matters coming within the classes of subjects set out in the Bill or agreed to by the Minister. The executive powers of an Indian nation would have included such areas as management and administration of lands, institution of offices, undertaking of public works, social services, economic development and the operation of educational facilities.

The Minister was empowered to enter into any agreement conferring greater power on an Indian nation with the approval of the Governor in Council. The Minister's power to confer those powers was broad and

plenary and extended to all matters falling within Section 91(24), being the federal government's power to legislate relative to Indians and Indian lands.

An interrelationship between the Indian Act and the Self-Government Bill was provided by Section 24 of the Bill whereby the Minister could declare all or any provisions of the Indian Act inapplicable.

The Bill provided for the appointment of an Administrator of bankrupt Indian nations, and also contained override provisions permitting the Minister or Governor in Council to disallow laws inconsistent with the Charter or other democratic principles.

Section 39 of the Bill preserved pre-existing rights and interests without defining anew the rights and position of lease holders and locatees. Federal laws of general application would have applied to Indian nations, but provincial laws of general application would not. This would have reversed the situation under Section 88 of the present Act, whereby provincial laws of general application apply to Indians. In my opinion, this provision, which apparently adopted the Penner Committee report recommendation, is inadvisable. To totally exclude provincial legislation, even if constitutional, appears to me a step of doubtful wisdom. For instance, would common law principles be excluded? What would be the commercial effect on reserves? I fear that a legal vacuum could be created. Even if that policy contains some desirable objectives, I think it would harm the Indian people of Canada to be so treated.

I recommend that in any self-government legislation, provincial laws not be generally excluded.

Finally, the panel created pursuant to the Bill was to be a court of record and its constitution and membership was prescribed by the provisions of the Bill.

The Bill has not been renewed. An alternative statutory scheme in which bands can elect to participate seems to me to be preferable to drastic reform of the Indian Act. Some bands in Canada today are partially satisfied with the Indian Act and in spite of its difficulties may prefer this to sweeping change. In relation to the central issues of self-government and self-regulation, it is clear that many bands are not prepared, nor do they desire, to take on all of the devolved powers which have been demanded of the Department by certain bands which have moved rapidly. There is a broad diversity of views on these issues in the Indian community and those views are not always similar even in groups of similar economic advancement.

I recommend that to enhance the progress of self-government there be enacted enabling legislation in addition to individual statutes in order to facilitate bands wishing to adopt self-government.

Funding for Self-Government and Devolution

It is clear that a band's progress towards self-government depends in large measure on the provision of adequate financing for this process. It seems to me that there should be funding allocated for this purpose in the Indian Affairs budget. It is vital to the success of self-government or self-direction initiatives that a band or group of bands possess a sufficient measure of expertise and be properly prepared to accept broader responsibilities. Failure to ensure that a band is properly prepared could result in costly failures.

I recommend that funding be allocated to finance the development of sufficient expertise within Indian bands and associations to enable them to more effectively assume powers of self-government.

Elements of Self-Government

1. Band or Tribal Council Government

One of the difficulties inherent in Indian self-government is that individual bands often lack the personnel resources required for local government administration. This is not only a difficulty in the lack of training of individual Indians, but also stems from the small numbers of people involved. The past ten years have seen a gradual development of tribal councils and organizations of Indian bands in similar geographic and economic situations which facilitates the assumption of self-direction by the groups involved.

I recommend that bands be encouraged to pursue self-government within a tribal council or broader administrative structure.

This recommendation necessarily involves a demarcation between the role of bands and the larger administrative structures relating to the rights and interests in band monies and lands. I think it necessary to preserve the distinct assets of bands unless each band, by majority vote, consents to pooling these assets. As a consequence, there will be a necessary division of authority relating to the use of monies and development of lands within the larger administrative structure.

2. Powers and Responsibilities of Band Members

There has been a growing tendency to devolve responsibility to band or tribal councils for the programs and services which are transferred from

the Department. I think that in general this process is to be encouraged. However, there are at least two factors which lead me to recommend that the band as a whole exercise a measure of control over important band decisions. It is clear from the evidence at Westbank, and the submissions to me, that many bands are small in number and that band councils can be susceptible to domination by a strong personality. Equally, it is clear that in politics where there are familial elements involved, the feelings between groups within the band may be very intense and, as a consequence, the band council may have difficulty responding to the interests of all band members. I think it is important that for major decisions concerning the investment of band monies and the use and development of lands, band members be entitled to vote on such issues. This process provides a broader spectrum of opinion and enables electors to have some say in their government. Such an approach, coupled with more effective disclosure, should ensure more efficient working of the democratic process.

I recommend that any enabling statute passed contain provisions to be included in a band constitution requiring that the band as a whole have the power to approve budgets, large capital expenditures and major land decisions.

The present culture which has evolved in relation to band votes should be respected. As noted in the evidence of Ms. Barbara Coble, band members may exercise franchise rights and deprive a Chief and council of a majority vote by absenting themselves from a band general meeting. Accordingly, large pluralities could simply be a reflection that those who opposed the measure being debated had refused to attend. Present statutory requirements calling for a vote of a majority of electors ought not to be disturbed. Different considerations may apply where bands are setting up new constitutions. I simply say that I would not favour changing the present Act concerning this issue.

3. Land

I have already stated that I consider it important that the band as a whole retain authority with respect to major decisions involving land. I have also discussed extensively the inadequacies of the present land regime in Part C of this Report. I consider it important that these land issues be resolved in an Indian Lands Act irrespective of the fortunes of self-government.

In the context of self-government, I think it would be an unhappy consequence if each band could fashion its own land regime. The potential for resulting confusion and uncertainty is great. I think, therefore, that an Indian Lands Act should be of general application to all bands, including those that exercise powers of self-government.

Provision should be made in any Indian Lands Act for the transfer of the Crown interest to bands that are able to assume full title. Pending such transfers, ultimate title should continue to reside in the Crown.

I recommend that bands be afforded the option of assuming fee simple title concurrent with the devolution to them of the powers of self-government.

4. Money

The concept underlying the division between capital and revenue monies is that the band's interest as a whole in capital monies is to be safeguarded by the Department's role in reviewing proposed expenditures of capital monies. At present, the band has no statute-authorized role or function relating to the investment of capital monies. I think self-government must confer on the band the power to make all economic decisions, including investments.

It may be that bands will want to delegate to their executive the responsibility for some or all decisions. The nature and extent of such delegation is properly left to the electors. It seems to me that bands would be ill-advised to delegate all economic powers to council. Why? My reasoning is as follows. If the council possesses all of the authority over fiscal matters (such having been delegated by the band), this is a tremendous repository of power in bands with any amount of capital. The extent of the power (real or perceived) means that control of the political levers of power becomes too eagerly sought after. The elected party has little check on its actions. It is in danger of succumbing to the disease identified by Lord Acton in the dictum that "absolute power corrupts absolutely". There is no via media. The "ins" are in absolute control and the "outs" inhabit a region of outer darkness. It is far better to have a measure of band input and control over major decisions. This both provides a wider measure of advice and counsel and is a safety valve to avoid explosions such as I saw at Westbank in the activities of the "Action Committee".

I think it desirable that band approval be obtained for major capital ventures of the band. The delineation of a major versus a minor expenditure will depend on the individual circumstances of the bands. I also think that the Department has a legitimate role in ensuring that there is no wasting or rapid disappearance of capital assets in bands that do not control their own assets. These assets represent not only the band's prospects of independence from the Department, but also the Department's prospects of freedom from wholly subsidizing Indian programs and Indian-based development.

I recommend that approval of major financial transactions be reserved to the band as a whole in bands assuming full self-direction or self-government.

5. Conflicts of Interest

As already noted, there can often arise potential conflicts of interest in a government in which many of the constituents are related. The central remedy in conflict of interest situations is to provide for publication and approval of the course of action suggested by those persons having responsibility for government. In the context of band government, it should not be very difficult to obtain the approval of band members if the proposed course of action is desirable and legitimate. I think it important, therefore, that actions to be taken by members of the council or chiefs in which such executives may have a conflict of interest should be subject to ratification by the membership as a whole. It is not sufficient that the chief or council member who is interested absent himself or herself from the meetings of council at which the matter is considered.

I recommend that in relation to the conferring of benefits or assets upon a member of the band executive or a member of his or her immediate family, decisions should be subject to ratification by the band membership.

6. Democratic Responsibilities

I think that the responsibilities of members of council as fiduciaries in relation to band members ought to be part of any enabling statute. Further, I think it important that band government be responsible to the band membership and that disclosure requirements for major decisions be imposed by the statute itself. This would ensure that band members are adequately informed about important decisions relating to their interests.

I recommend that any self-government statute require that the band constitution prescribe the duties of the band executive and provide for the disclosure of material transactions.

As we have seen at Westbank, band financial statements can be prepared in such a manner as to be unintelligible to the average person. Individual transactions of great importance can be hidden among numbers and verbiage so as to make it difficult for even a professional person to be apprised of what is actually occurring. I think it clear that independent auditors must have a role, as in so many other areas of society, in the handling of funds by local governments on behalf of band members and the Department.

The transfer of discretion in the expenditure of public funds from the Department to large numbers of local governments inevitably will give rise to problems. This is not sufficient cause to reverse the process, but means there is a need for clear statutory duties on the part of band executives and adequate disclosure requirements.

The specific recommendations I make respecting financial disclosure are included in Part C of Section II.

7. Continuing Role of Government

As a regime of self-government emerges, I think it will become important that the Department separate its functions and roles with respect to those bands which prefer to stay under the present system from those bands which adopt a mode of self-government. I doubt that the present Act can serve as a half-way house between self-government and the old structure. There are powers in the present Act which may be of assistance in preparing bands for self-government, but the thrust of the Indian Act is contrary to self-government. It is better to fashion new tools for the new order. I think that the comprehensive demands of the process of self-government should not be understated by permitting a limited attempt at self-government under the existing provisions liberally interpreted. That leads to the problem of too much policy and too little law previously discussed.

With respect to the role of the Department in dealing with bands that have assumed a large measure of self-direction, I think that it can continue to have a useful role in such areas as the negotiation of settlements, the monitoring of expenditures of public funds, the maintenance and completion of a federal Indian land register, and the administration of trust accounts not transferred to local government. In the event that bands which choose self-government prefer to retain a system of land title and tenure in which the government remains a trustee, the Department will obviously have some continuing role in surrenders and leasing of lands. As the bands take more ample responsibility for land decisions, the fiduciary duty of the Department will be abated or extinguished.

The prospects of settlement of certain aboriginal and other claims against the federal and provincial governments represent an opportunity for improvement of the difficult economic and social circumstances facing many Indian people in Canada. There is always the danger, however, that benefits realized can too easily fade and the opportunities presented by cash and land settlements could result in little significant improvement in the personal and societal circumstances of Indians in Canada. The history by Thomas Berger, *A Village Journey*, narrating the experience under the Alaska Settlements Act, gives food for thought. Care must be taken to create a proper structure to ensure that capital is not lost and that assets are preserved for the future of the band. As well, those responsible should endeavour to ensure that the monies and lands are used to achieve the collective desires of the Indian peoples themselves rather than any artificial objectives set for them. In a very practical sense, the risks attendant upon receiving significant amounts of money and land, the latter of which may be subject to

alienation in one form or another, requires that a system be in place to ensure that lasting benefits can be preserved for this and future generations to the greatest extent possible.

From the perspective of public policy and the Department, I think that it cannot take a too passive role in the administration of settlements of money and land in the future. Until the Department negotiates new structures whereby Indian self-government is fully realized, the Department should remain legally responsible under the present statutory scheme for failures which arise out of negligence or want of due care.

Departmental personnel are divided on the issue of how daring the Department ought to be in relation to surrendering its statutory and traditional roles to band councils and tribal councils. The Department and Indian groups are both presently suffering from a conflict between inconsistent objectives. The Indian groups, for the most part, wish to assume responsibility for their own affairs. At the same time, since the Departmental fiduciary responsibility is presently part of the hope for future economic gains, the Indian groups obviously would like to retain the right to recover compensation from the Department. It is not politically popular to acknowledge that a band's informed decision to follow a certain course of action carries with it a release of the Department's responsibility relating to that decision. Many Indian witnesses before me walked carefully around this issue. I could not blame them. They inhabit an intensely political environment. The Department, if it acts responsibly and in good faith, will fulfil its duty to itself and to bands. Modern bands with professional advisers are very different from older bands in which many people could not write their name. The Department should continue to exercise great care where less advanced bands are involved, but it should not be unduly alarmed about potential suits from those bands that are willing and able to make their own decisions. Courts usually operate in the real world. Absolute jurisdiction over decision making is wholly inconsistent with residual responsibility in the Department.

This is, of course, largely a political conflict rather than a purely legal one. One aspect of the problem can clearly be delineated. Any future attempts at structuring Indian self-government should, for obvious reasons, not affect the existing responsibility of the Department under existing structures to provide compensation for past wrongs. Once that is made clear, then I think it inevitable that the process of Indian self-government will result in an abatement, if not elimination, of the Department's financial responsibility for collective decisions which are made by Indian groups and which result in economic failure. A clear consequence of full responsibility is that Indian groups will have to make their own assessments about what degree of risk they are prepared to assume in relation to their own decisions.

I think there is a clear role for government to see that structures are in place which ensure that no local government or individual imperils the future of a band through risks that are not adequately considered and understood by all those who have a stake in the outcome. A refrain I heard often was that Indian people want to control their own affairs and destiny. They should. However, the present Act is not structured particularly well to ensure that result. I have indicated above some steps that can be taken to advance the progress of self-government. These include some amendments to the present Act, even though the Act is widely criticized and the sentiment is often expressed that its amendment may delay self-government.

I think amendments to the Act could delay self-government if amendments were all that occurred. However, if the comprehensive approach I endorse above is taken, I believe that those who wish to preserve the existing order and those who wish to assume greater or full self-direction can both be accommodated. We can make things better for the more conservative elements and we can make things possible for the more venturesome. I have not conducted hearings across the country, but I have had my staff study materials and solicit views beyond the confines of Westbank, and indeed, beyond the confines of British Columbia. It would be impossible to have conducted this Inquiry without arriving at certain beliefs and conclusions. Having arrived at them, I felt it my duty to pass them on to government. I would hope that many of these recommendations can bear fruit to improve Indian affairs in Canada.