APPENDICES

Appendix A

Lands and Monies under the Indian Act: Selected Provisions in Historical Perspective

Outline

1. The Indian Act: Its Origins and Development
   - (a) Pre-Confederation Roots
     - The Maritimes
     - Upper and Lower Canada
     - The Gradual Civilization Act of 1857
   - (b) Dominion Legislation, 1867–1876
   - (c) The Indian Act, 1876–1951
     - The Indian Act of 1876
     - The Indian Act of 1880
     - The Indian Advancement Act of 1884
     - The Franchise Act of 1885
     - Selected Legislative Developments, 1884–1946
   - (d) The Special Joint Committee and the 1951 Indian Act
   - (e) Some Subsequent Developments
     - The Hawthorn Report
     - The 1969 Policy Statement
     - The 1970's and 1980's

2. Indian Lands at Common Law and under the Indian Act
   - (a) The Concept of Surrender
     - (i) The Original Meaning
     - (ii) The Problem created by Confederation and "St. Catharines Milling and Lumber Co." v. "The Queen in Right of Ontario" (1888), 14 App. Cas. 46 (P.C.)
     - (iii) Some Statutory Provisions concerning Surrenders: Sections 2(1), 18(1), 37, 38 and 53(1)
       - Reserves and Surrenders
       - Conditional Surrenders
     - (iv) Where the Underlying Title is in the Federal Crown: the British Columbia Example
       - The Pre-Confederation Vancouver Island Treaties
       - Colonial Land Policy After Douglas, 1864–1871

Lands and Monies under the Indian Act: Selected Provisions in Historical Perspective

1. The Indian Act: Its Origins and Development

The Indian Act is more than 110 years old, and many of its provisions are even older. The procedures governing surrenders, for example, are rooted in the Royal Proclamation of 1763, and its primary, if not always compatible, goals of protection and assimilation may be found in legislation and treaties that pre-date Confederation. For much of its history it was subject to constant and technically complex tinkering, but it has been thoroughly reviewed and revised only once, in 1946–51. The result of that process was a statute that reflected the same goals as its predecessors and retained many common features. Although several sections that Native peoples found offensive were dropped, most of which dated from the period 1884–1918, and although band council powers were more extensive than before, the final say continued to belong to either the Minister or the Governor in Council. This remains true today.

The main difference between the 1951 Act and what it replaced has been described as the reduction of the Minister's powers to supervisory status with a veto (Tobias 1983: 52). It is also true that earlier, largely unsuccessful, attempts to force assimilation upon Native peoples were abandoned and provisions that authorized the Government to take reserve lands without consent were deleted. Moreover, the current Act authorizes the Governor in Council to grant to a band the right to exercise varying degrees of control over its reserve lands (s.60) and revenue monies (s.69) and, if it has reached "an advanced stage of development," to enact money by-laws as well. The history of the Indian Act is in many respects a history of this tension between wardship and independence, with legislators and Indians often in sharp disagreement as to how independence should be achieved.

(a) Pre-Confederation Roots

Until a few years before Confederation, Indian policy was primarily an imperial responsibility, and therefore, even after the establishment of colonial legislatures, there was little legislation dealing with Indians and Indian lands. In the Maritimes, Upper Canada, and Vancouver Island, treaties were made with the Indians, and although no land was ceded by the Maritime treaties, reserves were set aside there and in Quebec,

where there were no treaties at all. One reason for this is that on the Atlantic and in Old Quebec Indian-European relations had developed largely in advance of intense settlement pressures, and probably both sides felt there was sufficient land for all. By the time this was no longer true, the Indians had ceased to be a force to be reckoned with.

The Maritimes

In the early period, what few colonial statutes there were tended to be concerned with selling or giving liquor to Indians or with protecting their reserves from trespass. By the mid-nineteenth century, however, some were becoming a little more ambitious. In Nova Scotia, for example, the legislature passed "An Act to Provide for the Instruction and Permanent Settlement of the Indians" (S.N.S. 1841, c.16), pursuant to which a Commissioner for Indian Affairs supervised, managed and generally protected reserves from "encroachment and alienation" and preserved them for the use of the Indians. Two years later New Brunswick passed a similar law "to regulate the management and disposal of the Indian Reserves in this Province" (S.N.B. 1844, c.47), which permitted the public auction of reserve lands. There was no requirement that the Indians consent, and these statutes, in amended form, remained in force until they were replaced by the first Dominion statute on the subject in 1868. The annual reports of the Nova Scotia Commissioner reveal that in this period "Indian rights were not being respected" (Cumming and Mickenberg 1972: 104).

Upper and Lower Canada

It was the Upper Canadian experience that was most influential in determining the shape of Dominion legislation, however. From the American Revolutionary War onwards there was a series of land cession treaties with the Indians (see under 2(a), below), prompted first by military considerations and then by development and settlement pressures. The views of philanthropic and religious groups, the transfer of Indian affairs from military to civilian control in 1830, and the reports of three royal commissions in the 1840's and 1850's also heralded a period of greater legislative activity. Prior to 1850 and aside from the usual liquor and game laws, the only colonial statute of note was one passed in 1839 "for the protection of the Lands of the Crown in this Province, from Trespass and Injury" (S.U.C. 1839, c.15). Passed to supplement imperial Indian policy, it also provided for Indian Commissioners, but "the sympathies of the enforcing body lay more with the white trespasser than with the Indians" and the depredations against Indian land it was designed to halt continued (INA 1975: 30). Beginning in 1850, the legislatures became more interventionist.

That year saw two statutes that form an important part of the "prehistory" of the Indian Act. "An Act for the Better Protection of the Lands and Property of Indians in Lower Canada" (S.P.C. 1850, c.42) established a Commissioner to manage and dispose of Indian lands and defined "Indian" for the first time. And "An Act for the Better Protection of Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury" (S.P.C. 1850, c.74) made the Commissioners and Indian Superintendents Justices of the Peace with authority to impose punishment for violations of the Act. Among other things, it also exempted Indians from judgement and taxation.

The Gradual Civilization Act of 1857

The most significant of the pre-Confederation statutes, however, was passed in 1857 and it reflected the changes that had been taking place during the preceding three decades. The earlier policy of isolating Indians on remote reserves had not been successful, and there was a new emphasis upon assimilating the Indian as well as protecting and "civilizing" him. This was to be accomplished partly by moving to a policy of smaller reserves nearer to white communities and partly by a policy of enfranchisement (which meant losing Indian status, not gaining the right to vote). If the 1850 laws reveal an increasing involvement of local legislators in Indian policy, the "Act to encourage the gradual civilization of the Indians in this Province, and to amend the laws respecting the Indians" (S.P.C. 1857, c.26) was an even more substantial intervention by the colonial legislature in Indian affairs. Designed to do just what its title promised, it provided an inducement for the enfranchisement its sponsors wished to promote: each enfranchised Indian was to receive an allotment of reserve land and a payment "equal to the principal of the enfranchisee's share of the annuities and other income of the tribe to which he belonged" (INA 1975: 33). The Act has been described in this way:

> After stipulating in the preamble that [it] was designed to encourage civilization of the Indian, remove all legal distinctions between Indians and other Canadians, and integrate them fully into Canadian society, the legislation proceeded to. . .state that [an Indian] could not be accorded [full] rights and privileges until he could read and write either the French or English language, was free of debt, and of good moral character. If he could meet such criteria, the Indian was then eligible to receive an allotment of [up to fifty acres] of reserve land. . .and then to be given the franchise. Thus, the legislation to remove all legal distinctions between Indians and Europeans actually established them. In fact, it set standards for acceptance that many, if not most, white colonials could not meet. . .(Tobias 1983: 42–43)

The Act also provided that an Indian who could not read or write but who could speak either French or English, and who met the other

criteria could become enfranchised after satisfactory completion of a period of three years' probation.

The legislators were not the only ones who saw this law as significant. Many Indians regarded the enfranchisement provisions as aimed directly at the destruction of communal land tenure and tribal reserves. A campaign of sorts was launched against it, including a plan to complain to the Prince of Wales. In the words of one commentator:

> A general Indian position emerged in the 1860's. Councils across the colony remained pro-development. They wanted education and agricultural and resource development but would not participate in a system designed, as an Oneida petition said, to "separate our people". Civilization, which they might define as the revitalization of their traditional culture within an agricultural context, they would have; assimilation, the total abandonment of their culture, they would not. The policy of civilization, particularly as it was now centred on enfranchisement, was destined to founder upon the rocks of tribal nationalism. (Milloy 1983: 60)

This has been a constant refrain since the Gradual Civilization Act of 1857. By 1876 very few Indians had applied to be enfranchised, and only one application had been accepted. For some reason, the land this applicant was entitled to by law was never granted to him (Commons Debates 1876: 1037–38). And nearly one hundred years later, when the Minister of Citizenship and Immigration moved second reading of the 1951 Indian Bill, he felt obliged — because of "many protests from Indians" about remarks he had made on an earlier occasion — to explain that by "integration" he did not mean "assimilation" (Commons Debates 1951: 1350). In 1969 Indian associations reacted with even greater vehemence to Ottawa's proposal to do away with special status for Indians altogether (see under (e), below).

A year after the passage of the Gradual Civilization Act, a Special Commission appointed to look into these matters approved in principle of "the gradual destruction of the tribal organization", but recommended against introducing municipal government at that time because of certain American experiences with it. Instead, in 1859 the 1850 and 1857 laws were consolidated by an "Act respecting Civilization and Enfranchisement of certain Indians" (S.P.C. 1859, c.9) and in the following year an "Act respecting the Management of the Indian Lands and Property" (S.P.C. 1860, c.151) made the Commissioner of Crown Lands the Chief Superintendent of Indian Affairs and formalized the surrender process. More significant changes had to await Confederation.

(b) Dominion Legislation, 1867–1876

A year after Confederation, the Secretary of State was made Superintendent of Indian Affairs (S.C. 1868, c.42), and in 1869 an

"Act for the gradual enfranchisement of Indians and the better management of Indian affairs" (S.C. 1869, c.6) introduced a form of the sort of municipal government that the Special Commission of 1858 had recommended against. (If nothing else, the titles of these early statutes appear to reflect an admirable if somewhat perplexing optimism in their repeated determination to do "better".) It instituted the so-called "three year elective system", which required chiefs to be elected for three-year terms and authorized their removal by the Governor for "dishonesty, intemperance or immorality". The elective system applied to a band only if the Governor so ordered, and the Act substituted new but similar provisions respecting enfranchisement. It also lodged a power to regulate a number of minor matters in the "Chiefs of any Tribe in Council", subject to confirmation by the Governor in Council. However, the 1868 law concerning the Department of the Secretary of State retained and increased the much more important powers of the Government over Indian lands and property.

The Gradual Enfranchisement Act (1869) would appear to represent acceptance by the new Dominion Government of the Indian Branch's explanation of why enfranchisement had not worked. In the Branch's view, the traditional Indian leadership was opposed to it and had used their authority to dissuade others from seeking to be enfranchised. Consequently, that leadership had to be gradually replaced by a system of municipal government under departmental control (Milloy 1983: 61–62). This model was continued in the first comprehensive Indian Act in 1876 and its rationale was described by Deputy Superintendent William Spragge in 1871 as follows:

> The Acts framed in the years 1868 and 1869. . .were designed to lead the Indian people by degrees to mingle with the white race in the ordinary avocations of life. It was intended to afford facilities for electing, for a limited period, members of bands to manage, as a Council, local matters — that intelligent, educated men, recognized as chiefs, should carry out the wishes of the male members of mature years in each band, who should be fairly represented in the conduct of their internal affairs. . .Thus establishing a responsible, for an irresponsible system, this provision, by law was designed to pave the way to the establishment of simple municipal institutions. (Excerpted in Daugherty and Madill 1980: 2)

In 1873, a further reorganization of responsibilities took place. A Department of the Interior was established and the Minister of the Interior became, by virtue of his office, Superintendent General of Indian Affairs (S.C. 1873, c.4). The Indian Branch became a separate Department in 1880, although still presided over by the Minister of the Interior, and remained so until it was placed under the Minister of Mines and Resources in 1936. After that it became the responsibility of the Minister of Citizenship and Immigration in 1949 before attaining its present status in 1966. In the 1870's, however, the Department of the

Interior was a logical home for Indian Affairs because the Dominion Government had begun to make treaties with the Indians of the Northwest in order to clear the way for settlement and development. In 1874, Parliament therefore extended its Indian legislation to the new provinces of Manitoba and British Columbia and, ultimately, to the Northwest Territories (S.C. 1874, c.21). It was this extension that prompted the first consolidation of these laws two years later.

(c) The Indian Act, 1876–1951

The Indian Act of 1876

When David Laird, Minister of the Interior and Superintendent General of Indian Affairs, introduced the Indian Act in 1876, he told the House of Commons that:

> [t]he principal object of this Bill is to consolidate the several laws relating to the Indians now on the statute books of the Dominion and the old Provinces of Upper and Lower Canada. We find that there are three different statutes on the Dominion law books as well as portions of several acts that were in operation under the laws of old Canada, which are still in operation. It is advisable to have these consolidated in the interests of the Indian population throughout the Dominion, and have it applied to all the Provinces. (Commons Debates 1876: 342)

As this quotation suggests, the new Indian Act (S.C. 1876, c.18) was directed at consolidation, rather than innovation. But in the process it removed the legislative separation hitherto existing between Indians and Indian lands, and refined and reorganized the provisions respecting surrenders, enfranchisement, band membership, local government, and individualized land holding by way of inheritable location tickets (as to which see under (2), below). The enfranchisement sections did not, however, apply to the "less advanced" western Indians.

The opposition to the enfranchisement procedures of 1857 and 1869 may be the reason that the new Act required band consent to such applications. This met with considerable criticism in the Commons, but the Government resisted pressure to dispense with the consent requirement by pointing out that a scheme unacceptable to the Indians would be undesirable and that amendments could easily be made in the future (Commons Debates 1876: 1036–39). The Act also provided for the enfranchisement of whole bands if a majority of the members requested it, but this provision, like the enfranchisement process generally, was little used (see under 2(b)(i), below).

The Indian Act of 1880

There were a few minor amendments in 1879 and in 1880 the Act was consolidated again (S.C. 1880, c.28), mainly to provide for the reorganization of the administration of the Act by creating a separate Indian Department and to introduce new sections directed at the growing problems in the West. The buffalo were gone and many Indians were facing starvation, there was political unrest, and whisky traders, according to the agents in the field, were doing a brisk business. Many of the new amendments were therefore directed at the control of liquor, prostitution and "other vices". Overall, however, there were few major changes. Enfranchisement continued to be restricted to Indians east of Lake Superior, but the election rules were amended so that, in those bands where the Governor in Council had introduced the elective system, customary "life" chiefs were deprived of their authority unless they had also won election. The 1876 Act had permitted such chiefs to retain their authority until death or resignation, notwithstanding the adoption of the electoral regime. The system was beginning to stiffen.

By 1880, only 57 of approximately 90,000 Indians had been enfranchised, and that figure included children. As one Member of Parliament pointed out, at that rate it would take about 36,000 years to enfranchise the rest (Commons Debates 1880: 1992). The primary reason for such slow progress was that, from the Indian point of view, enfranchisement meant the loss of their land and traditions for very little in return. And from the point of view of the Department, most Indians were not ready for it, anyway. This caused some critics to question the policy that had been pursued over the preceding thirty years, but most were hard-pressed to know what to do instead. Some advocated "wiping out the distinction which exists between the races" and:

> giving the red man all the liberties and rights enjoyed by the white man, and entailing upon him all the responsibilities which attach to those rights and privileges. . .[L]egislation in the direction proposed, old-time legislation, simply means that it will entail upon the people, year after year, and for all time to come, the voting annually of hundreds of thousands of dollars to keep the Indians in the low, degraded state in which they are at present. (Commons Debates 1880: 1990)

Sir John A. Macdonald, however, was both Prime Minister and Minister of the Interior, and he had therefore introduced the Bill. He felt that without this sort of protection the Indians might well "disappear".

The Indian Advancement Act of 1884

In this year the Conservative government introduced a statute that Macdonald described as "experimental". It was, he said, designed to enable:

> the Indians to do by an elective council what the chiefs, by the Statute of 1880, have already the power to do. In some of the tribes or bands, those chiefs are elected now, in others the office is hereditary, and in other bands there is a mixture of both systems. This Bill is to provide that in those larger reserves where the Indians are more advanced in education, and feel more self-confident, more willing to undertake power and self-government, they shall elect their councils much the same as the whites do in the neighbouring townships. (Commons Debates 1884: 539)

The Indian Advancement Act (S.C. 1884, c.28) provided for the election of band councillors for a one-year term and gave councils under the Act significant powers to enact and enforce by-laws, including the power to assess and tax lands of enfranchised Indians and lands held by location ticket. This is now Section 83 of the current Act, concerning money by-laws. The Advancement Act also bestowed a power on the band council to subdivide reserve land for allocation purposes. This sparked some controversy because no guidelines had been set out:

> One of the most difficult questions in the advancement of the Indian and in fitting him to assume the duties of citizenship and manhood, is to be found in the subdivision of reserves. . .The intelligent Indian will, by thrift and industry, acquire the possession of 100 to 200 acres, while others will lose their land. Those frugal Indians are the class fitted to assume the duties of manhood, so they reply: we do not want the privileges of citizenship, which simply means the power to tax us and involves a surrender of more that half the possessions that we have. . .[R]ights which might have been acquired, whether legally or not, but rights recognized on the reserve for years and years, should be protected. It would never do to give six men the power to go and arbitrarily change the bounds. . .(Commons Debates 1884: 540)

Macdonald admitted that permitting elected councils to subdivide reserves could lead to problems, but maintained that this had to be risked if the Indians were to learn municipal government. That it was much of a risk may be doubted, however. By-laws had to be approved and confirmed by the Superintendent General and the Act stipulated that the local Indian agent preside at council meetings. When it was argued that the chief councillor rather than a government functionary ought to do so, Deputy Superintendent Vankoughnet dismissed the suggestion as likely to be "attended with mischievous results" (quoted in INA 1975: 85).

The Act was hardly a resounding success. For it to apply, it had to be requested by the band and authorized by Order-in-Council, and it seems

that neither the Indians nor Departmental officials were terribly enthusiastic. By 1898 only four bands in British Columbia, one in Ontario, and one in Quebec had been brought within it, and throughout its entire history (i.e., up to 1951) it was applied to only nine bands, whereas 185 were under the three-year system introduced in 1869. Often its application was highly theoretical as well (Daugherty and Madill 1980: 78; Bartlett 1978: 597). The system was incorporated into the Indian Act proper as Part II in 1906, and forms the basis of Sections 74 to 80 of the current Act, which are an amalgamation of the two pre-existing systems. Elections according to custom are also permitted, and today approximately 40% of Indian bands select their council by this method rather than under the Indian Act.

The debate over the Indian Advancement Act was not without its lighter moments. When a member of the Opposition expressed his support for a clause barring habitual drunkards from holding elected office on council, he suggested this should be extended to whites as well. Why, he asked, should we legislators be "more moral with our Indian friends that with ourselves?" Because, Macdonald replied, it "might diminish the members of the Opposition" (Commons Debates 1884: 542).

The Franchise Act of 1885

This statute constitutes an unusual and brief chapter in the history of Canadian Indian law. From 1885 to 1898, adult Indian males in eastern Canada, whether enfranchised pursuant to the Indian Act or not, could vote in Dominion elections if they met the same, relatively minimal, property qualifications as the whites. This change was effected when the Macdonald government, no longer content to have Dominion elections governed by existing provincial laws, passed the first federal Franchise Act in 1885. It has been suggested, perhaps not without reason, that the Government's expectation was that the Indians would vote for them, and the Bill that was first introduced covered all Indian males over twenty-one. However, the outbreak of the Riel Rebellion soon made this politically inexpedient. After the Opposition inquired whether Poundmaker and Big Bear could go straight "from a scalping party to the polls", Macdonald announced his intention to amend the Bill to exclude the Indians of Manitoba, British Columbia, Keewatin, and the Northwest Territories (Smith 1987: 5).

The Liberal position was that men who were wards of the government and without civic responsibilities could be improperly influenced and therefore should not have the vote. Returned to power in 1896, the Liberals eliminated the separate Dominion franchise in 1898, returning the situation to what it had been thirteen years earlier. The federal franchise was re-established in 1920 but it did not extend to Indians who ordinarily resided on a reserve.

When in 1951 the franchise was again held out to Indians, it was with strings attached. Some Indians had feared in the 1880's that voting would mean subjecting themselves to taxation, but Macdonald assured them that that was not the case. In 1951, however, it was: a waiver of the taxation exemption was a condition of the vote (Bartlett 1985: 583). Finally, in 1960 Indians were able to vote in federal elections on the same terms as other Canadians, eleven years after the Province of British Columbia had granted them the provincial vote.

Selected Legislative Developments, 1884–1946

Three trends stand out in the years between the mid-1880's and the mid-1930's. The first, particularly in the early years, involved attempts to repress by law certain aspects of Indian culture that were seen to inhibit advancement: for example, the criminalization of the potlatch and the Tamanawas dance in 1884, and the Sun dance in 1885. The second is a gradual but steady increase in the discretionary powers vested in the Superintendent General, especially over Indian lands and monies, in order "to overcome the apparently increasing reluctance of band councils to do what the Department deemed desirable" (INA 1975: 105). The third trend, which is closely related to the second, may be described as a steady erosion of reserves. This was done by creating inducements to Indians to surrender their lands, by dispensing with band consent in certain circumstances for the sale, lease, or development of land, and even by outright legislative expropriation. Some examples: the amount of money that the Governor in Council could disburse to band members upon surrendering land was increased from 10 per cent to 50 per cent (S.C. 1906, c.20, s.1); the pressure to dispense with band consent to enfranchisement that had been resisted in 1876 won the day in 1884 (S.C. 1884, c.27, s.16); and in 1911 s.49A was added to the Act, permitting the removal of reserves near larger urban centres without surrender (S.C. 1911, c.14, s.2). These and other examples will be considered in more detail under (2) and (3), below.

There were, of course, other changes, as well. Indians were permitted to devise their land by will, first with band consent, and then without it (S.C. 1884, c.27, s.5; S.C. 1894 c.32, s.1). Compulsory enfranchisement was tried, first in 1920 when Deputy Superintendent General Duncan Campbell Scott decided to "get rid of the Indian problem" and again in 1933 with "greater safeguards" (INA 1975: 121, 127, 131). And with remarkable frequency, other adjustments were made. By the mid-1930's, however, the years of constant tinkering with the Act were over.

(d) The Special Joint Committee and the 1951 Indian Act

After World War II, public (as opposed to official or bureaucratic) attention focussed on Indians in a way that had not happened previ-

ously, or at least not since the 1880's. This led to the appointment of a Special Joint Committee of the Senate and House of Commons which sat from 1946 to 1948. This Committee inquired into and reported on Indian administration generally, but with particular emphasis upon matters affecting Indian social and economic status and their "advancement", e.g., treaty rights, band membership, taxes, enfranchisement, the vote, encroachment upon reserves, and education. It was the first time that a serious attempt had been made to do this, and the first time that Indians were consulted in an organized way.

The 1946 hearings dealt with evidence from officials of the Indian Department, and were concerned mainly with their problems: inadequate staffing, low budgets, low salaries, low morale, and so on. In its first report that year the Committee recommended that "no decision affecting the welfare of the Indians. . .be made without the consent of the band", and this was a principle adopted, even if it was incompletely reflected in the legislation that ultimately resulted (Commons Debates 1946: 5485). The Committee also recommended that responsibility for Indian services be turned over to the provinces.

In 1947, it heard from representatives of a number of Indian bands and associations, a few of which had also made submissions the previous year. More emphasis was put upon the Indian Act itself during these hearings, but mainly in terms of broad principles, e.g., treaty rights, enfranchisement, and the powers of the Superintendent General. Most of the recommendations made by the Committee were concerned with Departmental administration, but it also urged the government — without success — to establish a claims commission for inquiring into treaty and other rights.

In 1948, the Committee spent much more of its time considering how the Act ought to be amended, but most of their deliberations on this topic were in camera and are not recorded in the minutes. In May and June 1948 two reports were submitted, one recommending that Indians be given the vote in Dominion elections, the other that, "with a few exceptions, all sections of the Act be either repealed or amended". This report then went on to make a number of further recommendations, both within and beyond the terms of reference set down in 1946, but these did not involve specific amendments. The Government then drafted a new Act, Bill 267, which it introduced, after enduring considerable criticism for the length of time it was taking, two weeks before Parliament was to prorogue in June 1950.

Both the substance of the Bill and the lack of time that the Government had allotted for consideration of it drew the ire of Committee members, the Opposition, and the press — not to mention the Indians themselves. There were demands that the Bill be held over until the next session, and one Committee member told the House that he was "deeply" disappointed:

> To think that, after all our efforts, the sum total of our reward is this contemptible thing we have before us today makes me wonder if I do not have to struggle to keep my faith in humanity. . .I have found no evidence of anything in the Bill to help the Indians to help themselves beyond what we had in the old Act. (Commons Debates 1950: 3946)

Bill 267 was withdrawn, and a Conference was held with Indian representatives prior to introducing a second bill the following year. After some discussion, which is summarized in the 1951 Commons Debates, Appendix B at 1364–67, the Conference unanimously approved 103 of the 124 sections of the new Bill (No. 79) and a majority approved a further 15. Of the remaining six, two dealing with taxation, the vote, and enfranchisement were unanimously opposed and four, concerning liquor, were opposed by a majority (Commons Debates 1951: 1351).

Bill 79 was referred to a special committee in April 1951 and was passed into law in May. Those who had criticized Bill 267 were generally pleased with the new Act. The restrictions on Indian culture (the potlatch, etc.) had been removed, and many of the extraordinary powers to interfere with reserves that had "crept into" the old Act over the years were gone. The Indian Advancement Act (Part II of the 1906 consolidation) became the local government sections of the new Act and the council powers provided for there were accordingly extended to councils under the 1951 law (INA 1975: 165). Considerable authority did, however, remain with the Governor in Council and the Superintendent General. For example, the former could exempt any band, Indian, or Indian lands from the operation of most of the Act (s.4(2)). Proposals to have this power amended to be conditional upon band consent failed (Commons Debates 1951: 1357, 1530, 1535, 3106–09).

(e) Some Subsequent Developments

One historian of Canadian Indian policy has suggested that the 1951 Act did not repudiate the goal of speedy assimilation, only the means that had been previously adopted to achieve it. And when it became clear that the new Act was not much more likely to promote this than its predecessors, alternative means were sought (Tobias 1983: 53). Whether or not that is an accurate assessment, some of these means need to be mentioned briefly.

The Hawthorn Report

Although s.141 of the 1927 Indian Act, which had prohibited the raising of funds and the obtaining of legal advice for the purpose of prosecuting land claims, was dropped from the Act in 1951, the Special Committee's recommendation that a claims commission be established was rejected by the Liberal government. When a second Joint

Committee in 1959–61 made a similar recommendation, the Conservative government adopted the proposal but fell before introducing the required legislation. The new Liberal administration put forward a modified version of the earlier proposal, but this too was side-tracked, this time by the federal election of 1965.

At about the same time, Dr. H.B. Hawthorn, who had done a report on British Columbia's Indians in the 1950's, was asked to do a further study, and in 1966–67 a two-part report entitled "A Detailed Survey of the Contemporary Indians of Canada" was published. It was not directly concerned with amendments to the Act, but was concerned with the "social, educational and economic situation" of the Indians. The report described the Indians as "citizens plus", and emphasized federal responsibility for Indian affairs. While services were being gradually transferred to the provinces, as the 1946 Special Committee had recommended, there was a need for caution because the provinces lacked administrative and professional expertise in the area:

> The perception that Indians are not really complete provincial citizens because of their special. . .relation to the federal government easily gets transmuted into the argument that if they wish to receive the same government treatment as other provincial citizens, they will have to give up their special privileges under treaty or the Indian Act. Provincial officials and politicians display a much more assimilative and less protective philosophy to Indians than does the federal government. There is, for example, a fairly general provincial antipathy to the reserve system. Indians, we were told on several occasions, cannot have it both ways and retain their special privileges while simultaneously obtaining the full benefits of provincial citizenship. (Pt.1, ch.17)

The 1969 Policy Statement

It was something of a surprise, therefore, when a few years later the Liberal government produced its White Paper on Indian policy. It proposed the dismantling of the Indian Affairs Branch within five years, the repeal of the Indian Act, the rejection of the land claims and treaties as regressive and the provision of services to Indians through regular provincial agencies. It ignored the "spirit and intent" of the Hawthorn Report and brought an outraged reaction from Indian groups. It represents, together with the decision of the Supreme Court of Canada in Calder v. A.G.B.C., [1973] S.C.R. 313, a major turning point in Canadian Indian history.

The B.C. Indians' Brown Paper, the Alberta Red Paper, and the Manitoba "Wahbung" all argued strongly against it (Daugherty and Madill 1980: 80). As the Indian Chiefs of Alberta put it in their Red Paper, they wanted the Act reviewed, not repealed, and wanted their special status confirmed and entrenched. "The only way to maintain our

culture is for us to remain as Indians. To preserve our culture it is necessary to preserve our status, rights, lands and traditions. Our treaties are the bases of our rights" (quoted in Bartlett 1978: 589). Of course, not all Indians have treaties, and not all agreed. But the proposed policy was withdrawn.

The 1970's and 1980's

Thereafter the emphasis shifted from the Indian Act to land claims, treaties, and native self-government and self-determination. It was a considerable departure from the policy announced in 1969. The James Bay Agreement, the Calder case, and the new federal policy on Native claims that was a result are all evidence of this, as is the continuing process of placing aboriginal rights into the Constitution. In 1981, the federal government announced a "re-affirmation" of the Comprehensive Native Claims process begun in 1973 in a publication entitled "In All Fairness: A Native Claims Policy", which was examined in detail a few years later by the Task Force to Review Comprehensive Claims Policy. This body issued a report in 1985 entitled "Living Treaties: Lasting Agreements", which declared the earlier policy defective in a number of respects. It proposed major changes designed to avoid the resort to courts that the Task Force saw the failure of existing policy tending towards, one of which was the negotiation of agreements which do not involve the extinguishment of Indian title. The Sechelt self-government legislation and the 1985 amendments to the Indian Act respecting band membership are also part of this current if controversial trend, and the latter represents one of the very few occasions in the last thirty years when the 1951 Act has been altered.

2. Indian Lands at Common Law and under the Indian Act

Under Section 91(24) of the Constitution Act, 1867, the Parliament of Canada has responsibility for "Indians and Lands reserved for the Indians". Prior to the first federal Indian Act in 1876, the fact that this section allocates legislative jurisdiction over "not one but two subject matters" (Lysyk 1967: 514) was clear: Indians and Indian lands tended to be dealt with in separate statutes. This changed in 1876, and although the primary reason was simply to consolidate the scattered Dominion and pre-Confederation statutes at a time when Parliament was extending its juristiction into newly acquired provinces and territories (House of Commons Debates 1876: 342), the change reflected a philosophical consolidation as well. Since at least 1830, when Indian affairs passed from military to civilian control, the critical importance of Indian lands to the new policy of "protecting, civilizing and assimilating" the Indian had been recognized (Tobias 1983: 39), both as a means of insulating him from corrupt influences and of training him in the property values of European culture. Philanthropic

and religious groups were particularly influential in this process. But Indian lands were also important because, as the century progressed, increasing pressure was brought to bear upon governments to open up more of this land for settlement and development. The imperial authorities were aware of this, and in keeping with standard imperial practice at the time, retained responsibility for the Indians notwithstanding the introduction of responsible government in the Canadas. By the 1850's, however, they were no longer willing to bear the expense this entailed, and sought to be relieved of it (British Parliamentary Papers 1856: 247). Accordingly, in 1860 responsibility for the Indian Department was transferred to the Canadian government, a move many Indians saw as giving up control to "the land jobbers" (Milloy 1983: 60).

Introducing the Indian Act of 1880, Sir John A. Macdonald made reference to both these tendencies when he responded to the member from South Brant's contention that government policy, instead of improving and assimilating the Indians, was only "more firmly fastening the shackles of tutelage upon them". Suggesting that his critic's view were politically motivated, he said:

> Disguise it as we may, wherever there is an Indian settlement the whites in the vicinity are very naturally anxious. . .to get rid of the red men, believing and perhaps, truly, that the progress of the locality is retarded by them, and that the sooner they are enfranchised, or deprived of their lands, and allowed to shift for themselves, the better. If the Indians were to disappear from the continent, the Indian question would cease to exist. But we must remember that they are the original owners of the soil, of which they have been dispossessed by the covetousness and ambition of our ancestors. . .[T]he Indians have been great sufferers by the discovery of America, and the transfer to it of a large white population. We are bound to protect them. (House of Commons Debates 1880: 1990–91)

The tensions between protecting and "civilizing" the Indian, and especially between protecting his land and developing it, are reflected in the history of some of the statutory provisions respecting (i) surrenders, (ii) individual title to reserve land, and (iii) the granting and leasing of reserve land without surrender. These will be considered in turn.

(a) The Concept of Surrender

(i) The Original Meaning

In North America the imperial powers, all of whom had to contend with aboriginal peoples, behaved in ways that reflect both similarities and differences between their governmental traditions and the situations in which they found themselves. The French, for example, do not appear to have recognized any form of Indian title, and although lands were set

aside for the Indians, no land "surrenders" took place (Stanley 1983: 4). Except for the purposes of the military and the fur trade, Indian relations were more a matter for Church than State, and this largely accounts for the provisions respecting "special reserves" under Indian legislation from Confederation to the present day: such reserves are primarily those in southern Quebec granted to Catholic religious orders (Morse 1985: 510).

The British, on the other hand, were relative latecomers to much of what is now Canada, and the importance of the Indians as allies in their wars against both the French and, later, the Americans, strongly influenced their Native policy. The "nucleus" of an Indian department had been established in the late seventeenth century in the American colonies, and this arrangement was put on a firmer footing in 1755 when two superintendents were appointed who reported to the British military commander in North America. During and immediately after the Seven Years' War, the British promised to protect the lands of their Indian allies, and this promise was formalized in Royal Proclamations in 1761 and 1763 (Hinge, Vol I: 1–7).

The Royal Proclamation of 1763 was by far the more important, and has been described as the "Indian Magna Carta". It established the broad outlines of British Indian policy in North America for years to come. Once regarded as the source of the Indian title that is the subject of land surrenders, Canadian courts now regard it instead as expressing the developing policy of the common law: Guerin et al. v. R. and National Indian Brotherhood, [1984] 6 W.W.R 481 (S.C.C.), *per* Dickson, J., interpreting the court's earlier decision in Calder v. A.G.B.C., [1973] S.C.R.313. The Royal Proclamation is strong evidence of the importance of the Indians, and in particular the Iroquois Confederacy, to Britain in the eighteenth and early nineteenth centuries. Among other things, it designated a protected Indian Territory into which Europeans could not go without licence and the lands of which could not be settled unless ceded in open assembly to an official authorized to represent the British Crown. These protections survived the Quebec Act of 1774, which removed the land north of the Ohio from the Indian Territory. A.-G. for Ontario v. Bear Island Foundation et al. (1984) 49 O.R. 353 at 376, and Sections 37–41 of the present Indian Act continue to reflect both the policies and the procedures first explicitly laid out in 1763.

However, when the American Revolutionary War ended and Britain gave up its claim to much of the land of its Indian allies, it did so without consulting them and soon found itself looking for land within British North America for both the Indians and the Loyalists. The Proclamation had contemplated the Crown buying lands from Indians "inclined to dispose of them", and therefore every effort was made to see that they were so inclined. Between 1781 and 1836, twenty-three

land sales were concluded with the Mississaugas, Chippewas, Ottawas, Potawotomis, and other tribes of Upper Canada (Stanley 1983: 8–9). Increasingly vulnerable after the conclusion of the War of 1812 because their hunting grounds were exhausted and because they had ceased to be important as military allies, the Indians were no longer a force to be reckoned with (Surtees 1983: 65). A policy of placating them with concessions therefore gave way to a policy of obtaining their land and inducting them into British society — should any of them survive what many whites saw as their inevitable extinction.

Before Confederation, however, the situation varied from colony to colony. In Lower Canada the process of settlement had been largely completed during the French regime, and in the Atlantic colonies neither the French nor the British appear to have negotiated land cessions, even after 1763. In the West, with the possible exception of the Selkirk Treaty of 1817, there was insufficient settlement even to raise the issue until the colonies of Red River, Vancouver Island, and British Columbia were established. But in Upper Canada the surrender procedures were followed, and the treaties or land agreements entered into there became important precedents for the numbered Dominion treaties that were negotiated after Confederation.

In Canadian law an Indian treaty, at least for the purposes of Section 88 of the Indian Act, "is an agreement *sui generis* which is neither created nor terminated according to the rules of international law" (Simon v. The Queen (1985), 23 C.C.C.(3d) 238 (S.C.C.) at 252). Equally important, it "embraces all such engagements made by persons in authority as may be brought within the term 'the word of the white man'" (Regina v. White and Bob (1965), 50 D.L.R.(2d) 613 (B.C.C.A.) *per* Norris, J.A. at 648–49, aff'd (1966), 52 D.L.R.(2d) 481). Outside the Maritimes, however, most Indian treaties, however they might be styled, involved the cession of land, and the Upper Canadian ones were no exception.

At first these treaties were on the basis of a single, one-time payment. After the War of 1812, however, the Lords of the Treasury resolved that the cost of purchasing land in Upper Canada ought to be borne locally:

> To provide this revenue, Lieutenant-Governor Maitland proposed to sell a portion of the Indian lands at public auction. Purchasers would be required to pay 10 per cent as a downpayment and carry a mortgage for the balance. However, as long as they paid the annual interest, the principal would not be required. The annual income from interest would then be used to make a payment, in perpetuity, to the Indians who sold their land. (Surtees 1983: 69–70)

In this way the authorities moved from relying exclusively on lump sums to annuities or "treaty money", and from 1818 onwards this was part of the negotiating process.

The Robinson Superior and Robinson Huron treaties of 1850 were particularly important. Named after the man who negotiated them, these treaties extinguished Native title to vast tracts of Indian land and set a pattern for future dealings. As provided for in the Royal Proclamation, the treaties were negotiated at a "public meeting or Assembly" at which the lands were ceded to a representative of the Crown. Reserves were set aside and listed in a schedule, and the Indians undertook not to "sell, lease or otherwise dispose of any portion of their reservations without the consent of the Superintendent General of Indian Affairs. . .(or) at any time (to) hinder or prevent persons from exploring or searching for minerals or other valuable productions in any part of the territory. . .ceded to Her Majesty". In addition to the reserves, the Indians received a lump sum payment and were promised annuities and a continuation of their hunting and fishing rights over the ceded territory, "excepting only such portions. . .as may from time to time be sold or leased to individuals or companies. . .and occupied by them with the consent of the Provincial Government".

The term "surrender", therefore, originally meant the sale of lands traditionally occupied or used by the Indians and the extinguishing of their right of occupation, but not necessarily of their right to hunt and fish. The land could be surrendered only to the Crown and, once surrendered, full legal title was in the Crown. The clarity of this result was clouded, however, both by the division of powers consequent upon Confederation and by the need to manage lands reserved in the treaty process "for the use and benefit" of the Indians occupying them.

(ii) The Problem Created by Confederation and St. Catharines Milling and Lumber Co. v. The Queen in Right of Ontario (1888), 14 App. Cas. 46 (P.C.)

Immediately after Confederation, the procedures for surrendering lands "reserved for the use of the Indians" that had been employed in the Robinson treaties were set out in more detail in Sections 8–10 of "An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands", S.C. 1868, c. 42. The Act provided that, to be valid, a surrender had to be by a majority of the chiefs at a public assembly held in the presence of the Secretary of State or his duly authorized representative, and the surrender had to be certified on oath before a judge. This was, in essence, the process laid down by the Royal Proclamation of 1763, modified to apply to lands already reserved to Indians pursuant to treaty or otherwise. It was continued in subsequent legislation, up to and including, although in amended form, Section 39 of the present Indian Act.

In the West, however, the treaty process was just beginning, and between 1871 and 1877, the Dominion government negotiated seven

numbered treaties with the western Indians in which they ceded land in return for reserves, annuities, hunting and fishing rights and sundry lesser considerations. Unlike the Robinson treaties, the reserves were not confirmed at the time of the treaty; instead, the Crown undertook to confirm them later, i.e., to grant them back to the Indians, after they had been surveyed. This change is significant because it meant that these reserves were made up of land surrendered by treaty, the Indian title to which had been extinguished. This caused some confusion in the early 1880's (see under (iii), below), and is of concern to many Indians today (Living Treaties 1985: 37–38).

One of these numbered treaties, Treaty No. 3 with the Ojibwa Indians in 1873, became the foundation of the Dominion government's position in the St. Catharines case. Relying upon the surrender by the Indians, the Dominion government claimed the right to issue Dominion timber licences in the area. When it was subsequently determined that these lands were within the province of Ontario, the question of the validity of these licences was raised. To succeed in court, therefore, the Dominion government became owner in their place. The Privy Council, however, ruled that the fee in the land had been in the Crown all along, and that only the Indians' right of occupancy, "a personal and usufructuary right", had been surrendered and extinguished by the treaty. Because the land was in Ontario and because Section 109 of the BNA Act was read as bestowing the beneficial interest in such Crown lands upon the province, the Dominion had no authority to grant the licences. Once the Indian title, which was an "interest other than that of the province" under Section 109, was extinguished, full beneficial title vested in the Crown in right of the province.

This created something of a constitutional problem for the Dominion government, charged as it was with responsibility for Indians and lands reserved for Indians. If, upon surrender to the Dominion of land located in a province, the entire beneficial interest in the land vested in the Crown in right of that province, how could the Dominion establish reserves following such a surrender or subsequently dispose of reserve land surrendered pursuant to the Indian Act? Once surrendered, the land was the province's, not the Dominion's, to dispose of. The Privy Council in Ontario Mining Company v. Seybold, [1903] A.C. 73 alluded to these difficulties in a case in which some land surrendered under Treaty No. 3 had been designated a reserve and re-surrendered for sale under the Indian Act of 1880. In ruling against the subsequent sale of the land by the Dominion, Lord Davey reminded Ottawa of the distinction, suggesting that the nature of the Canadian Constitution required Ottawa and the provinces to cooperate in such matters:

> [The argument of counsel for the appellants] ignores the effect of the surrender of 1873 as declared in [the St. Catharines Milling case]...Let it be assumed that the Government of the province, taking advantage of the surrender of 1873, came at least under an

> honourable engagement to fulfill the terms on the faith of which the surrender was made, and, therefore, to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves. The result, however, is that the choice and location of the lands to be so appropriated could only be effectively made by the joint action of the two governments. (82–83)

The Privy Council in Seybold described their decision in favour of the province as "a corollary" of their earlier decision in St. Catharines Milling, and a similar result was reached some twenty years later in A.-G. of Quebec and Star Chrome Mining v. A.-G. of Canada, [1921] A.C. 401. The problem was that when Indians surrendered lands occupied or used by them at common law or pursuant to the Royal Proclamation, they invariably did so on the condition that a portion of the land be reserved for their continued use and benefit. If anything, Street, J. of the Ontario Divisional Court put the issue in the Seybold case even more succinctly when he noted that it would be unjust of the province to ignore the terms of the surrender even though they had no legal obligation to do so.

The primary effect of these decisions was "to inhibit the establishment of reserves by the federal government and to preclude the surrender of such lands for the benefit of the Indians" (Morse 1985: 487). Clearly both levels of government had to reach some sort of agreement concerning Indian reserves, and this in fact happened, except in Quebec. Agreements were made with Ontario in 1891, 1894, 1905, 1923 and 1924, with the prairie provinces in 1930, with the Atlantic provinces in 1958–59, and with British Columbia in 1912. The latter was a particularly difficult process, however, and matters were not finally settled in B.C. until 1938 (see under (iv), below).

(iii) Some Statutory Provisions Concerning Surrenders: Sections 2(1), 18(1), 37, 38, and 53(1)

Today the most relevant sections are Section 2(1), which defines "reserve" and "surrendered lands"; Section 18(1), which provides that reserves are held for the "use and benefit" of the Indian bands assigned to them; Section 37, which provides that reserve lands may not be sold or leased without being surrendered, unless the Act otherwise provides; Section 38, which designates surrenders as either "absolute or qualified, conditional or unconditional"; and Section 53(1), which vests the management and disposition of surrendered lands in the Minister. Section 35, which permits reserve land under certain circumstances to be expropriated or used for public purposes, and Section 58(3), which permits the Minister to lease the unsurrendered land of an individual Indian upon request, are more appropriately considered under headings (b) and (c), below. Over time, the effect of St. Catharines Milling and the other cases referred to above seems to have been not only to require

federal-provincial cooperation in carving reserves out of land, the underlying title to which is vested in the provincial Crown, but also to highlight a latent ambiguity in these provisions and their predecessors.

Reserves and Surrenders

Section 3(6) of the Indian Act of 1876 defined a reserve as "any tract. . .of land set apart by treaty or otherwise for the use or benefit of. . .a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered. . ." Which Crown is unspecified, but the final phrase was presumably meant to acknowledge that reserve land set apart by treaty was land, the Native title to which had not been included in the surrender effected by the treaty, as was the case with the Robinson treaties of 1850. There was no definition of "surrendered lands" in the 1876 Act, but "Indian lands" were defined in Section 3(8) as "any reserve or portion of a reserve which has been surrendered to the Crown". By Section 29, such lands were to be "managed, leased, and sold as the Governor in Council may direct".

However, in 1882 the Act, which had been consolidated again in 1880 without affecting these definitions, was amended by deleting the phrase "but which is unsurrendered" in Section 3(6) and substituting the words "and which remains a portion of the said reserve" (S.C. 1882, c.30, s.1). None of the changes effected by the 1882 amending statute were debated in the House of Commons, but in the Senate one member queried the deletion, asserting that the amended section now seemed only to say that "an Indian reserve should be an Indian reserve". He received the following response:

> Many Indian reserves were set apart as such after the territory in which they are situated had been surrendered to the Crown by the Indians, such surrender having embraced with the other land covered thereby the reserves subsequently allotted to the Indians. This is the case with all the Indian reserves in the Northwest Territories and with very many in Manitoba and Keewatin. The Superintendent General considers this amendment necessary to carry out the Act. (Senate Debates 1882: 704)

This excerpt would seem to clarify a change that seems otherwise perplexing (see, for example, the decision of the Supreme Court of Canada in The Queen v. Smith (1983), 47 N.R. 132 at 143–44, where the deletion is incorrectly attributed to the Indian Act of 1886). Because the Dominion numbered treaties involved the surrender of all the Indians' lands, leaving reserves to be confirmed later, legislation that confined reserves to unsurrendered lands could, technically, be construed as excluding the western reserves from the definition. The fact that reserves and reserve land surrendered pursuant to the Indian Act may or may not have been previously surrendered to the Crown by treaty was not acknowledged, therefore, in the Indian Act of 1876.

The 1876 and 1882 definitions were combined in the 1906 Indian Act (R.S.C. 1906, c.81, s.2(i)), and the current definitions of "reserve" and "surrendered lands" — the phrase "Indian lands" was dropped in 1951 — clearly reflect a legislative intent to confine the meaning of "surrendered lands" to lands surrendered pursuant to the Act. However, even here, if the legal result of a surrender is to perfect the title of the provincial Crown, the St. Catharines problem can arise, as in fact it did in Smith, above.

In the judgement of the Court in that case, Estey, J. noted the confusing nature not only of the definition of "surrendered lands" in Section 2(1), but also of the surrender requirement in Section 37 and the authority of the Minister to dispose of surrendered land pursuant to Section 53(1). His remarks with respect to the latter deserve quotation:

> Section 53.(1)...appear[s] to have been based upon an assumption that after the surrender of lands set aside for Indians under s.91(24), some interest therein remains in the government of Canada; or alternatively, that a facilitative surrender has been taken so as to enable the Crown to manage the lands for the continued use and benefit by and of the Indians. The St. Catharines case, of course, has long since decided otherwise when the surrender of the usufructary interest in complete. It may be that s.53 and like provisions in the Indian Act are predicated upon the assumption that lands comprised in the Indian Reserves have been conveyed by the province to the Federal Government. Since these lands would then become public lands of the Government of Canada, Parliament could validly make provision for their continued use under s.91(1A). However, insofar as s.53(1) purports to affect land held by the province, it would be *ultra vires*. (146)

But such situations will be rare because the underlying title to reserve land is generally in the federal Crown, either because the land is federal territory (e.g., the Yukon) or by virtue of the sort of federal-provincial agreement referred to under heading (ii), above.

When one considers the reason for the deletion in 1882 of the phrase "but which is unsurrendered" from the definition of "reserve", the historical depth of the ambiguity becomes clear. Because most of the reserve land in western Canada had been surrendered (in the old sense) before being reserved, the Indian Department, with this meaning in mind, was concerned that these lands would be excluded from the statutory definition. Hence they requested the amendment to ensure they were included. However, the substitution of the words "and which remains a portion of the said reserve" indicated that reserve lands subsequently surrendered pursuant to the Act (i.e., in the newer sense) were *not* to be included in the definition of "reserve". These were defined as "Indian lands" or, since 1951, "surrendered lands". "Surrender" has both an older and a newer connotation — and so, as the excerpt from the Senate debates quoted above reveals, does the term

"reserve". Originally it meant land which had not yet been ceded to the Crown, e.g., land within the Indian Territory marked off by the Royal Proclamation. But now it usually means a reserve as contemplated by the Indian Act, which may or may not be composed of land ceded by treaty, depending upon whether there was a treaty, or if there was, what its terms were.

Conditional Surrenders

In addition to a new definition of "surrendered lands", the Indian Act of 1951 (S.C. 1951, c.29, s.38(2)) explicitly acknowledged the concept of a "conditional" or "qualified" surrender, perhaps partly as a result of the discussion concerning what constituted a "total and definitive" surrender in St. Ann's Island Shooting & Fishing Club Ltd. v. The Queen, [1950] S.C.R. 211. The idea that a surrender might be subject to conditions was, of course, nothing new. The Indian Act of 1876 provided that surrendered lands were to be managed as the Governor in Council directed, subject to the conditions of surrender (s.29), and this directive is now section 53(1) of the present Act. As Estey, J. said in Smith, however:

> Whatever 'surrender' may mean in the Indian Act, a surrender in law has the immediate result of extinguishing the personal right of the Indians to which federal jurisdiction attaches under s.91(24). (at 141)

But if a surrender is conditional or qualified, it can be said that the land in question continues to be "reserved for the Indians" and under federal jurisdiction. The surrender is a legal condition precedent to any dealing in the land but is merely "facilitative", i.e., designed to increase the value of the land to the Indians. Such land, although surrendered, remains land "reserved for the Indians" and is, for example, not subject to municipal zoning by-laws or provincial health regulations: Corporation of Surrey et al. v. Peace Arch Enterprises Ltd. and Surfside Recreations Ltd. (1970), 74 W.W.R. 380 (B.C.C.A.), although this decision should not be compared to Reference re Stony Plain Indian Reserve No.135 (1981), 130 D.L.R. (3D) 636 (Alta. C.A.). In Smith an attempt was made to characterize the surrender in that case as a conditional one, but it did not succeed, a result that strongly suggests that when an outright sale is contemplated the courts will be slow to conclude that the surrender of the usufructary interest has not been complete. Where a lease is concerned, however, the situation is different. As MacLean, J.A. put it in the Peace Arch case:

> In my view the "surrender" under the Indian Act is not a surrender as a conveyancer would understand it. The Indians are in effect forbidden from leasing or conveying the lands within an Indian reserve, and this function must be performed by an official of the Government if it is to be performed at all. . .Further, it is to be noted

> that the surrender is in favour of Her Majesty "in trust". This obviously means in trust for the Indians. The title which Her Majesty gets under this arrangement is an empty one. (385)

To sum up: the term "surrender" would appear to have at least two meanings. The older of the two refers to the process, first formalized in the Proclamation of 1763, whereby Indians ceded their lands to the Crown by conveyance or treaty, reserving portions of them for their continued use and occupation (as in the Robinson Treaties) or surrendering all the land and receiving a grant of reserve land back from the government (as in the numbered Treaties). To protect the Indians from unscrupulous whites, a surrender could be made only to the Crown and only in a prescribed fashion. The object of this sort of surrender is the complete extinguishment of Native title to the land. The second, newer meaning refers to the process under the Indian Act by which land that is already part of an Indian reserve is surrendered to the Crown either for sale or, much more likely, for lease. Here the object may be extinguishment, but much more often the object of a surrender will be simply to so manage the land as to maximize its economic benefit to the band, without extinguishing the Native title.

(iv) Where the Underlying Title is in the Federal Crown: the British Columbia Example

As stated above, the St. Catharines problem does not arise where the fee simple is in the federal Crown, and over the years agreements were entered into with a number of provinces where by they either agreed to cooperate with federal plans to dispose of surrendered lands or actually transferred title to reserve lands to the federal Crown. In British Columbia this process was a difficult one.

Unlike the prairie provinces, Native title to most of British Columbia has never been ceded by treaty, and whether this title was implicitly extinguished by colonial land legislation is a question that has yet to receive a definitive judicial answer. Only the northeast corner, which was included in Treaty No. 8 in 1899, and approximately one-fortieth of Vancouver Island, ceded to James Douglas in his capacity as HBC Chief Factor (to 1858) and Colonial Governor (1851–64), is subject to treaty.

The Pre-Confederation Vancouver Island Treaties

The fourteen Douglas treaties (1850–54) really fall into two groups, i.e. the eleven negotiated at Fort Victoria, which ceded an arc of land from Sooke to the northern end of the Saanich Peninsula, and the remaining three, two of which concern land at Fort Rupert and one at Nanaimo (Duff 1969). Based upon New Zealand precedents and

sharing much in common with the Robinson treaties of the same period, the treaties provided for reserves, lump sum payments, and the preservation of fishing and hunting rights in return for the ceded land. However, they were comparatively informal transactions, and there is reason to believe that the Island Indians understood the significance of them even less well than their prairie and Ontario counterparts. Unlike the treaties made east of the Rockies, there was no provision for regular payments: Douglas appears to have regarded annuities and lump sums as mutually exclusive, and the Indians opted for the latter although he urged them to choose the former. Nor, unlike the Robinson treaties, do the Vancouver Island agreements mention any limitations on the Native right to hunt and fish or explicitly refer to any restrictions on leasing or selling land. Douglas' policy, however, was to lease unused portions of the reserves for the benefit of the Indians (Fisher 1977: 114).

On at least four occasions to date, Canadian courts have pronounced upon these treaties. In Regina v. White and Bob, referred to under heading (i), above, the Supreme Court of Canada confirmed the B.C. Court of Appeal's ruling that the treaty with the Saalequun people of Nanaimo is a treaty under the Indian Act. Similar findings were made in respect of the Sooke agreement in Regina v. Cooper (1968), 1 D.L.R.(3d) 113 (B.C.S.C.) and the North Saanich agreement in Regina v. Bartleman (1984), 55 B.C.L.R. 78 (B.C.C.A.). The provincial government tried recently to relitigate this issue in a lawsuit between the Tsawout, whose ancestors were one of the three tribal groups who signed the North Saanich Treaty in 1852, and a corporation that had received permission from the provincial government to develop a marina in Saanichton Bay. The attempt was unsuccessful because the court ruled that the proposed development would interfere with fishing rights guaranteed by the treaty (Saanichton Marina Ltd. v. Claxton et al., B.C.S.C., 8 October, 1987).

When Douglas was obliged to summon the Colony of Vancouver Island's first legislative assembly in 1856, his treaty-making effectively ceased. Already strapped for funds, Douglas appealed in vain in 1861 to the Colonial Office, but they advised him that such matters were now a matter for the local legislature. The legislature refused to vote money for what they continued to see as an imperial responsibility. With the exception of an island in Barkley Sound that was conveyed in 1859, no more treaties were negotiated on Vancouver Island (Madill 1981: 74). None at all were entered into during the colonial period (1858–71) on mainland British Columbia because, by the time the colony was established in 1858, Douglas was out of funds and the colonial governments which administered Vancouver Island and British Columbia after Douglas' retirement took the position that the policy of extinguishing Native title was inapplicable on the Pacific slope. Much later, when the Nishga and Tshimshian peoples asked Premier Smithe in 1887 for a treaty like the ones they had heard the Dominion

government had made with the Indians east of the Rockies, Smithe even went so far as to pretend to them that they had been misinformed (Raunet 1984: 94–98).

Colonial Land Policy after Douglas, 1864–1871

The problems created by the St. Catharines, Seybold, and Star Chrome cases, discussed under (ii), above, were some years in the future when British Columbia joined Confederation in 1871. It is perhaps not surprising, therefore, that the Terms of Union have little to say about Indians and their lands and, indeed, very nearly included nothing at all of the subject (Special Joint Committee 1927: 4–5). Had the Dominion government been better informed about the new province's Indian policy, it is likely that the terms would have been more detailed and the parties less disposed to agree. As it is, Article 13 acknowledges that Indians and their lands are to pass under Dominion jurisdiction and that "a policy as liberal as that hitherto pursued" by the colony will be continued. In order to carry out that policy:

> . . .tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government for the use and benefit of the Indians on the application of the Dominion Government. . .

The Article goes on to provide that, in the event of disagreement, problems should be referred to the Secretary of State for the Colonies.

The Dominion government soon discovered just how liberal British Columbia's policy had been and just what its practice respecting allocating reserve land was. Whereas Dominion policy was to extinguish Native title and then allot reserves in the neighbourhood of eighty acres per family, since Douglas retired as governor, the practice in B.C. had been not to bother about Native title and to allot only six to ten acres per family (Bankes 1986: 136). While it is true that Douglas had not negotiated any land surrenders during the last ten years of his terms, he had continued to set aside generous reserves, as he explained in a letter to Dr. I.W. Powell, the first Indian Superintendent:

> . . .in laying out Indian Reserves no specific number of acres was insisted on. The principle followed in all cases was to leave the extent and selection of the land entirely optional with the Indians. . .the surveying officers having instructions to meet their wishes in every particular. . . (Reproduced in Cail 1974: Appendix D, Item 4)

He warned Powell against departing from this practice, but this in fact had already happened, as Douglas no doubt suspected. In 1864, Joseph Trutch had become Chief Commissioner of Lands, and he treated the fact that most of the reserves previously set aside came to only ten acres per family as a matter of policy. He seems to have been appalled by the

way the surveyors, following Douglas' instructions, had allotted whatever lands the Indians had requested, and in some areas he even had existing reserves reduced in size. His views may be gleaned from a letter he wrote to Sir John A. Macdonald after he had become B.C.'s first lieutenant governor. Describing most of the new province's Indians as "utter savages", he advised Macdonald that the Canadian approach to Native title would never work in B.C. and should not be adopted (Cail 1974: 181, 298–99). In the years to come, Victoria and the Dominion would clash repeatedly over their respective obligations under the Terms of Union, particularly when there was a Liberal government in Ottawa. It would be sixty-seven years before the lands contemplated by Article 13 would finally be transferred.

Dominion-Provincial Wrangling, 1871–1912

In 1873, B.C. agreed to increase the size of reserves to be allotted in the future to a maximum of twenty acres per family, but Ottawa remained of the opinion that, whatever Article 13 might mean, the province's position was unfair to the Indians. Further counter-proposals were exchanged, and in 1875–76, after the Dominion government had to disallow one B.C. statute dealing with Crown lands because it made no provision for Indians, an agreement was finally reached to appoint a three-man commission to allot reserves. Unfortunately, the provincial government was unhappy with the finding of this commission and accepted none of its proposed reserves. One of the commissioners, Gilbert Sproat, carried on on his own for two years but resigned in frustration in 1880. The reason may be gleaned from a letter, the text of which was read by a Member of Parliament to the House of Commons in April of that year, from an unhappy white resident of British Columbia:

> Mr. Sproat, the Dominion Land agent here, has been making great havoc with the settlement of the lands, giving to Indians all the land that was of any good for settlement and that was not previously preempted. His decisions have caused universal dissatisfaction among the whites. (Commons Debates: 1880: 1693)

At about the same time, feelings were also excited by the prospect of an Indian uprising consequent upon the murder of a constable at Kamloops by a gang of "half breeds". The rebellion, however failed to materialize.

A few days before the letter concerning Sproat was read in the Commons, David Mills, who had been Minister of the Interior in the former Liberal government, raised the ire of Amor de Cosmos by saying that the Terms of Union had completely "overlooked" Indian land claims. He went on:

> I think it is the only instance in the whole history of British colonization in North America, where the Government have

> undertaken to deal with the land without first securing the extinction of Indian titles. It is my opinion that the terms and conditions of the Union did not, and in law could not take away the right of the Indians in the soil. . .*That title is protected by the law*. . .[The commission was appointed because] the amount of land allotted to [the Indians] was so limited, that it was impossible for them to subsist. . . (Commons Debates 1880: 1634–35, emphasis added)

De Cosmos regarded this as an insult to the people of British Columbia, who had had "no trouble at all" with the Indians prior to Confederation and who had spend only $500 to $1000 per annum on the Indians compared to the $50,000 now spent by the Dominion. Sproat was accused by another Member from B.C. of giving the Indians whatever they wanted, and a motion for the return of all relevant documents and correspondence was passed.

Sproat was replaced by Peter O'Reilly, whose views were more in line with the province's, and as the white population finally began to exceed the Native population in the 1880's whatever earlier need for prudence may have existed soon lessened considerably (Titley 1986: 136–37). At last progress was being made, "although O'Reilly [resurveyed] lands already allotted by Sproat or the joint commissioners on the ground that they had been improvident, at least in the view of the province" (Bankes 1986: 138). By 1897, most reserves had been laid out. But title remained in the province.

The difficulty was not only that the two sides could not agree on the extent and size of reserves; they also did not agree in their respective interpretations of B.C.'s obligation to transfer the land. British Columbia took the position that it retained a reversionary interest in any lands conveyed, and relied upon a clause in the 1875–76 agreement which stated that "any land taken off a reserve shall revert to the province".

Still, the Terms of Union did contemplate a transfer and the province's so-called reversionary interest was really no different from that enjoyed by the other provinces as a result of Section 109 of the British North America Act and the St. Catharines case. From 1894 onward, Ontario and Ottawa entered into a series of agreements concerning the allocation of reserves, culminating in the 1924 agreement referred to under (ii), above, and in the same period negotiations were proceeding, although somewhat less amicably, in British Columbia. The unresolved problem concerning the province's reversionary interest held up the removal of the Songhees Reserve in Victoria and complicated the question of coal leases in Nanaimo, provoking a request to have the matter referred to the Supreme Court of Canada (Bankes 1986: 139). Instead, an agreement was reached in 1912 that was designed finally to resolve all questions respecting Indian affairs in B.C., except the question of Native or aboriginal title, which the province consistently refused to reopen.

The McKenna-McBride Agreement of 1912

The McKenna-McBride Agreement attempted to deal, by means of another larger commission, both with the allotment of reserves (neither the Native nor the white population, for very different reasons, were happy with the existing situation) and with the question of the provincial reversionary interest. Essentially, it provided that the new Royal Commission would adjust the size of reserves upwards or downwards in terms of the Indians' "reasonable" needs and that the province would then transfer these adjusted reserves to the Dominion. Title would revert to the province only if a particular band became extinct.

Because this process did not deal with aboriginal title and because it resulted in approximately 47,000 acres of valuable land being "cut-off" existing reserves in return for about 87,000 acres of much less valuable land, it was unacceptable to the Indians (La Violette 1961: 135). Moreover, the agreement was said to be "a final adjustment" of all outstanding issues and the requirement that the Indians consent to the changes was subsequently overridden by the British Columbia Indian Lands Settlement Act:

> For the purposes of adjusting. . .the reductions or cutoff from reserves in accordance with the recommendations of the Royal Commission, the Governor in Council may order such reductions or cut-offs to be effected without surrenders of the same by the Indians, notwithstanding any provisions of the Indian Act to the contrary. . . (S.C. 1919–20, c.51, s.3)

These measures continue to be a source of grievance and, indeed, are still being sorted out: see, for example, the Indian Cut-Off Lands Disputes Act, S.B.C. 1982, c.50. In 1920 W.E. Ditchburn of Indian Affairs and Major J.W. Clark for B.C. were appointed to review the Commission's report. It was, however, another sort of "Settlement Act" that helped to cause the implementation of the McKenna-McBride Agreement to be postponed for many years.

The Railway Belt and the Peace River Block

To facilitate the building of the railway that was promised to B.C. at Confederation, the Province had agreed to transfer to the Dominion a strip of land up to forty miles wide along the route of the proposed railway (Terms of Union, Article 11). Unfortunately, by the time Ottawa was finally ready to begin construction it had become aware that much of the land within the Railway Belt was not of the quality it had been led to believe and that B.C. had already alienated 800–900,000 acres of it. In any event, after a couple of false starts, B.C. passed a statute (S.B.C. 1884, c.14) that later came to be known as the Settlement Act, providing for the conveyance to the Dominion of the

forty-mile strip (10,976,000 acres) and a block of 3,500,000 acres in the Peace River area, although the latter was not selected until 1907. A further 1,900,000 acres on Vancouver Island was also included, for the construction of the extension of the railway from Esquimalt to Nanaimo (Cail 1974: 137–38n).

By the time of the Royal Commission of 1912–16, therefore, title to both the Peace River Block and the Railway Belt was in the Dominion and Treaty No. 8, which included the surrender of Indian title to northeastern B.C., had been negotiated. The Dominion government had also, pursuant to that treaty, set aside four reserves within the Peace River Block. When Ditchburn and Clark reported in 1923, their agreement was confirmed by both governments except as to the lands covered by Treaty No. 8 and the Railway Belt:

> Ottawa contended that when the belt had been conveyed to the Dominion, the province had lost all claim to reserves already granted and to those that might later be granted within its boundaries. In other words, its reversionary interest did not apply. The royal commission, however, had examined such reserves and had recommended cut-offs in a number of instances. Ottawa suggested that this had been done merely for the sake of consistency and that the cut-offs should not be made. Victoria's viewpoint was quite the opposite. It held that when the railway belt had been created under the act of 1884, its reversionary interest in reserves already laid out within the boundaries of the belt had not been cancelled. (Titley 1986: 148)

The Scott-Cathcart Agreement of 1929

There the matter stood until in 1927, when a further Royal Commission reported that the Railway Belt and the Peace River Block ought to be transferred back to the Province (Cail 1974: 151). Because the provincial authorities had no legal right to such a transfer, their Dominion counterparts "were quick to appreciate the opportunity" this demand presented finally to obtain title to B.C.'s Indian reserves (Bankes 1986: 143). Accordingly, the Dominion agreed to return all unalienated land in these regions, subject to settlement of the reserve issue. Insofar as reserves outside the two problem areas were concerned, the parties agreed in 1929 to a form of conveyance surprisingly favourable to B.C. Although the form reflects the McKenna-McBride Agreement that only the lands of extinct bands will revert to the provincial Crown, one clause permits the province to "resume" up to one-twentieth of the reserve land for public purposes, an arrangement which continues to cause problems today: see Moses v. The Queen, [1977] 4 W.W.R. 474, aff'd [1979] 5 W.W.R. 100 (B.C.C.A.).

Oddly — because title to the Railway Belt and the Peace River Block was already in the Dominion and there was therefore no need to convey

them — the agreement went on to provide that, nonetheless, reserves in these areas would be governed by the terms of the new form of conveyance. The Scott-Cathcart Agreement was made effective by Order-in-Council in 1930, the same year that the re-transfer of the Railway Belt and the Peace River Block, excluding the reserves, took place. All this was embodied in the schedule to the Constitution Act, 1930, 20–21 Geo.V (U.K.), c.26, and Article 13 of the Dominion/provincial agreement therein contained reads as follows:

> Nothing in this agreement shall extend to the lands included within Indian Reserves in the Railway Belt and the Peace River Block, but the said reserves shall continue to be vested in Canada in trust for the Indians on the terms and conditions set out in [the Order-in-Council referred to above].

All that remained was for the province to reciprocate and convey the Indian reserves outside of the Railway Belt and the Peace River Block to Canada.

Order-in-Council 1036

Surprisingly, this did not happen. The B.C. government continued to raise questions about reserve size and even about the cut-offs in the former Railway Belt, notwithstanding that the Scott-Cathcart Agreement explicitly excluded these reserves from the transfer. Moreover, the Dominion Order-in-Council regarding the 1916 Royal Commission Report (as amended by Ditchburn and Clark) had refused to go along with cut-offs in the Railway Belt and this had been part of the Agreement (Titley 1986: 159). On these issues Ottawa therefore remained adamant, and after a few more years of bartering mineral and timber rights, B.C. finally conveyed title in its Indian reserves to Ottawa in 1938 (Order-in-Council 1036). In 1961, reserve lands in that part of the province subject to Treaty No. 8 were also conveyed to Ottawa (Order-in-Council 2995), and in 1969 Order-in-Council 1555 deleted the provision concerning extinct bands.

A legal distinction presumably remains between Indian reserves within the Railway Belt and other reserves because the former were not conveyed to Ottawa in 1938; the rights enjoyed by the province in these reserves is by virtue of the agreement between the Dominion and the province that the terms of the standard form conveyance should apply to them (Smith 1986: 20). However, as a result of Order-in-Council 1036 the problem presented by St. Catharines Milling and The Queen v. Smith cannot frustrate the surrender of reserve lands in British Columbia. As Dickson, J. put it in the Guerin case (above, heading (i)):

> When the land in question in St. Catharines Milling was subsequently disencumbered of the native title upon its surrender to the federal government by the Indian occupants in 1873, the entire beneficial

> interest in the land was held to have passed, because of the personal and usufructary nature of the Indian's right, to the Province of Ontario under s.109 rather than to Canada. The same constitutional issue arose recently in this court in [the Smith case], in which the court held that the Indian right in a reserve, being personal, could not be transferred to a grantee, whether an individual or the Crown. Upon surrender the right disappeared "in the process of release".
>
> No such constitutional problem arises in the present case, since in 1938 the title to all Indian reserves in British Columbia was transferred by the provincial government to the Crown in right of Canada. (498)

What the English legal historian F.W. Maitland referred to as the feudal "mystery of seisin" clearly lives on in the magical constitutional tangle of Canadian Indian law.

(b) Communal Title and the Creation of Individual Interest in Reserve Land

The inclusion of inheritable location tickets in the Indian Act of 1876, based upon similar provisions introduced seven years earlier, constitutes a statutory announcement of a central policy of the Indian Department: the gradual substitution of individual ownership for customary, communal title to land. By concentrating effective authority over band membership, local government, and land management in the Superintendent General, the authorities hoped to guide the Indians towards eventual assimilation into white society. Individualized title was an essential step in this process, and had been so viewed since at least the 1830's. It was only a step, however, and until they became enfranchised and were granted the title in fee simple, locatees' rights were and are limited. Although there are certainly important exceptions, and although there have been times when this philosophy tended to be contradicted by events, the overall scheme of the Indian Act is to maintain reserve lands intact for the use and benefit of the band for whom the lands were set apart: The Queen v. Devereux (1965), 51 D.L.R.(2d) 546 (S.C.C.) and Joe v. Findlay (1981), 122 D.L.R.(3d) 377 (B.C.C.A.). Probably the most significant statutory exception to this principle today is s.58(3), discussed under (c)(iii), below. Its outer limits remain to be determined.

(i) The Relationship between Enfranchisement and Individual Property Rights

Individual, inheritable rights to land, especially when made devisable by will without band consent in 1894, were seen not only as tending to increase the Indians' attachment to European notions of real property but also to prepare them for assimilation into the wider society through enfranchisement. At first the approach was somewhat different. In the

Gradual Civilization Act of 1857 (S.P.C. 1857, c.26), the colonial legislature provided that any Indian who became enfranchised would be allotted a life estate in up to fifty acres of reserve land. By Section 10 of the statute, this estate could be willed to or inherited by his children, and in their hands it became a fee simple. In this scheme, becoming enfranchised was seen as a prerequisite to becoming a proprietor, as the preamble to both the 1857 Act and the subsequent "Act respecting the Civilization and Enfranchisement of certain Indians" (S.P.C. 1859, c.9) makes clear. The legislation was passed in order to:

> encourage the progress of civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between them and Her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it, by such Individual Members of the said Tribes as are found to desire such encouragement and to have deserved it. . .

First the Indian was, if suitable, to be enfranchised; then, gradually, he and his descendants were to enjoy full rights of property. Because one of the effects of this process was the removal of the land of enfranchised Indians from the reserve and hence the depletion of the band's assets and treaty rights, it met with considerable opposition.

This approach was continued by the first Dominion legislation on the subject, the Gradual Enfranchisement Act of 1869 (S.C. 1869, c.6), which provided for the issuance of letters patent for land held by enfranchised Indians (s.13). But there was a change. The statute deemed an Indian to be lawfully in possession of reserve land which had been subdivided by survey into lots only if the Superintendent General had granted him a "location title", thus extending individualized "ownership" — or at least possession — to Indians who were not enfranchised (s.1). Land held by location title was not transferable and continued to be exempt from seizure for debt, but it could descend to the holder's children upon his death. Unlike the land of an enfranchised Indian, however, the children received only a life estate (s.9). In the 1869 legislation, therefore, individualized property rights could be enjoyed to a certain extent prior to as well as after enfranchisement.

This difference is reflected in the 1876 Act, which appears to distinguish between ordinary location tickets and location tickets issued to "probationary" Indians, i.e., those who have applied for enfranchisement and have been provisionally accepted (s.86). In the former case, the band would "locate" the member on a particular lot and, if the Superintendent General approved, he would issue a location ticket. The land covered by the ticket could be transferred only to an Indian of the same band, and then only if both the band council and the Superintendent General consented (ss.7–9). A band member seeking to be enfranchised, on the other hand, needed the band to consent and to assign him a "suitable allotment of land for that purpose". He then had

to be found fit by an official designated by the Superintendent General, who would then grant him a location ticket "as a probationary Indian". After three years of good behaviour, the applicant was entitled to have issued to him letters patent granting him the land in fee simple (ss.86–87). Indians completing this process would then:

> no longer be deemed Indians within the meaning of the laws relating to Indians, except in so far as their right to participate in the annuities and interest monies, and rents and councils of the band of Indians to which they belonged is concerned. . .(s.88)

Further, if the band as a whole decided to allow every member who chose to do so to become enfranchised, an Indian who received letters patent by virtue of the process just described could, by undergoing yet another three-year period of probation, become entitled to receive "his or her share of the capital funds at the credit of the band. . .or. . .of the principal of the annuities of the band", and cease to be an Indian "in every respect" (s.93).

These provisions were explained to the House of Commons, not always very precisely, by the Minister on March 2 and 21, 1876, and other Members noted that both the 1857 and the 1869 schemes had failed (Commons Debates 1876: 342–43, 749–50, and 752–53). So did this one, and mainly for the same reason: bands did not want land removed from the reserve and possibly sold to non-Indians. Consent to individual applications was therefore rarely obtained, and in the nineteenth century only one band availed itself of the second-stage procedure under Section 93. In 1880, a Member of the House suggested another reason for this reluctance to the Commons. After noting that Sir John A. Macdonald's 1876 law, as expected, had been no more successful than his 1857 one, he stated:

> It is said the reason why so few Indians are enfranchised is because they are not fit for the position. With regard to the Six Nation Indians, the fact that the more intelligent and industrious among them have not enfranchisement, under the present law, is the most conclusive proof of their ability to look after their own interests. At present many of this class occupy from 200 to 300 acres of land apiece, were they to be enfranchised, as the law now stands, they would get only their share of the reserve, something less than fifty acres. In such circumstances they are not so foolish as to seek for enfranchisement. (Commons Debates 1880: 1992)

The extent to which this was true of other reserves is not clear. In the West, however, it was not an issue because the Act provided that the enfranchisement sections were not to be applied there until such time as the Governor General proclaimed their extension to those provinces and territories (S.C. 1876, c.18, s.94; R.S.C. 1886, c.43, s.82).

These provisions, as amended from time to time, remained a permanent feature of the Act, and in 1951 a waiting period of ten years between enfranchisement and fee simple title was introduced (S.C. 1951, c.29, s.110). The Minister allowed that this was a more restrictive provision than before, but it was to assure bands that the land would not be sold "immediately upon enfranchisement" (Commons Debates 1951: 1353, 3070, 3082–83). In 1985, the enfranchisement part of the Act was repealed (S.C. 1985, c.27, s.19).

(ii) Some Statutory Provisions Respecting the Possession of Land in Reserves: Sections 20–29 of the Current Act

The scheme laid down in 1876 is essentially that described above: band members were located by the band, and, when the approval of the Superintendent General was obtained, a location ticket issued. One copy was kept by the Department, one was for the local agent (to be copied into the band register, if there was one), and one was for the band member. No holder of a location ticket could be dispossessed of land "on which he or she has improvements, without receiving compensation therefore" (s.6). Location title could be transferred only to another band member if both the council and the Superintendent General consented, and upon death one-third of the holder's interest went to his widow and the rest went to his children, who held "a like estate in such land as their father" (s.9). In 1880, the requirement that the band consent to transfers was deleted (S.C. 1880, c.28, s.19), and over the years there were a number of changes respecting the descent of property, notably an amendment in 1884 permitting locatees, with the consent of the band and the Superintendent General, to devise their land by will (S.C. 1884, c.27, s.5). In 1894, the requirement that the band consent was dropped (S.C. 1894, c.32, s.1). In western Canada, Indians who had, prior to the establishment of a reserve, occupied and improved land subsequently included in a reserve, were to be in the same position as Indians holding land under a location title (s.10). There were no changes when the Act was consolidated for the third time in 1886: R.S.C. 1886, c.43, ss.16–19.

In 1890, however, "Certificates of Occupancy" were introduced for the Indians of Manitoba, Keewatin and the "Western Territories" — a somewhat unusual geographical term. In those areas the Indian Commissioner was authorized, prior to locating an Indian in the usual way, to issue a Certificate of Occupancy for up to 160 acres. This certificate conferred lawful possession of the land upon the holder, but could be cancelled by the Commissioner at any time (S.C. 1890, c.29, s.2). Presumably, this was to impose a sort of probation period even upon Indians who were not seeking enfranchisement; certainly it had that effect.

There were no significant changes in the consolidations of 1906 and 1927, and in 1951 these provisions were put in what is essentially their present form. Certificates of Occupation were no longer confined to the areas named above but could be issued whenever the Minister wished to have more time to consider whether an allotment by a band council should be approved, and location tickets were replaced by Certificates of Possession (s.20). A Department Register for these certificates was required (s.21) and the provisions regarding western Indians' improvements were generalized (s.22). One Indian representative at the Ottawa Conference in 1951 objected to the temporary possession provisions as creating "feelings of insecurity", and argued that, once land had been allotted by a band council, it should not be subject to ministerial conditions. (Conference 1951: 1365).

By Section 29, reserve lands remained exempt from seizure for debt. More significantly, the requirement that an Indian dispossessed of land he had improved be compensated, which had been in the Act since 1876 was substantially altered. In the 1927 consolidation it was provided that:

> ...no Indian shall be dispossessed of any land on which he has improvements, without receiving compensation for such improvements, at a valuation approved by the Superintendent General, from the Indian who obtains the land, or from the funds of the band, as is determined by the Superintendent General. (R.S.C. 1927, c.98, s.21)

In 1951 this became:

> An Indian who is lawfully removed from lands in a reserve upon which he has made *permanent* improvements *may, if the Minister so directs,* be paid compensation in respect thereof in an amount to be determined by the Minister, either from the person who goes into possession or from the funds of the band, at the discretion of the Minister. (S.C. 1951, c.29, s.23, emphasis added)

The improvements now had to be permanent and compensation was no longer mandatory. These changes were carried over into the current Act.

By Section 24 the right of an Indian in lawful possession of reserve lands to transfer his right of possession to another band member (with the consent of the Minister) was expanded to permit a transfer to the band itself, and Section 25 made provision for Indians who ceased to be entitled to live on a reserve to transfer their land, or in default thereof, have it revert to the band and receive compensation for payment improvements. In the House one member objected to this, arguing that ownership of property was "sacred" and that he did not see why the Indian should not be compensated for the land as well as the improvements. The Minister did not really answer this question, but intimated that because a locatee could transfer his land only to another band member, his interest in it was not one that was worthy of compensation.

This did not satisfy his questioner, who replied that the locatee should be entitled to some compensation for the land "if it is his own property". A few moments later, during a discussion about Indian wills, the Minister described the question of the nature of a locatee's interest in his land as "a rather interesting point of law" (Commons Debates 1951: 3064–65).

Sections 26 and 27 provided for the correction of fraud or error in Certificates of Possession or Occupation, and then had to be amended to include location tickets, presumably because the failure to include them had rendered the new provisions largely ineffectual (S.C. 1956, c.40, s.9). Finally, Section 28 rendered void any attempt by a band or band member to permit anyone other than a band member to occupy or use reserve land, except where the Minister authorized such use or occupation in writing. When Indian representatives queried this latter provision, expressing their concern that private use of reserve land should have the sanction of the band council, the response stressed the fact that the Section limited such ministerial permits to periods of no more than one year (Conference 1951: 1366). An amendment a few years later allowed the Minister, if the band consented, to prescribe a longer period (S.C. 1956, c.40, s.10). The effect of this provision is to add a third method of validating non-Indian use of reserve lands, the other two being by surrender and by a lease pursuant to Section 58(3) of the current Act (Sanders 1985: 465), considered under (c)(iii), below.

(c) The Management and Disposal of Reserve and Surrendered Lands

When Clifford Sifton became Minister of the Interior and therefore Superintendent General of Indian Affairs in 1896, he discovered that, contrary to what he had assumed, it was rather difficult for the government to appropriate Indian lands (Hall 1983: 120). But this was already changing. The North West Rebellion in 1885 had hardened hearts, and in the 1890's the pressure upon the government and the Indian Department to open up Indian land for settlement and development intensified. For the next forty years this pressure, and the change in the law it helped to produce, was constant, and the Superintendent General was authorized to do more and more without the consent of the band. In 1895, for example, he was authorized to lease, without surrender, the land of any Indian who applied to him for that purpose (see under (c)(iii), below), and in 1918 to lease, again without surrender, any uncultivated reserve land. This was to prevent the Government's campaign to increase productivity in the West from being put "entirely at the mercy of the Indian bands" (Commons Debates 1918: 1047–48, explaining S.C. 1918, c.26, s.4).

This trend peaked just before the First World War when Section 49A was added to the Indian Act, enabling the government to expropriate certain reserves in violation of treaty and surrender requirements:

> In the case of an Indian reserve which adjoins or is situated wholly or partly within an incorporated town or city...of not less than 8,000...the Governor in Council may...refer to...the Exchequer Court of Canada for inquiry and report the question as to whether it is expedient, having regard to the interest of the public and of the Indians...for whose use the reserve is held, that the Indians should be removed...

The section was enacted to avoid having to pass a special statute each time this needed to be done, and was prompted by an Act that went through Parliament at the same time removing the Songhees from their Reserve in Victoria, B.C. This Reserve, which was situated across from the legislative buildings in Victoria harbour, had been the object of civic enmity (because it was seen as an eyesore and a source of social problems) and envy (because it occupied extremely valuable land) since colonial times. In 1859, Governor Douglas had refused a request by the House of Assembly to have the Indians moved, on the ground that it would be unjust to violate the government's solemn treaty obligations (Fisher 1977: 114). Yet in 1911, this is precisely what was done. "While we wish to pay every respect to treaty right", the Minister of the Interior informed the House, "it is absolutely necessary, in a progressive country, that existing circumstances and ... conditions should be taken account of". The Songhees, he said, were occupying extremely valuable land without making use of it; they would therefore be transferred to new land in Esquimalt and paid compensation (Commons Debates 1911: 7987–88). In a related development a few years later, Parliament authorized the Governor in Council to reduce the size of B.C.'s Indian reserves, again without requiring compliance with the surrender provisions of the Indian Act (S.C. 1919–20, c.51). That action is discussed under (a)(iv), above.

In response to criticism that Section 49A went too far, it was amended to require the Exchequer Court's finding to be referred to Parliament for approval before a removal could proceed (S.C. 1911, c.14, s.2). The section remained in the Act until 1951, when the Minister at that time conceded that it was discriminatory and that the Indians felt it made them "second-class citizens" (Commons Debates 1951: 1355).

By the 1930's, the government had other concerns, and in 1936 the Indian Department once again became a Branch, this time of the Department of Mines and Resources, and the Minister of Mines became the Superintendent General of Indian Affairs (Department of Mines and Resources Act, S.C. 1936, c.33).

(i) The Minister's Authority over Surrendered Lands: Section 53(1) of the Current Act

Governmental authority over the management and disposition of surrendered lands predates Confederation, as the Nova Scotia, New Brunswick, and Upper and Lower Canadian statutes referred to under 1(a), above, make clear. The Lower Canadian law, for example, established a Commissioner to manage and dispose of Indian lands, and its legal effect was considered in the Star Chrome case (see (a)(ii), above). Section 29 of the 1876 Indian Act provided as follows:

> All Indian lands, being reserves or portions of reserves surrendered or to be surrendered to the Crown, shall be deemed to be held for the same purposes as before the passing of this Act; and shall be managed, leased and sold as the Governor in Council may direct, subject to the conditions of surrender, and to the provisions of this Act.

It is essentially the same today, except that this authority since 1951 has reposed in the Minister or his designate: s.53(1). The determination of whether a particular purpose for which reserve land is used is truly for the use and benefit of the band remains with the Governor in Council, however: s.18(1). The historical ambiguity of s.53(1) and its predecessors is discussed under (a)(iii), above.

The Minister also has considerable powers with respect to reserve land, e.g., s.18(2), dealing with schools, burial grounds, health, etc.; s.58(1), dealing with improvements to uncultivated or unused lands and agricultural leases, and s.58(4), concerning the disposition of grass, fallen timber, and gravel, most of which are subject to the consent of the band council. At the Ottawa Conference in 1951, questions were raised about these provisions, and some representatives complained about the manner in which Indian agents had been leasing uncultivated or unused lands. Disposing of sand and gravel without consent was also discussed, and the representatives were assured that it would be done only when, due to absences, there was "undue difficulty or delay" in obtaining band council consent. The Conference was also told that leases granted for such reasons would not be renewed without consent (Conference 1951: 1366).

By virtue of Section 60, the Governor in Council may, should a band so request, confer "such control and management over (reserve lands) occupied by that band as the Governor in Council considers desirable". This authority can also be withdrawn.

(ii) The Requirement of Surrender and the Public Purpose Exception: Sections 35 and 37 of the Current Act

The principle set out in Section 37 is arguably the most fundamental in the Act, forbidding as it does the disposition of any reserve land that

has not first been surrendered to the Crown by the band "for whose use and benefit in common (it) was set apart". This principle is, however, subject to exceptions made elsewhere in the Act, notably Sections 35, providing for lands taken for public purposes, and 58(3). These will be considered in turn.

The earliest version of the policy reflected in Section 35 deals, not surprisingly, with railways. The history of the common law world in the nineteenth century is festooned with statutory provisions favouring railways, and Section 25 of the first Dominion Act respecting Indian lands is no exception. I stated simply that if any railway, road, or public work passed through or caused injury to any Indian land, compensation would have to be paid. This same provision, more or less, appears in the 1876, 1880, and 1886 Indian Acts, and then in 1887 it was amended to read that "no portion of any reserve" should be encroached upon in this way without the consent of the Governor in Council, but if any railway, etc. did pass through or cause injury, compensation was required (S.C. 1887, c.33, s.5). The wording of this provision was criticized in the House as being contradictory but, amended only slightly, this is substantially what appears in the 1906 consolidation as well.

In 1911, however, the section was changed into what is essentially its present form by authorizing companies and municipalities with statutory expropriation powers to expropriate reserve lands for public purposes (S.C. 1911, c.14, s.1). The consent of the Governor in Council was required for such expropriation, and in 1951 the special reference to railways, etc. was dropped (S.C. 1951, c.29, s.35). Section 35 was the subject of "a considerable amount of discussion" at the Ottawa Conference, but delegates were assured that the policy behind the section was "not the wholesale acquisition of land" but "the use of lands for public utilities and other similar services". This seemed to satisfy those present and the section was approved (Commons Debates 1951: 1366).

(iii) The Exception for Individual Occupants: Section 58(3) of the Current Act

Section 58(3) provides that the Minister "may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered". As stated earlier, this is one of only two ways in which non-Indians can lawfully lease reserve land without it being surrendered. Its history in instructive.

The general principle governing reserve land is that it should not be "sold, alienated, leased, or otherwise disposed of" until it has been surrendered to the Crown by the band for whose "use and benefit" it was set apart (s.37). This principle dates back at least to the Royal Proclamation of 1763, and appears in the first Dominion statute

concerning the management of Indian lands in 1868. But in the Indian Act it is subject to statutory exceptions which date from the first Act in 1876, and others were to follow.

The origin of the present Section 58(3) is probably to be found in the Act of 1880, which permitted the Superintendent General to lease without surrender the lands of "aged, sick and infirm Indians and widows and children left without a guardian" for their support (S.C. 1880, c.28, s.36). This was expanded in 1884 to include the land of Indians who were professionals or school teachers, or who worked at a trade that interfered with their "cultivating land on the reserve" (S.C. 1884, c.27, s.8), and then these three new categories were condensed into one, i.e., "occupations" that interfered with cultivation, in 1894 (S.C. 1894, c.32, s.3). In 1898, authority to dispose of wild grass and dead or fallen timber without surrender was also added (S.C. 1898, c.34, s.2).

The most important change had come a few years earlier, however. In 1895, the section was repealed, thus deleting the reference to widows, etc. and occupations that interfered with farming, and a much broader provision was put in its place:

> No reserve or portion of a reserve shall be sold, alienated or leased until the same has been released or surrendered to the Crown for the purposes of this Act; provided that the superintendent general may lease, for the benefit of *any* Indian, *upon his application for that purpose*, and land to which he is entitled *without the same being released or surrendered.* (S.C. 1895, c.35, s.1)

The effect of this was to remove the need to obtain band consent (by way of surrender) to leasing land which had been allotted to a band member and which he wished to lease, so long as the Superintendent General was willing. In the Commons, the change was described as designed to make the law "general", and as prompted by:

> a number of cases [in which] Indians have. . .left the reserve, and under the law, as it at present stands, we are not in a position to lease these lands without the consent of the band. . .[T]he neighbours, through spite or pique, have used sufficient influence to prevent that being done. (Commons Debates 1895: 3933)

That, in any event, was the official view. But dispensing with band consent created its own problems. As others saw it eighty-five years later, when more and more locatees wished to enter into long-term commercial leases, the Crown's obligations to the band respecting the allotted land were not to be regarded as "entirely superceeded" by the allotment. Using this provision to grant leases that are virtual alienations would be "contrary to the spirit" of the Act, at least (Program Circular, Indian and Inuit Affairs, 1980, No. H-7–1 at 2.4 and 3.1). The recent case of Re Boyer and The Queen et al. (1986), 26

D.L.R.(4th) 284 (F.C.A.), however, strongly favours individual over communal property rights insofar as the present s.58(3) is concerned.

In 1919, authority to grant leases for surface mining rights was vested in the Superintendent General, whether anyone had requested this or not (S.C. 1919, c.56, s.1). Compensation was to be provided for any damage caused thereby to an occupant, and in 1938, after the Indian Department had become a branch of the Department of Mines and Resources, provision was made for compensating non-Indian lessees and licensees as well. This amendment went on to distinguish between mineral leases which did, and did not, require a prior surrender (S.C. 1938, c.31, s.1).

In 1951, the section was split, and the first part, which contains the general prohibition against disposition without surrender, became Section 37. The latter part, containing the exception for individual occupants, was moved to the section of the Act dealing with land management, and numbered 58(3). The provisions concerning uncultivated land, and many of, but not all, the other provisions which reposed control in the Superintendent General (now the Minister of Citizenship and Immigration), were replaced by ones requiring the consent of the band council (see under heading (i), above). This was the general thrust of the 1951 reform of the Act, and Sections 37 and 58(3) have not changed since that time.

At the Ottawa Conference in 1951, the question of the meaning of the words "except where this Act otherwise provides" in Section 37 was raised. The answer given by the government was that this referred to action taken under Sections 35 (lands taken for public purposes) and 110(2) (grants to enfranchised Indians). No mention was made of Sections 28(2) or 58(3), perhaps because the concern at that time was with sales rather than leases and licences (Conference 1951: 1366).

3. Management of Indian Monies

Although a definition of Indian lands appeared as early as the first Indian Act in 1876, there was no definition of Indian monies until 1951. In that year, Indian monies were defined as "all monies collected, received or held by [Her] Majesty for the use and benefit of Indians or bands", and so it remains today. This difference between lands and monies is some indication of the relative importance of the two, and the extent to which Indian lands and monies have been related in the past. Unlike Indian lands, however, Indian monies have received comparatively little attention from historians, lawyers, and the courts.

The relevant provisions of the current Act are ss. 61–69. Section 61 is to monies what s.18(1) is to lands: it provides that they are to be expended only for the "the benefit of the Indians or bands for whose use

and benefit in common the monies are received or held", and the Governor in Council may determine whether a particular expenditure meets this criterion. The fact that such provisions seem to permit no appeal to the courts of the Governor in Council's determination provoked considerable debate in 1956 (Commons Debates 1956: 7118–19, 7140–43), and s.18(1) was relied upon by the Crown in the Guerin case as negativing any fiduciary obligation. This contention was ultimately rejected in that case, and the gap complained of in 1956 has therefore been at least partially filled.

Section 61(2) provides for interest to be paid on Indian monies held in the Consolidated Revenue Fund at a rate to be fixed by the Governor in Council. In 1951, some of the representatives at the Ottawa Conference wanted this amended to ensure that the rate would never fall below five per cent, but they were unsuccessful (Conference 1951: 1365).

Section 62 distinguishes between capital and revenue monies by providing that all monies derived from the sale of surrendered lands and capital assets of a band are deemed to be capital monies of the band and the rest are revenue monies. The distinction is important because the 1951 Act allocates ministerial power based upon this distinction and because s.69, much like s.60 regarding lands, authorizes the Governor in Council to permit a band "to control, manage, and expend in whole or in part its revenue monies". The first permission was granted in 1959 and by 1971 it had been granted to many bands (Daugherty and Madill 1980: 76). As the schedule to the Indian Bands Revenue Monies Regulations reveals, well over half the bands now enjoy this power.

Sections 64 and 65 deal with the Minister's authority over the capital monies of a band, exercised with the consent of the band council, and s.66 deals similarly with its revenue monies, although here the Minister has more authority to act without consent. Section 68 empowers the Minister to apply the annuity or interest money of an Indian to the support of his spouse or family in a number of circumstances. Aspects of these provisions and others are considered in more detail below.

Speaking generally, the provision of the 1951 Act respecting Indian monies reflect the same tension between wardship and independence that characterizes the rest of the Act, and the same tendency towards the latter. However, the continuing supervisory role of the Minister and the Governor in Council, especially the latter's authority to permit a band to enact money by-laws only if it "has reached an advanced stage of development" (s.83), are indications that much remains unchanged. The Minister of Citizenship and Immigration, anticipating criticism of the amount of ministerial discretion in the proposed 1951 Act, commented on this compromise as follows:

> This bill does continue ministerial discretion, but I assure the House that this discretion is very much limited as compared with the present

> act; and in committee I am sure we will be prepared to defend such discretion as has been retained. *In particular the Minister is obliged to retain authority over the expenditure of band funds*, for the very simple reason that these monies are in the consolidated revenue fund and there must be some authority for their payment. I would not want to mislead the House. *The ministerial authority does extend to supervision of expenditure of band funds, but I want to assure the House that just as soon as a band demonstrates its ability to handle money it will be given an opportunity of doing so.* (Commons Debates 1951: 1353, emphasis added)

(a) Monies from Land Surrenders

The early legislation did not segregate provisions respecting lands and monies. The first Dominion law to address the subject of monies was the 1868 statute, which constituted the Department of the Secretary of State and provided for "the management of Indian and Ordinance Lands" (S.C. 1868, c.42). Section 7 stipulated that all monies for the "support and benefit" of Indians, including those from the sale of land and timber, should be applied in the same manner as before the Act. Section 11 vested control of these funds in the Governor in Council, authorizing him to direct how the monies should be invested, when payments should be made and assistance given, and how much should be set apart for the management of Indian lands and property. The first Indian Act in 1876 was similar, except that it provided that, at the time of surrender, it could be agreed to pay up to 10 per cent of the proceeds of a sale to the members of the band instead of investing or applying them to other purposes. This figure appears to reflect the treaty-making policy developed when it was decided to move from lump sum payments to annuities after the War of 1812 (see under (2)(a)(i), above). The 1876 Act also required that the proceeds of the sale or lease of any Indian lands, timber, hay, stone, minerals, or "other valuables thereon" should be paid to the Receiver General to the credit of the Indian fund.

The Indian Acts of 1880 and 1886 continued these provisions. There were some minor amendments in 1895 and 1898, and in 1906 the amount that could be paid to band members from land sales was increased to 50 per cent. The reason was, according to the Minister of the Interior, that:

> [ten per cent] is very little inducement. . .and we find that there is a very considerable difficulty in securing [the Indians'] consent to any surrender. Some weeks ago. . .it was brought to the attention of the House by several members, especially from the Northwest, that there was a great and pressing need. . .to secure the utilization of the large areas of land held by Indians in their reserves without these reserves being of any value to the Indians and being a detriment to the settlers and to the prosperity and progress of the surrounding country. (Commons Debates 1906: 5422)

For a few more years the rate remained at ten per cent for timber and other property, but the pressure was on. Some members wanted the ceilings raised higher or even removed (Commons Debates 1910: 5926–27), and in 1919, the 50 per cent rate was applied to timber and other property as well as land (S.C. 1919, c.56, s.2). In 1951, this became s.64(a) and the phrase "per capita" was inserted. It is now s.64(1)(a).

(b) Capital and Revenue

Although the use of the term "revenue" is more recent, the first reference to capital appears to be in the enfranchisement provisions of the 1857 Gradual Civilization Act, and these references continue in the statutes that followed. The gist of them is that band capital is not to be eroded without band consent, and this seems to be a reflection of the surrender principle concerning land. The principle itself eroded, however. For example, a section introduced in 1894 authorized the Governor in Council, with the consent of the band, to use the capital monies of that band to purchase reserve lands and to finance permanent improvements and the purchase of cattle (S.C. 1894, c.32, s.11). In 1918, it was amended to allow this to be done without band consent if the refusal of such consent was "detrimental to the progress or welfare of the band" (S.C. 1918, c.26, s.4). It seems reasonable to assume, however, that because Indians had virtually no control over their funds and because most of this money was from the sale of land and land-based resources, there was not a pressing need to attempt a distinction between capital and revenue. It was only then the government decided, in the 1951 Act, to move towards transferring more fiscal control to bands that this became important.

There have always been money provision. The current s.68, for example, has its beginnings in the Indian Act of 1886 (R.S.C. 1886, c.43), which was amended a number of times between 1887 and 1898 to provide for the families of Indians who had offended against contemporary laws and morals. Section 72 of the 1886 Act authorized the Superintendent General to stop the "annuity and interest money" of any Indian who had deserted his family and to apply the monies instead to supporting the family. Section 73 conferred a like power to stop payment where an Indian woman with no children had deserted her husband and was living "immorally" with another man. In 1887, these powers were broadened to include depriving an offending Indian of his right to "participate" in the real property of the band, and in 1894, s.72 was expanded to apply to an Indian whose behaviour caused his wife or family to leave, or who was separated from them by reason of imprisonment. In 1898, the Superintendent was further authorized to stop the monies of an Indian parent of an illegitimate child and to apply them instead to the support of that child. This statute also expanded his authority over "immoral" Indian women that had been conferred in 1886, permitting him to order that their interest and annuities be paid towards the support of any children deserted by them.

Although the notion of an Indian being deprived of "participating" in the real property of the band is somewhat vague, there may be a parallel in the old enfranchisement provisions (see under 2(b)(i), above, and ss.15(5) and 16(2) of the current Act). Under the 1875 Indian Act, an Indian who was a successful applicant for enfranchisement received an allotment of land in fee simple and ceased to be an Indian except insofar as he was entitled to "participate in the annuities and interest monies, and rents and councils" of the band. But at this stage the enfranchisee was not entitled to receive his share of the capital funds of the band and the principal of the annuities. As the Minister put it, if enfranchised Indians wished to "get possession of their share of the invested funds of the land", consent of the band had to be obtained for such a distribution (Commons Debates 1876: 342, 750). This rarely happened.

A number of other references to capital, including the provisions respecting loans dealt with below, are in amendments to the original 1894 provision authorizing the Governor in Council to use band capital to purchase reserve lands, etc. In 1918, for example, the same statute that provided for dispensing with band consent in these circumstances permitted the Superintendent General to lease uncultivated reserve land without a surrender and to authorize the expenditure of "so much of the capital funds of the band as may be necessary" to make the land suitable for agricultural or grazing purposes (S.C. 1918, c.26, s.4). Again, the reason was to prevent "reactionary or recalcitrant Indian bands" from "checking progress" (Commons Debates 1918: 1047–48). These provisions, modified to require the consent of the band council are now ss.58(1) and 64(1)(d) of the Act.

Another amendment to the original power to expend capital was made in 1936, when it was extended to permit using such funds to purchase "the possessory rights of a member of the band in respect of any particular parcel of land on the reserve" (S.C. 1936, c.20, s.3). If an Indian devised land to someone not entitled to live on the reserve, the land had to be sold to someone who was so entitled; there was no provision permitting the band itself to resume the land, however, and this was the point of the change.

Two more provisions that relate to Indian monies that deserve mention were enacted in 1895 and 1910. The first vested authority in the Governor in Council to reduce the purchase money due on sales of Indian lands or to reduce or remit the interest on such money. It also authorized the reduction of rents on leased Indian lands if the Governor in Council found them to be excessive (S.C. 1895, c.35, s.8). All reductions or remissions pursuant to this section had to be reported to Parliament. Pressure from purchasers of uninspected Indian land who had belatedly discovered that they had paid too much was behind this measure. The Indian Department had been "dealing" with the problem for some time, but the Justice Department questioned the legality of reducing the payments without statutory authority (Commons Debates

1895: 3937–38). The concern, no doubt, was that this amounted to a violation of the surrender terms, or put differently, an unauthorized reduction of band capital. Perhaps today it would be characterized as a breach of fiduciary duty within the Guerin principle. The section appears in the 1906 and 1927 consolidations but was dropped in 1951.

The second section rendered invalid any contract of agreement concerning Indian monies or securities, or monies appropriated by Parliament for the benefit of Indians, that was made by chief, councillors, or band members unless it was authorized by the Act or approved in writing by the Superintendent General (S.C. 1910, c.28, s.2). Similar in form to s.28 of the current Indian Act regulating the use and occupation of reserve land, its intent was to clarify and reaffirm the principle that band funds could not be "bartered away" without governmental approval (Commons Debates 1910: 5922–26). There is no precise equivalent in the 1951 Act, although s.61 reflects the same general idea.

As stated earlier, the distinction between capital and revenue is more explicit in the 1951 Act because, unlike the earlier versions of the Act, the government's powers are more precisely organized around this distinction. The earlier laws vested the management of Indian monies in the Governor in Council and then added special powers on an *ad hoc* basis when it appeared that it was necessary to expend the capital of the band. These provisions respecting the sale or development of unsurrendered land and, similarly, could sometimes be exercised without band consent. The 1951 Act, on the other hand, generally transferred these powers from the Governor in Council to the Minister, and this trend was continued, after considerable debate, in 1956 (Commons Debates 1956: 7111–14, 7119–20ff). It then defined capital and revenue monies and set out the Minister's authority over each in separate sections, most but not all of which provided for the consent of the band council. The result suggests that the intent was to rationalize the rather haphazard growth of the preceding sixty years or so, and there is therefore often no precise or direct correlation with earlier versions, as there was in previous consolidations.

It is perhaps useful to note that s.66 is the only section concerned with Indian monies that attracted debate in 1951. Section 66(1) conferred upon the Minister a very general authority, subject to band council consent, to authorize the expenditure of revenue monies to "promote the general progress and welfare of the band or any member of the band" (s.66(1)). It was the subject of debate because there was a concern that it would adversely affect Indian entitlement to social security benefits (Commons Debates 1951: 3067). Some of the delegates to the Ottawa Conference were also concerned about s.66(2) which, in one form or another, had been in the Act since 1886. It authorized the Minister, without consent, to expend band funds for such things as the care of the sick and disabled and the burial of deceased

indigent band members, and it was felt that public rather than band funds should be used for these purposes (Conference 1951: 1365).

(c) Loans

It is important to distinguish between loans from band funds and loans from the Consolidated Revenue Fund under s.70.

Loans from band funds have the longer history. They were introduced in 1924 because Indians in financial distress to whom agents had issued special permits to buy farm equipment had apparently run up a number of bad debts. The idea was to provide a loan fund out of the capital monies of the band. Such loans were under the authority of the Governor in Council and required band consent. They were "to promote progress", and could not exceed one-half of the appraised value of the interest of the borrower in the reserve land held by him (S.C. 1924, c.47, s.5). This section became s.64(h) of the 1951 Act and another subsection was added in 1956 to provide for construction loans, with or without security, to build houses for individual band members, and for the guarantee of loans to band members for building purposes (S.C. 1956, c.40, s.15). It is possible that this was a response of sorts to a complaint made at the Ottawa Conference. At that time a delegate inquired why loans from the Consolidated Revenue Fund could not be used for houses, and the response was that the main objective of the program "was to provide for loans to Indians for *revenue producing projects*, and that housing, unless it were for rental purposes, was not revenue producing" (Conference 1951: 1367, emphasis in original). The 1956 amendment did not, of course, provide for loans from the fund, but it did provide loans for housing. Band fund loans are now dealt with in ss.64(h) and (j).

The quite different Consolidated Revenue Fund loans are dealt with in s.70 of the current Act, which was first enacted as s.94B in 1938 (S.C. 1938, c.31, s.2). It met with general but not unanimous approval (Senate Debates 1938: 472). The section created a "revolving loan fund" originally limited to $350,000, but in 1955 this was increased by way of a separate appropriation to $650,000 (Commons Debates 1956: 5173). In 1956, this was increased again to $1,000,000, this time by an amendment to the Indian Act itself (S.C. 1956, c.40, s.18), and is now at $6,050,000. In 1956, the Minister, the Honourable J.W. Pickersgill, explained that loans made pursuant to this section:

> . . .are advanced to Indians to assist them in establishing themselves in agriculture, forestry, fishing, in setting up business in handicrafts, for getting equipment and facilities for guiding, trapping and a good many other. . .pursuits. The purpose of the loans is to make it possible for Indians — who, because of the protection they are given under the Indian Act, are also under a disability about borrowing in the ordinary way — to get money on reasonable terms in order to

> supplement their traditional mode of livelihood. (Commons Debates 1956: 5173–74)

He went on to add that the record of repayment was "remarkably good".

The 1956 amendments, not all of which have been mentioned above, were incorporated into the 1970 consolidation and, except for some changes consequent upon the new band membership rules introduced in 1985 (S.C. 1985, c.27, ss.10–13), the provisions respecting Indian monies in force today are the same. There are very few judicial decisions interpreting these sections. Land issues appear to have generated far more litigation. As bands and Indian entrepreneurs become more active in business, more matters concerning Indian monies may come before the courts.

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APPENDIX B

Dispute Resolution

Much of the evidence heard during the course of this Inquiry was related to complaints of one sort or another. I heard from lessees who complained about the actions or inaction of the Band Council or the Department of Indian Affairs. Several Band members testified concerning various grievances related to the administration of Band affairs or, in some cases, related to their dealings with Departmental officials. One purpose of calling a public inquiry into a matter is to have a public airing of complaints or allegations, and to afford those persons who may be the object of complaints an opportunity to respond to them. As I listened to numerous witnesses on a variety of subjects, I could not help but wonder how many of the issues, which were essentially of local interest, could have attained such prominence as to be the subject of a public inquiry. I do not say that the concerns raised by any of the witnesses during this Inquiry were trivial or unworthy of being heard. A small sore can become a serious infection if it is left untreated. To a certain extent, that is what happened at Westbank.

While many of the controversies or disputes that arose at Westbank may be attributable to a clash of particular personalities, I believe that the types of disputes are not uncommon in the administration of Indian affairs. As Indian bands assume more powers and responsibility, either by way of the devolution policy or through self-government, it becomes more likely that band government will become the object of increasing complaints. As is the case with governments everywhere, the greater the influence an authority has over the lives of individuals, the greater is the chance that objections or complaints will arise. In order that governments may carry on their operations in an orderly and efficient manner, it is highly desirable that an effective mechanism be available for the resolution of disputes. If disputes which concern local matters can be dealt with in a timely fashion at the local level, it is in everyone's best interest. Local disputes can become highly politicized and blown out of proportion when the combatants attempt to enlist the support of the Minister or a local Member of Parliament. When local battles are fought at such lofty heights, the fallout can be very disruptive indeed.

Perhaps the reason why disputes of a local nature can become overly complex is that a unique relationship exists between the Department of Indian Affairs and an Indian band. On the one hand, the Department attempts to further Indian self-government, but on the other hand it has certain supervisory functions. Under the current legislative structure, the Department is involved as an intermediary whenever Indian lands are leased. In practical terms, however, it is the Indian band or locatee

who has the direct interest and consequently the day-to-day involvement with lessees. Because the Department (Crown) is a party to any lease, it is understandable that the Department will be drawn into some disputes that concern the lease itself. It is also understandable that a lessee may look to the Department for assistance or action in situations where problems arise with the local Indian government. The Department is clearly in a difficult position when disputes arise between lessees and local Indian governments.

Similarly, the Department has a difficult role to play in resolving disputes which may arise between band government and band members. Any active involvement by Departmental officials, no matter how well-intentioned, could be criticized by either side in the dispute. If the Department supports the complainant against the band council, its action may be viewed by the band executive as paternalistic interference. If the Department supports the band council, it may be criticized for ignoring the complaints of the band members.

Local band government disputes often have been brought to the attention of senior Departmental officials or Members of Parliament. During the course of the Inquiry, I was told that it is not unusual for band members to petition the Minister in an attempt to call attention to local problems. I was also told that Ron Derrickson was a very persistent advocate while he was Chief of the Westbank Band, and would not hesitate to bring local matters to the attention of the Regional Director General, or even the Minister. Various non-band members who had problems in their dealings with the Westbank Band and the Department turned to their Members of Parliament in an attempt to resolve a situation which they felt had reached an impasse.

It appears to me that matters which are entirely local in nature are all too often turned into political causes. Why, for example, should the Minister have to deal with a dispute over the administration of one band's water by-law? There must be some method by which disputes and problems concerning local band government matters can be resolved without involving senior officials of the Department or Members of Parliament.

Many provinces in Canada have established an office of ombudsman to serve as a mediator for citizens who feel that they have a complaint against a particular governmental authority. The federal government has not established an office of ombudsman. Because the federal government has legislative jurisdiction concerning Indians and lands reserved for Indians, the services of a provincial ombudsman are not available to residents of Indian reserves who have complaints against the local government. This may be another example of what has been termed the "regulatory vacuum" that exists on Indian reserves.

I believe that the concept of the ombudsman might be usefully employed in the resolution of disputes related to the administration of Indian affairs at the local level. An ombudsman has the quality of impartiality which is necessary for any mediator of disputes. The office of ombudsman is generally endowed with investigative powers, including the power to compel the production of documents and examine witnesses under oath. Often an ombudsman can investigate a complaint and successfully resolve the matter in an informal and unobtrusive manner. I suggest that an office similar to that of the provincial ombudsman be established for the purpose of mediating disputes which may arise from the administration of local Indian government and Indian affairs generally. Such an institution might be called the "Office of the Native Ombudsman".

The Supreme Court of Canada has recently offered the following comments on the goal and purpose of an ombudsman:

> The limitations of courts are also well-known. Litigation can be costly and slow. Only the most serious cases of administrative abuse are therefore likely to find their way into the courts. More importantly, there is simply no remedy at law available in a great many cases.
>
> H.W.R. Wade [*Administrative Law*, 5th ed. (1982), pp. 73–74] describes this problem and the special role the Ombudsman has come to fill:
>
> > But there is a large residue of grievances which fit into none of the regular legal moulds, but are none the less real. A humane system of government must provide some way of assuaging them, both for the sake of justice and because accumulating discontent is a serious clog on administrative efficiency in a democratic country.
> >
> > The vital necessity is the impartial investigation of complaints... What every form of government needs is some regular and smooth-running mechanism for feeding back the reactions of its disgruntled customers, after impartial assessment, and for correcting whatever may have gone wrong. Nothing of this kind existed in our system before 1968, except in very limited spheres. Yet it is a fundamental need in every system. It was because it filled that need that the device of the ombudsman suddenly attained immense popularity, sweeping round the democratic world and taking root in Britain and in many other countries, as well as inspiring a vast literature.
>
> This problem is also addressed by Professor Donald C. Rowat, in an article entitled *An Ombudsman Scheme for Canada* (1962), 28 Can. J. Econ. & Poli. Sc. 543, at p. 543:
>
> > It is quite possible nowadays for a citizen's right to be accidentally crushed by the vast juggernaut of the government's administrative machine. In this age of the welfare state, thousands of administrative decisions are made each year by governments or their agencies, many of them by lowly officials; and if some of

> these decisions are arbitrary or unjustified, there is no easy way for the ordinary citizen to gain redress.
>
> The Ombudsman represents society's response to these problems of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman "can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds": *Re Ombudsman Act* (1970), 10 D.L.R.(3d) 47 at p. 61, 72 W.W.R. 176 (Alta. S.C.) at pp. 192–93, *per* Milvain C.J.T.D. On the other hand, he may find the complaint groundless, not a rare occurrence, in which event his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self-confidence of the public employees impugned.
>
> In short, the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature, and the executive cannot effectively resolve.
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> (Re British Columbia Development Corp. et. al. and Friedmann et. al. [1984] 2 S.C.R. 447 at pp. 460–461).

Although local Indian governments are not as large or complex as provincial governments, an ombudsman or similar official may nevertheless have a valuable role to play in resolving complaints against a band administration or the Department of Indian Affairs. Many of the services local Indian governments provide or will provide to their members and residents are similar to those provided by other governments. Consequently, the band administration may be viewed as the equivalent of other bureaucracies from the perspective of a band member or resident of the reserve. Lessees on the reserve must deal with the band executive with respect to many typically administrative matters. That is a natural consequence of their decision to operate their businesses within the jurisdiction of a local Indian government. The experience at Westbank illustrates the desirability of having some practical mechanism for dispute resolution when a person feels that he or she has a legitimate complaint regarding an administrative matter. It seems to me to be far preferable for a local matter to be resolved through the assistance of an independent mediator rather than via the political route.

Some disputes are of a legal nature and in such cases the parties will have recourse to the courts. In Section II, I have recommended changes to the manner in which lease negotiations are conducted. I see no role for an ombudsman in matters concerning lease negotiations such as the setting of rents. Also, it should be noted that, as in the case of the provincial ombudsman, the jurisdiction of the proposed mediator is best

limited to administrative matters. For example, the mediator could not entertain a complaint about the substance of a particular by-law passed by a band council. However, he could properly investigate a complaint regarding the manner in which a particular by-law was being implemented.

In order for the proposed mediator to effectively discharge his duties, I believe that it is necessary that he or she have powers and responsibilities similar to those of an ombudsman. The most important features of a mediator are that he is independent and that he is always perceived to be independent and impartial. Another important feature of the ombudsman, which I suggest be incorporated here, is that his role is limited to that of a persuader and mediator rather than an arbitrator. An ombudsman has no power to compel any government authority to remedy what he perceives to be a wrong. Rather, the ombudsman may only report to the government executive branch, or to the legislature, concerning any intransigence on the part of the governmental authorities. A report to the legislature is usually a measure of last resort, where the ombudsman has failed to resolve a problem and feels that there is a continuing problem which ought to be addressed. The report becomes a matter of public record and the mere threat of such publicity may be sufficient to move a party from an unreasonable position. I believe that it is a particular strength of the ombudsman concept that the ombudsman cannot interfere with the administration of government, but rather must serve as a persuader to attempt to assist members of the public in any disputes that they have with governmental agencies. In this way, the ombudsman can remain an impartial mediator rather than usurping the role of legislator or adjudicator. I therefore suggest that the proposed mediator for Native disputes should not have the power to enforce his view of matters upon a local Indian government or the Department of Indian Affairs.

The Native Ombudsman's powers and duties with respect to administrative matters should be established in general terms. In the British Columbia Development Corporation case noted above, the Supreme Court of Canada considered the meaning of the term "matter of administration" as that term is used in the British Columbia Ombudsman Act. The Ombudsman's investigative authority concerning matters of administration was found in that case to include the power to investigate a complaint concerning any governmental authority engaged in the implementation of government policy. The court would have only excluded the activities of the legislature and the courts from the Ombudsman's jurisdiction. The governmental authorities with which the proposed Native Ombudsman should properly deal are local Indian governments (band or tribal councils) and the Department of Indian Affairs.

Another feature which ought to be part of any mediation system is the preservation of the confidentiality of any information received

during the course of an investigation. For example, the British Columbia Ombudsman Act requires that the Ombudsman and every person on his staff maintain confidentiality in respect of all matters that come to their knowledge in the performance of their duties, except under defined circumstances. Certain matters may be disclosed if it is necessary to further an investigation, prosecute an offence under the Act, or establish grounds for conclusions and recommendations made in any report. The British Columbia Ombudsman Act also stipulates that investigations be conducted in private, unless there are special circumstances in which public knowledge is essential in order to further the investigation. Such provisions tend to encourage a more informal and unobtrusive dispute resolution process.

The Office of the Native Ombudsman must be endowed with powers to obtain information such as the power to compel production of documents and to summon and examine under oath any person who, in the opinion of the mediator, is able to give information relevant to the investigation of a complaint. In order to support the powers of the office, there should be created an offence in the nature of a summary conviction for anyone who, without lawful excuse, intentionally obstructs or hinders the Native Ombudsman or his staff in the exercise of any of their powers or duties.

Any complaints that are made should be in writing before they are considered. The Office should have quite a broad discretion to refuse to investigate or to cease investigation of a complaint for specific reasons. For example, if in the opinion of the Native Ombudsman the complaint is frivolous, or if in his opinion further investigation will be of no benefit, then there should be available the option to refuse an investigation or to cease investigation of any matter. However, in such a case, the Ombudsman should have the duty to inform the complainant in writing and give reasons why the matter was not pursued. In order to make the investigation procedure a fair and reasonable one, the authority who is the subject of complaint or investigation must be notified of any pending investigation. It is a feature of the British Columbia legislation that the Ombudsman must consult with the authority under investigation if that authority so requests. As well, where there appears to be grounds for making an adverse report, the Ombudsman must give the interested authority an opportunity to make written or oral representations.

Following any investigation, the Native Ombudsman should inform the complainant of the results of the investigation. Where he believes that the actions or omissions of the authority were contrary to law, unreasonable or otherwise wrong, he should be required to report his opinion to the authority and to make any recommendations that he considers appropriate. If the authority fails to take adequate action within a reasonable time following the recommendations of the

Ombudsman, then the Ombudsman should have the power to report the matter to higher authorities.

The Office of the Native Ombudsman should be established under and report to a Ministry such as the Secretary of State in order that it may be truly independent of the Department of Indian Affairs. Such an office can only be successful if it is seen to be an independent body. The person who is in charge of the Office ought to be appointed only following significant input from the Native community. I suggest that there be at least one branch office established in every region according to need. It would defeat the Office's main purpose — to resolve local disputes — if it were to be only located in Ottawa/Hull.

If an office similar to that of the Provincial Ombudsman can be established to assist in the resolution of disputes connected with local Indian government, there could be many benefits. Because the Office would be independent and impartial and its services would be rendered free of charge, aggrieved persons would be encouraged to resolve disputes through mediation rather than through the Minister's office. Where a complaint is found to be groundless, an impartial and independent report may well serve to vindicate the governmental official whose conduct has been impugned. Such positive feedback can enhance the morale and self-confidence of local governments or Departmental staff. Local Indian governments have experienced substantial growth over the last ten years since the Department began to devolve more responsibility and authority, and there may naturally be some problems adjusting to a new role. An official mediator in the form of an ombudsman could serve a very useful role in ensuring that the administration of Indian governments and Indian affairs runs smoothly and free of the disruptive effects of Departmental investigations or public inquiries. I recommend that serious consideration be given at once to setting up such an office.

APPENDIX C

Infrastructure on Reserves

A continuing problem to residents in the area of the Westbank Indian Reserves is the assurance of an adequate water supply. This problem is particularly pressing on Reserve 9. Mr. Ronald Derrickson described the situation as he had knowledge of it. It was his thesis that rather than have a multiplicity of wells (and other individual services such as garbage collection and the like), that there be a central authority to look after such matters. That, of course, raises issues of by-laws and taxation. He said this:

A ...one of the problems we have is we have basically on this Reserve, 15 or 20 or 30 individual little water systems, which all get minimum maintenance and minimum care. In many areas of the trailer parks, there was concern from National Health and Welfare that eventually the saturation of the lands down there would cause severe problems with the wells, and it even caused sewage leakage, eventually into the lake.

The other thing was that the trailer park owners, and rightly so, you know, have to supply a service, where they have to pay out of their own pocket, the service of garbage, water, sewer; and each individual supply his own needs and doing it.

The problem is with the Province of British Columbia, they don't have any ground water legislation in this province. This is missing. All the other provinces have ground water legislation; in other words, the control over who can drill where, and what you can take out.

In other words, there are certain restrictions in the Province of Alberta's ground water legislation, so you can't have a situation that's created, and — I can't remember the golf course name up there.

Q Shannon Lake?

A Shannon Lake Golf Course, and the Shannon Lake Development, you have two or three thousand gallon a minute wells that are pumping onto that golf course, and into the homes, and we have all these wells. Our main supply of water on this Reserve is from the well, from the ground water. We have watched, over the last four to five years, as development increases, on the fringes especially, on the uplands going northwest, we have watched the ground water levels dropping year after year after year, to where our trailer parks and our development are in jeopardy; in jeopardy of having to close down because there is not enough water to service the residents in those trailer parks.

The idea of the water by-law was to put in place the regulations so that we could take over that function and handle it, number one, more economically. For example, if, say, you know, blankety-

blank trailer park that was on this Reserve, if they were there and they were charging $150 a month, for lack of a better figure, and we wanted to take over the garbage and the water system, the maintenance of the water system, and be responsible for it, then our suggestion to them was they would drop their rates for what it cost them to supply that service.

I mean, a reasonable figure would have to be worked out. If it costs, say, Jack Alexander at Pine Ridge Trailer Park $10 a month from his income, to supply the service of water, the sewer and garbage, we would take over that function, you know, in this case we were only talking about water; we were putting together our garbage collection by-laws — this would in turn, create one uniform company, or utility that can handle this function; it would create employment for our Band members. It would also provide us with the vehicle to get low interest loans and grants relying on the income from the tenants.

In other words, instead of the trailer park owners supplying water, we would, and they would, in turn, reduce their rents and they wouldn't have that responsibility. So, if Jack Alexander ran out of water down there, he could phone up the utility and say, look, I am out of water, it's your responsibility, you're collecting the rates. That, in turn, would allow us to build up enough of a fund, have enough income coming from — and you know, there's several trailer parks on this Reserve — create enough income to eventually put in an overall water system, overall sewer system on this Reserve to supply everybody.

It became — well, I guess I don't have to repeat myself — it became increasingly difficult to try and have an idea like that acceptable to the trailer park owners when we were lashing out at each other all the time.

Q Mr. Derrickson, did you feel at the time that that particular by-law was implemented that it was necessary and important, as far as the Reserve was concerned, at that time?

A Well, I think we have, right today, on this Reserve, a serious water situation. I mean, you know, you hear people say, why those Indians have all that good land, why the hell don't they get off their butts and do something about it. We don't have the infrastructure on this Reserve to take advantage of the opportunity that's there regarding that land. We can't get our share. If we could just get our share in relation to the good land that we hold near that highway corridor, this Band would be well off.

Until we can have the infrastructure, what are you going to do? You can't build a hotel with no water and no sewer; you can't build a shopping centre with no water or no sewer. (My underlining)

(Transcripts: Volume LXVI, pp. 9865–9868)

Chief Robert Louie also told the Inquiry that an adequate water system, particularly for Reserve 9, is badly needed. Because of the nature of the climate in the Okanagan, water supply is a difficulty that is constantly faced with regard to any new development. The problems were not lessened during the past summer, which was unusually dry.

The question of providing adequate infrastructure on Indian reserve lands is becoming more topical. It is obviously more important in the case of those reserves that are ripe for increased development because of their proximity to growing urban areas. The Westbank Reserves fall into this category. The Department has been aware of the necessity for adequate services on reserves for quite some time.

For instance, in a memorandum of June 27, 1973 from Mr. Sparks to Mr. Walchli, who was then the Regional Superintendent of Economic Development for the B.C. Region, Mr. Sparks noted that it was going to be increasingly necessary for adequate infrastructure to be provided for any large-scale development of Indian lands to occur. The required infrastructure would differ depending on the location, climate, and the like.

It is clear that it would greatly assist development on Reserve 9 to have an assured and adequate supply of water. Various mobile home parks are already located on this Reserve, and its lands are becoming more desirable due to its proximity to the Highway 97 corridor and Kelowna. It appears to me that this Reserve has now reached the stage where a comprehensive water system is an essential component of the infrastructure needed to attract continuing development. In the short-term, it may need some government backing (perhaps by way of guarantee as I comment on elsewhere in the Report), but over the long-term such a system should at least partly pay for itself, including its maintenance and operation.

The story of Pineridge Mobile Home Park illustrates the sort of problem that can occur with regard to water supply. Pineridge Park comprises approximately 21 acres located near Lake Okanagan on Reserve 9, the locatee of which is Mr. Ronald M. Derrickson. The Pineridge Park has from its inception been operated by Jack and Barbara Alexander. The original water supply utilized by Pineridge came from wells on the property. These wells depended on springs adjacent to McDougall Creek.

Mr. Derrickson had some rental houses (fourplexes) located just below the Pineridge property, closer to Lake Okanagan. The Band subdivision on Reserve 9 is located above the Pineridge Park property.

In 1982, the Band, Mr. Alexander, and Mr. Derrickson agreed that they would cooperate in building a waterline for the joint benefit of the Band subdivision, Mr. Alexander's park, and Mr. Derrickson's rental properties. The line, which in part traversed Pineridge Park, was installed in approximately 1982. Mr. Alexander utilized it in conjunction with his existing wells until 1984. In 1983–84, he ran into problems with his wells, which were serviced by springs in the McDougall Creek area. Because of the change of course of that creek, necessitated by

highway construction, the wells Mr. Alexander had been using were rendered virtually useless and he had to have a new well drilled on adjacent property.

He had an unpleasant surprise, however, in 1984. As noted, he had agreed to contribute to the capital cost of the waterline which he needed to supplement his wells. He was paying part of the cost by monthly payments to the Band. He paid until the events he described in his evidence.

Q And you did make those payments?
A I made it up until June 20, 1984 when they shut my water off. I haven't paid them since.
Q All right. Now, tell us about that. What happened on June 20, 1984?
A Well, we came home from a school — we were at the school, for the kids, and we came home to no water, because they'd shut the water right off and they'd also drained my tanks down to his fourplexes. We had quite a rough time of it for a while, and we couldn't get that turned on again. We never did.
Q So, ever since June, 1984 that source of water has been turned off?
A Right.
Q Have you had any discussions with Ron Derrickson or any other members of the Council about that?
A Yes, we've talked about it, but they haven't got the water to supply it.
Q Who told you that?
A Ron Derrickson.

(Transcripts: Volume XIII, pp. 1754–1755)

Mr. Alexander told the Inquiry that he had paid about $16,000 of the approximately $20,000 that was his share of the cost of the waterline, but that he had ceased paying after 1984 when the water was cut off.

This situation illustrates one matter that would have to be carefully addressed in the construction and operation of any new water system. It would appear that the water to the Alexander property was cut off in 1984 without any consultation or warning. This was not a desirable method of proceeding, to say the least.

Mr. Alexander, in good faith, contributed a portion of the capital costs to this waterline, and then found himself suddenly cut off from using the water supply. That situation apparently had persisted for three years to the time he gave evidence. Obviously, the Band must have regard to the residences in the subdivision as a priority, but it could scarcely be considered good practice to suddenly shut off the water to Mr. Alexander's property without giving him any warning and the time to make alternate arrangements. Mr. Alexander might feel justifiably ill-treated in that he has provided funds for a capital work which has

proved latterly to be of no use or benefit to him. He seemed to be a patient and fair-minded man. He was not as critical as he might have been of the rather high-handed action that appears to have occurred with regard to this water system.

It appears to me that the Department should make immediate efforts to organize a decent water system for Reserve 9. This matter is of vital concern, not only to the Band itself, but to residents on that Reserve. In order to make certain that a system is run in a proper and even-handed and businesslike fashion, it is my view that it should be set up under some sort of body equivalent to a public utilities commission. It seems to me that a body comprising representatives of the Department, the Band, and mobile home park lessees would be required to ensure that the system would be run for the benefit of all interested parties.

I think that the Department will have to assist with a good portion of the initial capital costs. This can be viewed as simply an investment in the future that ultimately will be repaid in many tangible and intangible ways. Of course, there are always more needs than resources. But one of the great needs, as I see it, in Indian communities, is the need to establish a proper economic base. It is the old choice between giving a person a fish or teaching him how to fish. I think that the Westbank Reserves are a good example of a situation where creation of a better infrastructure will be a great engine for economic progress. New developments on the Reserve will just have to pay their rateable portions of capital costs. The ultimate aim should be to make any system self-sustaining by imposts and fees charged to users and developers.

One of the great continuing policy problems for the Department is to know where to best direct its resources. The needs in the differing reserves are many and varied across the country. Choices have to be made. The Department may, from time to time, be criticized for putting money into a reserve which is relatively well off and perhaps not pouring more money into reserves that are very disadvantaged and that have no particularly viable economy. There was continuing debate over that sort of issue in the case of Toussowasket Enterprises.

There never will be a universally popular solution to this sort of dilemma, but I do not think the Department should be criticized for endeavouring to enhance the economic status of the more economically progressive reserves. Indian communities need some joint sense of purpose; as certain reserves progress, they become role models for others. Joint political action is occurring more generally and it is to be hoped that joint economic action can be encouraged. Over the long-term, it should be possible for richer bands to supply capital to other developing reserves. The Department and advanced bands can liaise to work in this direction. A great problem with regard to Indian people throughout Canada has been the dearth of viable economic enterprises.

Bands and locatees with good lands should be encouraged to make the best use of them to provide a better base for themselves and those who come after them.

We had the privilege during the Inquiry of hearing from Senator Len Marchand. He described his early years and how he had obtained an education and participated in political life. His story is but one example to Native people everywhere that doors to advancement need not be closed to them. It is difficult to advance with no economic base. The route to greater self-direction lies in good part through the route of economic self-sufficiency.

Certain individuals at Westbank have made good economic progress. There will always be distinctions in the rate of progress based on differing inherited talent, business opportunities, and life experience. There may be perceived inequities, but there are always those prepared to carp at others who are relatively successful. The answer to such criticism often is, "go and do likewise".

I think it is desirable that the Department furnish technical and economic assistance to bands and individuals who have a demonstrated capability, and who have progressed some distance along the road to economic self-sufficiency. I have said elsewhere that the Department must seek to be involved more as a guarantor than simply as a funding agency. It is vitally important that there be successful Indian role models so that the rising generation can discern ways in which they can make the best use of their lives.

There has been a fair measure of controversy and confrontation between the Westbank Band Council and lessees and residents on Reserve 9. Neither the Band nor the lessees benefit from continuing differences and controversy. A more adequate water system would make this land more attractive for leasing, to the ultimate benefit of the Band and of locatees. Such a system would also enhance the value and amenities of the existing mobile home parks located on Reserve 9.

But any new system must be administered in an even-handed and orderly fashion, unlike the behaviour in the Alexander episode. One problem that surfaced from time to time during the course of the evidence before the Inquiry was what I might term an occasionally inconsistent approach by Band Council to questions of local government and the provision of utilities. Obviously, this sort of an approach can have a very chilling effect on any proper long-term development.

To those who would say that providing assistance for the installation of a water system would show favouritism to this Reserve, I simply say that this Reserve has a critical problem coupled with real opportunity for growth, and it is a matter of prudent investment to put money where you can obtain some tangible results.

It seemed clear from the evidence I heard that unless this issue is addressed in the near future, a very serious situation will arise on Reserve 9. The problem ought to be addressed without delay, and as I noted above, the Department need not feel apologetic about putting some resources into a reserve that does have great potential for development and that has shown significant economic progress.

Although there is a proper role for government in providing certain essential services, I am not at all certain that government does well when it goes beyond that and attempts to take on a role that more properly belongs to private entrepreneurship. For example, it has been suggested that government purchase some or all existing mobile home parks at Westbank. But it was not apparent to me that that was a sound suggestion. It will be remembered that the Band itself resiled from the idea of being in the mobile home park business in 1982 because of perceived problems of management. It seems unlikely that government itself planned to manage the enterprises; the apparent plan was to have the Band or individual locatees run the parks. What level of expertise or experience would be brought to such management? Government, of necessity, would have to be cautious in undertaking to buy enterprises on Indian land with a view to transferring such enterprises over to bands or band members. Where would the process begin or end? Would, for instance, tenants of mobile home parks be well served by such intervention? The question of setting precedents would have to be examined. If problems were encountered on a reserve in the future, it might be suggested that government step in as a purchaser of enterprises if such a course were adopted at Westbank.

It seems to me preferable to have government provide funding for better infrastructure on reserves and leave it to the bands and individual locatees or lessees to inaugurate and operate business enterprises. Ultimately some form of market place economy has to apply if satisfactory economic results are to be obtained. Government may provide technical assistance, guarantees, and the like to be of assistance to enterprise. Bands may have to be more active in the regulatory field to ensure proper development. Government (at all levels) can assist by financial underwriting, by providing a consistent regulatory scheme, and by helping to put in place a proper infrastructure in order to foster better economic development on Indian reserves.

The Department has a difficult task in this time of transition. On the one hand, it is withdrawing from certain traditional functions that it has long performed and is turning over greater responsibility to Indian bands or councils. On the other hand, it has a continuing responsibility to Indian people to look after their economic interests where bands are not economically sophisticated. As well, it has a duty not to withdraw too precipitously from a role in the administration of agreements already in place. The transfer of responsibility to bands must be done in a planned fashion. One can recognize the desire of government not to be

unduly involved in private sector matters, but as regards the Department of Indian Affairs and Northern Development, there is a long history of very active involvement in the lives of Native people. The Commission heard on more than one occasion the refrain that the Department should get out of the lives of Indians. Counsel to the former Band executive said this in his submission to me:

> It is my submission that the Indian Act, while competent Federal legislation, is mired in a Victorian mind set. Since the Indian Act has been Canadian law for generations, the attitudes found in it are sedimented Canadian beliefs. The attitude that Indians are not equal to white people is especially visible in Government and specifically in the Department of Indian Affairs and agencies like the R.C.M.P. because they have to "deal with Indians" and operate pursuant to the Indian Act.
>
> (Transcripts: Volume LXXIX, p. 11810)

I think the Department genuinely wishes to step back from any overly active involvement in band affairs. But that process must be gradual and orderly. When there was a general rejection of Departmental involvement in 1975, the result was unhappy. The Department should not be vilified as the oppressor of Indian people — it has, and will have for years to come, a role in their lives. It will always be a delicate task for the Department to tread a line between being, on the one hand, intrusive, and on the other hand, indifferent. It is a resource to be used by bands and a source of stability in the present times of change.

APPENDIX D

Family Relations Rights on Reserves

During the course of this Inquiry, a number of witnesses voiced concerns about defects in the legislation that applies (or does not apply) to Indian people on reserve lands. For example, there were difficulties in applying Band by-laws to surrendered lands. Some witnesses have adverted to a "regulatory vacuum". As well, because of the separation of powers under the Canadian Constitution, many provincial laws have no application to reserve lands. Under the Constitution, "Indians and lands reserved for Indians" is a heading that falls under exclusive federal legislative jurisdiction.

By Section 88 of the Indian Act, provincial laws of general application are made applicable to Indians to the extent that they are not inconsistent with the Indian Act or any rules, orders, regulations, and by-laws made pursuant to the Act. That section reads:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The Canadian Constitutional law doctrine of paramountcy provides that where there is conflict between provincial laws and federal laws, federal law will take precedence.

The constitutional status of reserve lands can be viewed as both an advantage and a disadvantage vis-à-vis the application of provincial laws. In some instances, the non-applicability of provincial laws may make Indian lands more attractive to investors or developers. Indian reserves may be viewed as special status islands not subject to provincial or municipal regulation and the accompanying red tape. But this special status can sometimes be a disadvantage. For example, Mr. Ronald M. Derrickson expressed concern that strata title legislation in force in B.C. was not applicable to Indian lands. While legislation obviously can be a burden to some segments of society, its usual purpose is to remedy some perceived or actual problem in society. Due to the constitutional position of reserve lands, Indian people may not be able to receive the benefit of remedial legislation enacted by provinces to enhance the opportunities or rights of different groups.

In many areas, the Indian Act deals with subject matters that are traditionally in the domain of provincial jurisdiction. It is perhaps not surprising that the current Indian Act, substantially unchanged since 1951, has lagged behind the growing complexities of reserve development and government. The Act is likewise out of step with societal changes. One obvious area where Indian legislation is outdated is in a total absence of recognition of a family law regime. The subject matter of family relations law generally falls within the constitutional sphere of the provinces.

Over the last twenty years there has been an increased awareness of the status and rights of women. Beginning in the 1970's, most provincial governments embarked on a process of legislative reform designed to reflect the principle of the equality of the sexes before the law. One major area which was the subject of reform was family relations. In particular, new provincial laws were enacted to ensure a more equal division of family assets upon the dissolution of a marriage. This new legislation typically allowed women to share more equitably in assets generated during the marriage.

Important aspects of provincial family relations law have been held not to apply to Indians living on reserve lands. It was recently decided by the Supreme Court of Canada that the provisions of the Family Relations Act of British Columbia, which allows a court to order division of family property, did not apply to lands on an Indian reserve. That case involved people from Westbank. The decision is cited as Derrickson v. Derrickson (1986) 26 DLR (4th) 175. Mrs. Rose Derrickson, a party to the action, gave evidence before the Inquiry.

Prior to her marriage, Mrs. Derrickson had been a member of the Okanagan Band. She acquired membership in the Westbank Band upon her marriage to Mr. William Derrickson. At the time of their marriage, the couple did not own property on the Westbank Reserves. Mrs. Derrickson bought some land with assistance from her family. This land was registered in her name and the couple built their home on it. During the course of their marriage, they purchased other properties on Reserve 9 which were registered in the name of Mr. William Derrickson. In her evidence before this Commission, Mrs. Derrickson stated that she felt that all of the property which they had purchased was joint family property. When the marriage broke down, the parties were unable to agree on a division of assets and court proceedings ensued. The matter progressed through the Supreme Court of B.C., the B.C. Court of Appeal and, ultimately, the Supreme Court of Canada.

Mrs. Derrickson sought to have the provisions of the British Columbia Family Relations Act apply to the division of the family property upon the dissolution of the marriage. The applicable sections of that Act are as follows:

43. (1) Subject to this Part, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

(a) a separation agreement;
(b) a declaratory judgement under section 44;
(c) an order for dissolution of marriage or judicial separation; or
(d) an order declaring the marriage null and void

respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to:

(a) an order under this Part; or
(b) a marriage agreement or a separation agreement.

(4) This section applies to a marriage entered into before or after this section comes into force.

51. Where the provisions for division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to

(a) the duration of the marriage;
(b) the duration of the period during which the spouses have lived separate and apart;
(c) the date when property was acquired or disposed of;
(d) the extent to which property was acquired by one spouse through inheritance or gift;
(e) the needs of each spouse to become or remain economically independent and self sufficient; or
(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 43 or the marriage agreement, as the case may be, be divided into shares fixed by the court. Additionally or alternatively the court may order that other property not covered by section 43 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

52. (1) In proceedings under this Part or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 51, and may make orders which are necessary, reasonable or ancillary to give effect to the determination.

(2) In an order under this section, the court may, without limiting the generality of subsection (1), do one or more of the following:

(a) declare the ownership of or right of possession to property;

(b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;
(c) order a spouse to pay compensation to the other spouse where property has been disposed of, or for the purpose of adjusting the division;
(d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specific proportions or amounts;
(e) order that property forming all or part of the share of either or both spouses be transferred to, or in trust for, or vested in a child;
(f) order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property; or
(g) where property is owned by spouses as joint tenants, sever the joint tenancy.

This legislation is of general application to persons in the Province of British Columbia. The Supreme Court of British Columbia in the Derrickson case held that this provincial law was inconsistent with the Indian Act. In particular, sections of the Family Relations Act which allowed a judge to make an order respecting the division of immovable property (lands and buildings) were found to be in conflict with the provisions of Section 20 of the Indian Act. That section of the Indian Act deals with the matter of lawful possession of reserve lands.

20. (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

(2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.

(3) For the purposes of this Act, any person who, on the 4th day of September, 1951, held a valid and subsisting Location Ticket issued under "The Indian Act, 1880", or any statute relating to the same subject-matter, shall be deemed to be lawfully in possession of the land to which the location ticket relates and to hold a Certificate of Possession with respect thereto.

(4) Where possession of land in a reserve has been allotted to an Indian by the council of the band, the Minister may, in his discretion, withhold his approval and may authorize the Indian to occupy the land temporarily and may prescribe the conditions as to use and settlement that are to be fulfilled by the Indian before the Minister approves of the allotment.

(5) Where the Minister withholds approval pursuant to subsection (4), he shall issue a Certificate of Occupation to the Indian, and the Certificate entitles the Indian, or those claiming possession by devise or descent, to occupy the land in respect of which it is issued for a period of two years from the date thereof.

> (6) The Minister may extend the term of a Certificate of Occupation for a further period not exceeding two years, and may, at the expiration of any period during which a Certificate of Occupation is in force
>
> (a) approve the allotment by the council of the band and issue a Certificate of Possession if in his opinion the conditions as to use and settlement have been fulfilled; or
> (b) refuse approval of the allotment by the council of the band and declare the land in respect of which the Certificate of Occupation was issued to be available for re-allotment by the council of the band. R.S., c. 149, s. 20.

The effect of the section is that no individual Indian can be in lawful possession of reserve lands without the approval of the Minister. Applying the doctrine of paramountcy, the trial judge concluded that he lacked jurisdiction under the B.C. Family Relations Act to direct a division of reserve lands.

Section 52(2)(c) of the Family Relations Act empowers a court to order one spouse to pay compensation to the other where property has been disposed of or for the purpose of adjusting the division of property. Mrs. Derrickson also sought relief under these provisions of the provincial legislation. The trial judge held that he lacked jurisdiction to order a division of property or to make an order for compensation in lieu of any such division. In the result, Mrs. Derrickson was unable to obtain any sharing of the real property registered in the name of Mr. Derrickson. Similarly, her husband was unable to obtain a court order dividing the property registered in Mrs. Derrickson's name. In terms of land assets, the division of property in effect at the time of the marriage breakdown clearly appeared to favour Mr. Derrickson, but the provincial legislation could not be utilized to provide for a more equitable division of the property between the former spouses.

The Derrickson case went on appeal to the British Columbia Court of Appeal. Mrs. Derrickson did not have adequate financial resources to fully fund an appeal. However, the Department of Indian Affairs felt this was a significant matter so funds were provided to have counsel argue the matter. The British Columbia Court of Appeal agreed with the conclusion of the trial judge that the provincial Family Relations Act could not be invoked to obtain an order for the division of property on an Indian reserve. However, the Court of Appeal differed from the trial judge on the issue of whether or not any order for compensation could be made. In order to get a definite pronouncement on these important issues from the highest court in the land, the Department supported a further appeal to the Supreme Court of Canada.

The judgement of the Supreme Court of Canada was delivered by Mr. Justice Chouinard. He identified the issues facing the court in Derrickson v. Derrickson as follows:

1. Are the provisions of the Family Relations Act applicable of their own force to lands reserved for the Indians?

2. Is the Family Relations Act referentially incorporated in the Indian Act by the application of s. 88 of the latter Act?
This issue in turn breaks down into two:

(a) Does s. 88 of the Indian Act apply to lands reserved for the Indians?
(b) In the affirmative, do the provisions of the Family Relations Act fall within one of the exceptions in s. 88?

3. Can an order for compensation be made in accordance with para. 52(2)(c) of the Family Relations Act with respect to lands on a reserve in lieu of an order directing division of property?

After a full analysis of the provincial legislation and the Indian Act, it was held that the Family Relations Act could not apply of its own force to lands reserved for Indians. Mr. Justice Chouinard found, as had the B.C. Supreme Court and the B.C. Court of Appeal, that there was conflict between the two Acts, and that, by reason of the paramountcy doctrine, the conflicting provisions of the Family Relations Act could not apply to lands on an Indian reserve. This conclusion was reached by the application of settled principles of Canadian constitutional law. The Supreme Court was clearly conscious of the practical difficulties occasioned by the application of those principles in this class of case. Mr. Justice Chouinard stated:

> In reaching this conclusion I am not unmindful of the ensuing consequences for the spouses, arising out of the laws in question, according as real property is located on a reserve or not. In this respect I borrow the following sentence, albeit in a different context, from P.W. Hogg, op. cit., at p. 554:
>
> > Whether such laws are wise or unwise is of course a much-controverted question, but it is not relevant to their constitutional validity.

The Supreme Court agreed with the B.C. Court of Appeal that an order could be made pursuant to Section 52(2)(c) of the provincial Family Relations Act to direct the payment of monetary compensation in lieu of an order for division of immovable property. Although some spouses may benefit in the future from that aspect of the decision, it was not of great practical assistance to Rose Derrickson. In order to obtain a compensation order in lieu of division of lands she would have had to return to the Supreme Court of British Columbia. This would entail further expenditure. Furthermore, it would have to be established that her husband had sufficient liquid resources to comply with any order. Mrs. Derrickson had already run into difficulty in this regard during her first appearance before the British Columbia Supreme Court. If the only substantial asset is real property on a reserve, any enforcement of a

compensation order may be practically impossible. Mr. Derrickson had been receiving money from a developer regarding one of his properties, but Mrs. Derrickson could not prove this satisfactorily as there was no registered lease. The fact that there was an unofficial lease arrangement was confirmed by another witness at this Inquiry. Mr. Fred Walchli, at one point in his testimony, termed this type of lease a "buckshee lease".

Mr. Ward Kiehlbauch arrived in the Okanagan area in 1977 in search of a suitable location for a proposed tourist attraction. He was impressed with the tourist facilities already situate on Reserve 9. Through Chief Ron Derrickson he was introduced to Mr. William Derrickson and soon entered into an arrangement to lease certain lands from William Derrickson. Mr. Kiehlbauch planned to construct and operate a recreation project which he proposed to call "Space Trek". Although he had some start-up capital, he had not yet obtained all the financing required for such an ambitious project. According to the evidence of Mr. Kiehlbauch, William Derrickson made a proposal that would ease the financial strain on the project in its developing stages. The locatee was prepared to accept the annual rental in unequal instalments at irregular intervals. Mr. Kiehlbauch was thus afforded an opportunity to pay the rent in such instalments as he could afford, when he could afford them. According to Mr. Kiehlbauch, the reason that Mr. Derrickson was prepared to be so lenient was that he did not want his wife to know about the payments. These sorts of strategies are all too familiar to practitioners at the family bar. By this time, the Derrickson marriage had broken down and legal proceedings were under way. Mrs. Derrickson placed a caveat on the properties which her husband owned. Mr. Derrickson requested Mr. Kiehlbauch not to register any lease. Apparently Mr. Derrickson found that if a lease was registered on the property, his spouse would be more likely to share in some of the income from it. If a lease had been properly registered, payments would usually flow through the Band, which would ultimately then pay the proceeds over to the locatee. Rentals paid on a lease would be duly recorded in the Band office. Apparently Mr. Derrickson felt that if payments went through this pipeline, Mrs. Derrickson would be able to seize all or part of the money. To avoid this, Mr. Derrickson wanted to receive the lease payments "under the table" and Mr. Kiehlbauch agreed to Mr. Derrickson's scheme. This course of action ultimately proved unfortunate for both locatee and lessee. The participants in this covert scheme outsmarted themselves.

No lease was ever registered. Mr. Kiehlbauch had financial difficulty because he was unable to obtain proper financing without a duly registered lease. When he attempted to sell his partially completed project, Mr. Derrickson sought some percentage of the sale proceeds before he would execute a lease. Stalemate ensued and the sale eventually fell through. In the process, animosity arose between Mr. Kiehlbauch and Mr. Derrickson. Ultimately, the undertaking ended in financial disaster for all. Mr. Kiehlbauch departed, leaving behind his

partially completed "Space Trek". As a result of his efforts to conceal income from the lease arrangement from his spouse, Mr. Derrickson ended up with no viable lease. Mrs. Derrickson received nothing. Her prospects of receiving any meaningful award of compensation in the future remain uncertain. The Derrickson v. Derrickson case and the story of the Kielbauch development illuminate a continuing problem area in the lives of Indian spouses.

In his evidence before this Commission, Mr. Ronald M. Derrickson complained about the lack of protection afforded to Indian women under the present legislative regime. Responding to questions from his counsel, he gave the following evidence of his role in the Derrickson test case, and his views of what could be done to assist women in a position similar to Mrs. Rose Derrickson:

> Q Mr. Derrickson, notwithstanding the difficulties you had with Rose Derrickson, in reference to earlier times in the 1980's and the latter part of the 1980's, did you go to bat for her and seek legal assistance for her to take her case to the Supreme Court of Canada in reference to her domestic problems?
>
> A Yes.
>
> Q Have you continued since that time to try and support her?
>
> A But you know, not only that, but I also went to bat for her husband, that he get legal assistance, because my complaint was that you can't legally support one side — I'm the Chief of the Band — I have no — you know, even though I'm male and maybe I have my male egotism, the fact is that I made sure that not only did she get legal assistance, I made sure that Bill Derrickson got legal assistance.
>
> I lobbied for that and it was done. Not only that I have since — Rose Derrickson lost that in the Supreme Court of Canada. I've approached Len Marchand and other politicians and senior people to try and see if we could find a good case so that women could regain their rights under the Charter of Rights, their rights to get half of the property or a reasonable settlement if a separation or divorce occurred.
>
> Because Indian women, although they have got rights back to the reserve, if their husband owns land they have no rights to take part of that land. It's a damn shame. (My underlining)
>
> (Transcripts: Volume LXVII, pp. 9993–9994)

Mr. Derrickson here expresses a concern that is doubtless shared by many persons in the Native community. He took steps to protect and advance the property rights of Indian women in the Derrickson case. Hopefully his determination to ensure that Indian women are treated equally will one day meet with success. However, the Supreme Court of Canada has made it clear that under the existing law, it is not possible for a trial court to order a division of family assets consisting of real property, pursuant to existing provincial family relations legislation.

I have considered this question raised before the Commission concerning better protection for spouses and children when a matrimonial arrangement breaks down. There is nothing contained in the Indian Act, as framed presently, to deal with this issue. I do not understand why it is any less desirable for Indian people to have equivalent legislative safeguards to enhance their lives than it is for non-Indian people.

I suppose that it would be technically possible to add sections to the current Indian Act to provide a family relations code for Native people. There may be hesitancy to do this because it is already such an omnibus statute.

It would also be possible to enact a wholly new federal statute dealing with family law matters. The subject could also be included in any new legislation dealing specifically with Indian lands. The essential problem concerns land so this might be a sensible route to pursue.

There are a host of precedents on the subject matter of family relations law from the various provincial jurisdictions. It should be possible to provide that the law governing family relations in force in each province is applicable to Indian band members living on reserve lands in each province. Using this approach, Indian families would be entitled to the same rights and remedies under the law as other families resident in the various provinces enjoy. Referential incorporation of provincial law in areas where provincial and federal jurisdictions overlap has been employed in the past in order to achieve a uniform legislative scheme.

Section 88 of the Indian Act already provides for incorporation of all provincial laws of general application except where they conflict with the Indian Act. The Supreme Court of Canada has declared that there is a conflict between current provincial family law legislation and the Indian Act. This conflict could be overcome if provincial family relations legislation were expressly adopted by federal statute. Some minor consequential amendments would be required to the present Act (for instance, Sections 20 and 24) in order to remove any conflict and to ensure effective court orders. I doubt that any fair-minded Native person would have any hesitation in endorsing such legislation. The need exists, as demonstrated by Derrickson v. Derrickson. The solution is not hard to find. Steps should be taken to remedy this gap in the law as soon as possible.

APPENDIX E

Conduct of the Inquiry

P.C. 1986-1816

CANADA

PRIVY COUNCIL

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by Her Excellency the Governor General on the 12th day of August, 1986.

WHEREAS certain matters associated with the Westbank Indian Band of Kelowna, British Columbia have been the subject of public controversy;

WHEREAS there have been allegations of impropriety on the part of officials of the Department of Indian Affairs and Northern Development (DIAND) and of Councillors of the Westbank Indian Band (Band) in connection with the affairs of the Band;

AND WHEREAS three reviews of these matters have been conducted and the resulting reports have been submitted to Ministers of Indian Affairs and Northern Development without resolving the concerns relating to these matters.

THEREFORE, the Committee of the Privy Council, on the recommendation of the Prime Minister, advise that a Commission do issue under Part I of the Inquiries Act and under the Great Seal of Canada appointing Mr. John E. Hall of Vancouver, British Columbia to be Commissioner to inquire into and report on the circumstances of, and factors contributing to, the above-mentioned controversy, allegations and concerns and, without limiting the generality of the foregoing, to inquire into and report upon

(1) the manner in which DIAND, in headquarters and in the regional and district offices, has carried out its responsibilities and functions in relation to the Band and to lessees and residents on reserves of the Band from 1975 to the present, particularly in relation to:

- the financial arrangements and transactions including Indian moneys, with the Band,

- the use of Band lands by Band members, lessees and other residents,

- the review by the Department of all by-laws made by the Band,

../2

to determine whether these responsibilities and functions were carried out in accordance with law, established policy and generally accepted standards of competence and fairness;

(2) the exercise of Band government from 1975 to the present, and in particular:

- whether there has been abuse of office by chiefs or councillors of the Band,

- whether there have been conflicts of interest on the part of chiefs or councillors of the Band and whether any conflict should or could have been avoided,

- consider the impacts of these practices, if any, on the members of the Band and on lessees and other residents of the Westbank Indian Band reserves;

(3) the activities of lessees and residents of Westbank Indian Band reserves in relation to the Band, the Band Council and Band members, and in particular:

- whether these lessees and residents met their obligations to the Crown and to the Band,

- whether the activities of these lessees and residents contributed to tensions and conflicts with the Band; and

(4) to recommend any changes to the Indian Act relating to the management of lands, Indian moneys 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.

.../3

P.C. 1986-1816

The Committee further advises that

(a) the Commissioner be authorized

(i) to adopt such procedures and methods as he may consider expedient for the proper conduct of the inquiry and to sit at such times and at such places within Canada as he may decide;

(ii) to engage the services of such staff and counsel as he may consider necessary or advisable, at such rates of remuneration and reimbursement as may be approved by the Treasury Board;

(iii) to engage the services of such experts and other persons as are referred to in section 11 of the Inquiries Act who shall receive such remuneration and reimbursement as may be approved by the Treasury Board;

(iv) to rent office space and facilities for the Commission's purposes in accordance with Treasury Board policy; and

(b) The Commissioner be directed to submit a report to the Governor in Council embodying his findings, and recommendations on or before June 30, 1987, and to file with the Clerk of the Privy Council his papers and records as soon as reasonably may be after the conclusion of the inquiry.

CERTIFIED TO BE A TRUE COPY - COPIE CERTIFIÉE CONFORME

CLERK OF THE PRIVY COUNCIL - LE GREFFIER DU CONSEIL PRIVÉ

Hearings Schedule

DATE	LOCATION
1986	
November 12–14	Westbank, B.C.
November 17–20	Westbank, B.C.
December 8–12	Vancouver, B.C.
1987	
February 2–6	Westbank, B.C.
February 9–13	Westbank, B.C.
February 16–19	Westbank, B.C.
March 4–6	Vancouver, B.C.
March 9–13	Vancouver, B.C.
March 24–27	Vancouver, B.C.
March 30-April 2	Westbank, B.C.
April 6–10	Westbank, B.C.
May 11–15	Vancouver, B.C.
May 19–22	Westbank, B.C.
May 25–29	Westbank, B.C.
June 1–5	Westbank, B.C.
June 8–10	Westbank, B.C.
June 22, 24, 25, 30	Vancouver, B.C.
July 2	Vancouver, B.C.
August 11–12	Westbank, B.C.
August 18–21	Vancouver, B.C.
August 24, 26–28	Vancouver, B.C.

Total Number of Hearing Days: 84

Total Number of Exhibits: 225

Total Number of Witnesses: 67

Witnesses and Individuals Appearing Before the Inquiry

Westbank Indian Band Members

Barbara Coble
Harold J. Derickson
Richard N. Derickson
David Derrickson
Larry A. Derrickson
Ronald M. Derrickson
Rose Derrickson
Brian D. Eli
Mary A. Eli
Millie Jack
Chief Robert Louie
Roxanne Lindley
Thomas Lindley
George Michele
Bruce Swite
Lucy W.E. Swite

Department of Indian Affairs Officials (Past and Present)

Dr. Owen A.J. Anderson
Peter J.F. Clark
Frederic R. Drummie
Donald K. Goodwin
Ernest E. Hobbs
H. Alexander McDougal
Donna Moroz
Denis Novak
L. Myler Savill
Arthur S. Silverman
David G. Sparks
Gabor Szalay
Gordon C. Van der Sar
Frederick J. Walchli

Mobile Home Park Operators

Jack E. Alexander
Leonard R. Crosby
Nicholas Dachyshyn
Donald A. Lauriault
James B. Lidster
T. Darcy O'Keefe
John K. Ross
Val Spring
Henriette York
Ted Zelmer

Auditors, Accounting Experts and Northland Bank Officials

Kevin E. Berry, C.A.
Martin G. Fortier
Danier T. Hopkins
William D. Kinsey, C.A.
Patrick J. Lett, C.A.
Harold B. McBain
Donald A. Pettman, C.A.

Business and Professional People

Andrew T. Archondous
Victor N. Davies
Gordon F. Dixon
Mervin G. Fiessel
Nicholas Kayban
Ward A. Kiehlbauch
Beverly P. Kingsbury
H. Grant Maddock
Dudley A. Pritchard
Edward C. Ross
Robert M. Turik
Derril T. Warren

Others

Claire B. Eraut — First Citizens' Fund (B.C.)
Linda Grover — Employee, Westbank Indian Band
Sgt. Leonard H. Nyland — R.C.M.P.
Donald I.F. MacSween — B.C. Department of Highways
Senator Leonard S. Marchand
Robert Sam — First Citizens' Fund (B.C.)
Norman Schwartz — Administrator, Westbank Indian Band
Barbara Shmigelsky — Former Employee, Westbank Indian Band
Sgt. Brian H. Vance — R.C.M.P.

Part IV Submissions

Chief Clarence "Manny" Jules
William D. Kinsey, C.A.
Chief Robert Louie
Chief Joe Mathias
Chief Sophie Pierre
Chief Paul Sam

Final Submissions

Cecil O.D. Branson, Q.C.
Leonard R. Crosby
P. John Landry
John A. McAfee
John S. Maguire
John F. Rowan, Q.C.
Duncan W. Shaw, Q.C.

Counsel Appearing at the Inquiry

Commission of Inquiry	John F. Rowan, Q.C. Donald M. Smith D. Geoffrey Cowper
Department of Indian Affairs and Northern Development	Duncan W. Shaw, Q.C. P. John Landry
F.J. Walchli, Former Regional Director General, Dept. of Indian Affairs	Cecil O.D. Branson, Q.C.
Westbank Indian Band	John S. Maguire
Former Executive of the Westbank Indian Band	John A. McAfee
Touche Ross Ltd., Liquidators of the Northland Bank	Frederick H. Herbert, Q.C. Sharon L. Fugman

Inquiry Staff

Commissioner	John E. Hall, Q.C.
Counsel	John F. Rowan, Q.C. Donald M. Smith D. Geoffrey Cowper
Experts	William D. Kinsey, C.A. — Investigative Accountant John R.D. Iwanson — Investigator
Administration	Maureen E. Cowin — Executive Secretary John T. Laurillard — Hearings Officer Lise M.M. Carrière — Secretary
Report Production	Mary Ann Allen, Marguerite Côté, Marie Dionne, Paul Ollivier, Jean Wilson