REPORT OF COMMITTEE RESPECTING
DEPARTMENTAL INITIATIVES TO RESOLVE OUTSTANDING DIFFICULTIES SURROUNDING WESTBANK BAND OF INDIANS

Prepared For
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REPORT OF COMMITTEE RESPECTING DEPARTMENTAL INITIATIVES TO RESOLVE OUTSTANDING DIFFICULTIES SURROUNDING WESTBANK BAND OF INDIANS

PART I

REVIEW OF THE LAWSON, LUNDELL REPORT

Report of Committee Respecting Departmental Initiatives to Resolve Outstanding Difficulties Surrounding Westbank Band of Indians

Mandate

The Mandate of the Committee is set out in two memoranda, one dated April 19, 1985 and the second dated April 24, 1985 both signed by John S. Rayner, Executive Director General, Indian and Inuit Affairs. Although the mandate as set out in the aforementioned memoranda will not be repeated here, suffice to say the basic thrust of the mandate was to initiate a complete departmental review of all historical matters affecting the Westbank Indian Band. The objective is to attempt to resolve any and all outstanding matters in the best interests of all affected parties to the end that all would receive fair and equitable treatment. The departmental initiative was to include all outstanding issues between the Westbank Band of Indians and the third party lessees that have business dealings with the Band. Included as well were all departmental personnel, particularly those from British Columbia Region, who were also affected by issues regarding the Westbank Band over the past several years.

Background

1. Following the closure of certain District Offices and Central British Columbia Region, the Regional Director General in 1977, entered into the Reserves and Trusts Management Services Agreement with 11 British Columbia Indian Bands, including the Westbank Band of Indians.

2. In 1978 the Westbank Indian Band requested that they be given the authority to manage their Reserve and Surrendered Lands under Sections 53 and 60 respectively of the Indian Act.

3. Although the Band received the Section 53 authority in 1980, the request for Section 60 authority was not processed because of intervening complaints by non-Indian tenants. These complaints generally related to rental increases that were alleged to be exorbitant as well as to alleged harassment by Chief Ronald Derrickson and his Band Council.

4. In June 1981, the owner of one of the Mobile Home Parks raised rents to tenants above the rate allowed by the British Columbia rentalsman. The tenants appealed the rent increase to the rentalsman who declared the increase to be illegal. The rentalsmans's decision was subsequently upheld by a British Columbia Supreme Court decision dated March 3, 1982. Although no further appeal was undertaken, the Westbank Band continues to dispute this decision.

5. The Department, as well as the local members of parliament, continued to receive an on-going series of complaints from non-Indian park owners and tenants regarding the management of their leases and the nature, content, interpretation and enforcement of Band on-Reserve by-laws.

6. As a result of this and other events at the Westbank reserve the matter eventually came before the House Standing Committee on Indian Affairs. The Committee recommended an independent public inquiry with regard to all activities carried out by the British Columbia Regional Office in conjunction with Indian Band members and officials of the Westbank Indian Band.

7. On July 12, 1982 Chief Ronald Derrickson of the Westbank Band met with the Minister and requested that a thorough investigation be made of all aspects of the Band's administration as well as its related companies. It was agreed that an independant law firm would be hired to look at the legal aspects of leases, land holdings and by-laws and that specific complaints by trailer court owners about the by-laws would be investigated.

8. On July 15, 1982 the then Minister announced that he had ordered an internal review of activities involving the Westbank Band. A three-man review committee was established composed of:

   1. Mr. Donald K. Goodwin, Assistant Deputy Minister, Chairman;

   2. Mr. J.D. Leask, Director General, Reserves and Trusts, Member; and

   3. Mr. E. Hobbes, Director of Economic Development, Member.

9. The Committee divided its review into two categories:

   1. Land transactions, by-laws and Indian estates; to be headed by Mr. Leask; and

   2. Economic development and the use of public funds; to be headed by Mr. Hobbes.

10. In August, 1982 the law firm of Lawson, Lundell, Lawson and McIntosh was selected to assist Reserves and Trusts in the internal review. The firm was asked to review the following areas:

1. All aspects of selected land transactions on Westbank Reserves, including headleases between the Federal Crown and corporations formed by the Band, individual Band members and non-Indians;

2. Subleases granted by Head lessees on the Westbank Reserves to tenants at selected trailer courts;

3. Band by-laws in effect on the Westbank Band Reserves in terms of their intended application, scope and enforcement by the Chief and council; and

4. The administration of estates as they are affected by land transactions.

11. On January 13, 1983 Chief Derrickson sent a telex to the Minister expressing his disagreement with the way the review was being conducted. He alleged that the Minister had failed to live up to the terms of the verbal agreement that arose out of their meeting of July 12, 1982. He asked the Minister to revise the terms of reference so that the law firm would be required to identify the documents that they wished to see and the reasons for wishing to see them prior to production by the Band.

12. The terms of reference were not revised and subsequently, the Chief and Band Council declined to be interviewed by the Lawson, Lundell team and also refused to permit them access to the Band's files except under very strict guidelines. As a condition to being interviewed and providing access to the Band's files, the Chief and Council insisted that they have the right to review and edit the law firm's report before it was put in final form. The Lawson, Lundell team refused these requests and hence were subsequently denied access to the Band's files and interviews with the Chief and Council.

13. On February 4, 1983 Chief Derrickson and the Westbank Band Council filed a Statement of Claim in the Federal Court of Canada against the federal Crown and six Departmental officers with respect to the internal Westbank review. The essence of the Court action being that he, Chief Derrickson, and the Westbank Indian Band, were being unduly harassed by the Department of Indian Affairs. The Department of Justice subsequently brought a motion to have the names of the six Departmental officers struck from the writ. This motion was granted by the Court. The action is still pending.

14. Concurrently, a specific dispute was emerging regarding certain actions of a company called Tousawasket Enterprises, and owned by Mr. Noll Derricksan,a member of the Westbank Band. The company had gotten into certain financial difficulties with respect to its operation of a mobile home park on leased Reserve lands.

15. On April 23, 1982 the Department of Indian Affairs accepted the relinquishment of a lease to Tousawasket Enterprises Ltd. A condition precedent to the acceptance of the relinquishment of the lease was that the outstanding mortgage to the Federal Business Development Bank and the outstanding loan from the Indian Economic Development Fund both be repaid in full. The mortgage and loan were repaid in full on April 22, and April 23, 1982 respectively. It was alleged that the Department illegally assisted the company to pay off the mortgage and loan by providing a grant of $300,000 to the Band to permit it to buy into the company.

16. At the time of the acceptance of the relinquishment of the lease there was an outstanding unregistered judgment from the British Columbia Supreme Court naming Tousawasket Enterprises Ltd. as the judgment debtor and Donaldson Engineering and Construction Ltd. as the judgment creditor. This judgment is still oustanding.

17. On April 20, 1983 the Lawson, Lundell report was delivered to the Department. It concluded, among other things, that there were, in fact, several administrative deficiencies in terms of the Westbank Indian Band's operating procedures. In particular, the report recommended that the 1977 Agreement be cancelled.

18. Some three months later, on July 14, 1983 the Review of Financial Transactions and Relationships - Westbank Indian Band and British Columbia Region (the "Hobbs" Report) was also delivered.

19. The Lawson, Lundell Report was subsequently referred to the Department of Justice who, in turn, referred the matter to the Kelowna Detachment of the Royal Canadian Mounted Police for further investigation regarding the complaints and allegations raised or referred to therein.

20. An R.C.M.P. investigation was conducted and a "Brief" was subsequently forwarded to the Kelowna District Crown Counsel on December 15, 1983. The opinion of Crown Counsel was that there existed insufficient evidence for any charges. A "Brief" was also provided to the Department of Justice by the investigating officer on January 18, 1984.

21. The problems continued to percolate until February, 1985. At that time the present Minister directed that the Department was to commence immediately a new initiative. The personnel assigned were to be given a broad mandate to review all outstanding problems and grievances concerning the Westbank Band of Indians. The objective would be to facilitate a fair and equitable resolution of all outstanding matters provided any proposed solutions were compatible with both the present law and the government's policies respecting aboriginal rights and Indian self-government.

The Approach

22. The Committee commenced work on April 25, 1985. To avoid the pitfalls of the past, it was decided at the outset that the new initiative must:

1. be a full, fair and complete airing of all grievances with the "chips left to fall as they may";

2. not be seen as an attempt to be a "whitewash" of any nature;

3. be an open and honest initiative conducted on an individual basis with each of the affected parties;

4. consistent with the applicable law and regulations, allow each and every person affected access to all known information;

5. permit each affected person to respond in his own way to any matter raised in any relevant correspondence to which he may wish to respond; and

6. discuss with each of the affected parties the general thrust of the final report which will be submitted to the Minister.

23. It was further decided that to come directly to grips with the essence of the matter the Committee would concentrate its efforts on the following areas:

1. a through item-by-item review of the Lawson, Lundell report including specifically;

   i) the issue of the validity, interpretation and application of the Westbank Indian Band's by-laws; and

   ii) the issue of alleged conflicts of interest involving the Chief and Band Councillors;

2. a general review of the "Hobbs" report; and

3. a review of and recommendations regarding the Westbank Indian Band and Westbank lessees business dealings and associations.

PART II

THE LAWSON, LUNDELL REPORT

THE LAWSON, LUNDELL REPORT

Introduction

24. Since its publication in April 1983, the Lawson, Lundell report has been the focus of considerable controversy and debate within the Department of Indian Affairs as well as among the Indian and non-Indian communities in and around the Westbank/Kelowna area of British Columbia. It has produced one law suit to date and contains the potential for producing others in the future.

25. The report was initiated as a response to long continuing complaints from the Mobile Home Park Owners Association, a group of lessees who conducted mobile home park business operations on lands surrendered for lease by the Westbank Indian Band. It was also directly prompted by a report of the Standing Committee on Indian and Northern Affairs which advocated in 1982 a public inquiry into the relationships between the regional office of Indian and Northern Affairs in Vancouver and the Westbank Indian Band.

26. The terms of reference for the review were set out in a letter to Mr. Alistair Miller of Lawson, Lundell, Lawson and McIntosh dated September 23, 1982. By their own summary, as set forth in the first paragraph of the report, the firm interpreted their role as:

> "acting on your behalf to conduct an initial review into and report our objective views to you upon some aspects of the affairs of the Westbank Indian Band..."

27. We have asked several key Departmental employees, all of whom have played instrumental roles in the course of events affected by the Lawson, Lundell and the Hobbs Reports, to review these reports and to submit their comments to us. This they have done and their comments form the essence of this report.

28. To facilitate an orderly review of the Reports, it has been decided to review each issue by reference to subject heading/page number. This will then be followed by relevant comment extracted from the various reports submitted by the affected Departmental personnel. This will be further followed by a synthesis of the situation containing the observations and comments of the writers.

29. It is important when reading this report to bear in mind that submissions were accepted in the form and content submitted. We were given no authority to demand

authentication of documents or affidavits regarding statements. Accordingly, we were aware that we were exposing the process to the pitfalls of 'self-serving' evidence. However, our overriding concern was to facilitate the free and unfettered response of each affected person to the individual issues raised in the Reports. We concluded that our personal acquaintances with the individuals involved; our in-depth knowledge of the pertinent rules and regulations in effect in the Department at any particular time; as well as our fundamental understanding of the inner procedural workings of the Department would assist us in identifying self-serving evidence. Accordingly, where self-serving evidence was found to be present and had no other relevant function, it was ignored and not included in this report.

Corporate Searches (Page 11)

Comment - Lawson, Lundell

30. We conducted corporate records searches with respect to every company of which we have knowledge which is a locatee or lessee... These searches involved considerable time and effort and had the object of identifying individuals with a beneficial interest in reserve lands and to identify any attempt by individuals to hide their involvement in the ownership or development of reserve lands by the use of limited companies. These searches in themselves did not reveal any evidence of wrongdoing.

Comment - Sparks

31. Lawson spent considerable time gathering a lot of irrelevant information. That the searches themselves did not reveal any evidence of wrongdoing is not collaborated by any scheme showing the relationship of the corporate entities nor any evidence of the intercorporate financial transactions. Nor does it appear that any attempt was made to discuss with the officers or directors of these companies any of the issues that are germane to this Report.

Overview

32. The need for a corporate records search of every corporation which was "a locatee or lessee" of the Westbank Band is not made clear. Lawson, Lundell provided search results for 48 companies. The vast majority of these companies are not familiar names to

those involved in the Westbank problems. It is obvious from the report that they were looking for "...any evidence of wrongdoing..." Unfortunately, they did not elaborate on the nature of the wrongdoing for which they searched or the reason for casting such a wide net.

33. The conclusion that the searches did not "in themselves" reveal any evidence of wrongdoing was also an unfortunate choice of words. It permitted wide ranging inferences on the part of readers which may or may not have been intended by the authors. Within the context of the overall situation at Westbank at that time, the reader is left to ponder, what the phrase "in themselves", as used in the context of the report, is intended to mean.

34. In the result they appear to have merely provided additional ammunition to those who would accuse them of embarking on a "fishing expedition".

Legality of By-Laws

Comment - Lawson, Lundell

35. "As stated in the introduction to this report, we have not had access to minutes of the Band Council meetings at which by-laws were passed to determine whether proper notice was given, a quorum was present throughout and the proper voting procedure was followed and, accordingly, we make no comment on deficiencies in these procedures which may have the effect of invalidating the by-laws". (Page 12)

36. Many of the by-laws appear on their face to be ultra vires the Band. This is not surprising as it appears to be the policy of the Minister to disallow a by-law under Section 82 for illegality only in what appears to him to be the most obvious case. This policy is expressed in letters from your Department confirming approval of by-laws under Section 82, in which letters the following statement is normally made:

> "The coming into force of any by-law pursuant to section 82(2) of the Indian Act cannot, of course, be taken as any expression of opinion by the Minister that the by-law is valid. Only a Court of Law can make a final decision on the validity of a by-law if and when it is ever challenged in a Court". (Pages 13/14)

37. "Occasionally a proposed by-law is submitted by the Minister to his legal counsel for review, which results in disallowance of the by-law. For example, proposed By-law No. 1981-03 to establish the office of Band Rentalsman was disallowed". (Page 14)

Comment - Roberts

38. As a general rule Headquarters would assume, in the absence of anything to the contrary, that a by-law, or resolution had been passed at a duly convened meeting of the Council by a majority of the councillors present at that meeting (s.2 (3) (b) of the Indian Act). Usually the by-law would include an appropriate number of signatures of members of the Council. (Page 1)

39. However that, in itself, proves nothing. The only record of any real significance would be a certified true copy of the minutes of the meeting at which the power had been exercised (see Gottfriedson case in British Columbia). This would be a big departure from current practices throughout the Department and "strange" to the Indian Band Councils. A variation to the current format of the "BCR Form" may be successful, and has been proposed on a number of occasions; but to the best of my knowledge is currently in limbo. (Page 1)

40. It is my understanding that the basic concept of Section 81 is for the passing of by-laws to govern "community activities" and not personal or business, although, depending on the type of by-law, these latter activities may be involved or controlled by such by-laws. (Page 1)

41. It should be remembered that Departmental policy, at least to the early '80's, was to register virtually every by-law that was submitted in line with its then desire to further local government and control. A by-law seldom would be disallowed, and only for very good cause - e.g. so badly drafted it made no sense; or the concept (as opposed to particular sections) was clearly ultra vires. With the coming of the current rights legislation the policy has tightened somewhat and under the current process some of the by-laws referred to in the report would be disallowed if they were submitted at this time. This is evident by reviewing the By-Law Register. (Page 1)

42. In addition to Departmental policy it is also necessary to put the passing of the by-laws in the appropriate time frame vis-a-vis the current "rights legislation". Many

approaches were acceptable prior to that legislation which would not be acceptable now. That would include allowing a Council to use its discretion, without criteria for such matters as the issuance of permits, in much the same way as the current Indian Act allows the Minister to use his discretion (e.g. Section 82), or for that matter censorship, or the Custom Officers at the International Border (both of which were recently found to be lacking). (Page 3)

43. Again, at this time almost all by-laws are referred to Legal Services for comments, whereas before only highly questionable ones would have been. Even now those comments are sometimes considered and administratively a different decision is made. In the last four or five years, I cannot recall an instance a Council's authority was not challenged by Legal Services which generally recommends that the by-law be disallowed. This creates a situation where one has to wonder whether the legislators, in the eyes of Legal Services, intended to give any by-law making powers to a council. (Page 3)

Comment - Sparks

44. Lawson does not state if they requested copies of the minutes of the Band Council meetings where by-laws were enacted. (Page 1)

45. The comment made by Lawson is that the by-laws on their face may appear to be ultra vires. This is an opinion and, in most cases, it could be equally argued with appropriate case authority that the majority of the by-laws are neither ultra vires nor invalid. The Minister, pursuant to Section 82 of the Indian Act appears to have a quasi-judicial duty to set aside by-laws which are repugnant to public policy. It does not appear to be a duty of the Minister to adjudicate on the legality of by-laws made by Councils of Bands. (Page 2)

Comment - Ryan

46. It is my opinion that this sweeping categorization of the by-laws is not justified by the facts. I do admit that there are problems with many of the by-laws, but only in one or possibly two cases could I see a court of law declaring the entire by-law to be ultra vires the Band Council. On the whole, my examination of the by-laws leads me to the conclusion that their enactment by the Westbank Band Council was, for the most part, a reasonable exercise of the authority contained in Sections 81 and 83 of the Act. (Page 4)

Overview

47. It would appear from the statements and observations of Departmental personnel that considerable insight into Departmental procedures and rationale could have been provided to Lawson, Lundell had they seen fit to so inquire.

48. The report does not address the critical question of what duty, if any, rests upon the Minister with respect to the allowance or disallowance of by-laws. As stated by Sparks, there would appear to be a duty on the Minister to disallow any by-law which was repugnant to public policy. But, is that the sole basis for disallowance by the Minister; or are there other grounds?

49. After quoting a standard paragraph from Departmental letters confirming approval of Section 82 by-laws, the report fails to comment on whether the position adopted by the Department is a valid position or not. It would have been significantly valuable if Lawson, Lundell had offered its opinion as to whether the courts are the appropriate forum for challenging the validity of by-laws or whether there is a positive duty on the Minister to decide the validity/invalidity of each proposed by-law and to rule accordingly. The quote they present appears to invite this inquiry and it is puzzling that the matter is raised and dropped in the manner that it is. Notwithstanding, this is an area worthy of follow-up on the part of the Department.

By-law 1979-1: "A By-law to Provide Regulations for Occupancy and Building Maintenance Standards".

Comment - Lawson, Lundell

50. "The purpose of this by-law is to ensure that all persons who receive CMHC financial assistance under the Residential Rehabitation Assistance Program to improve buildings on the reserve maintain those buildings to CMHC standards. The by-law seems to have the paternalistic intent of ensuring that individuals receiving financial assistance do not put this in jeopardy". (Page 15)

51. "This by-law is ultra vires insofar as it purports to apply to owners of buildings on the reserves who are not "the Band or individual members of the Band". (Page 15)

Comment - Sparks

52. The comment "The by-law seems to have the paternalistic intent" is an unworthy comment that impinges upon community values. The facts are that Indian and non-Indian communities are required under the National Housing Act and its related regulations, in order to participate in the Residential Rehabilitation Assistance Program, to enact such legislation. If it is paternalistic, it is as equally paternalistic to the City of Vancouver as it is to any Indian Band. (Page 3)

53. This comment (re ultra vires) is correct, and there is no evidence to indicate that any effort was made by the Westbank Band to enforce this by-law against owners of buildings who were not either individual members of the Band or the Band's own holdings. (Page 3)

Comment - Roberts

54. "There are many by-laws of this nature throughout British Columbia and I have always understood they were done in conjunction with CMHC and its programs, and are not paternalistic in this sense". (Page 4)

55. I would agree that the by-law is probably ultra vires insofar as it purports to apply to owners of buildings on the Reserve who are not the Band or members of the Band. On the other hand I see no indication that it has been imposed in this way; and since it involves a CMHC program, and the Band, would not likely be so imposed." (Page 4)

Overview

56. Again it would appear that no effort was made to inquire into or otherwise ascertain the reason for the existence of the by-law. Had inquiry been made of the pertinent Departmental personnel it is reasonable to assume that Lawson, Lundell would have been referred to the requirements of the National Housing Act and the Residential Rehabilitation Assistance Program.

By-law 1979-2: "The Westbank Indian Reserves Official Community Plan".

Comment - Lawson, Lundell

57. The purpose of this By-law is to give by-law status to Westbank Indian Band Tsinstikeptum Reserve No. 10 Development Plan, prepared September 26, 1979 by The Esnouf Neilson Partnership of architects and planners.

58. The By-law cites as its authority Subsections 81(c) and 81(g).

59. Subsection 81(c) provides for "the observance of law and order". Subsection 81(g) provides for by-laws for "the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any such zone".

60. Subsection 81(c) is designed to ensure civil order. Subsection 81(g) is designed to permit zoning by-laws. Neither is expressly designed to permit the adoption of community plans. The difference between community planning legislation and zoning by-laws is expressed in Rogers, The Law of Canadian Municipal Corporations, at page 769 as follows: "Community planning is a relatively new field of municipal activity and is at the same time a concomitant and an outgrowth of power of local authorities to regulate land use by means of zoning regulations... Planning legislation contemplates overall planning for the entire territory of the municipality whereas zoning by-laws, as the term suggests, are generally employed to restrict the uses to which specific areas of the municipality can be put". Unless Subsections 81(c) and 81(g) in combination permit the adoption of community plans (which is at the least questionble) this By-law in its entirety may be invalid.

61. By way of specific comment, paragraph 3 of the By-law provides that:

> "The Council, its administrators, employees, agents and designees...shall not without consideration at three (3) successive, regular Council Meetings, duly convened, enact, consent to, approve or do any act or permit to be done any act which might be contrary to the provisions of the said Plan".

62. This provision may be invalid insofar as it represents an attempt by the present Council to impose restrictions on the manner in which a future Council may exercise its powers.

63. Also, subparagraph 4 (a) of the By-law provides that:

> "Any person who suffers or permits any act or thing to be done in contravention of this By-law or who neglects to do or refrains from doing any act or thing which violates any of the provisions hereby imposed, and each day that such violation is permitted to exist shall constitute a separate offense".

64. The Plan itself, on the other hand, contains the following statement in paragraph 3.3.3:

> "The plan, at this time, can only provide a guideline for what is probable and stimulate interest through conceptual ideas for its realization".

65. It follows that subparagraph 4 (a) may be void, as it may not be possible to determine with certainty whether an offence has been committed. Furthermore, Subsection 81(r) of the Indian Act, which permits the "imposition on summary conviction of a fine not exceeding one hundred dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law", does not contemplate that a person may be imprisoned for 30 days or fined $100 for each day that a by-law infraction is permitted to exist, and subparagraph 4 (a) may be invalid on this basis as well. (Pages 16-18)

Comment - Sparks

66. By-law 1979-2 (SOR/80-149) is, as Lawson says, an attempt to initiate planning legislation over a substantial and clearly identifiable part of the territory of the lands reserved for the Westbank Indian Band, namely Reserve #10. While many of the principles set out in Rogers' The Law of Canadian Municipal Corporations are equally applicable to Indian Bands, many are not. In Rogers' work, most of the reference is made to municipal entities that are created by letters patent or special legislation. There are, however, other forms of municipal entities created under the "home rule" concept which function entirely outside of the specific laws related to Canadian municipal corporations. Examples of such communities are the city of St. John in New Brunswick and the town of Amherst in Nova Scotia. On page 17, paragraph 2, this provision is probably not invalid as it is not beyond the power of Council to amend this particular by-law or revoke it. Furthermore, Section 4 of the said By-law refers to persons and not to the Council itself as an entity. (Page 3)

67. The By-law is an order as defined in the Interpretations Act I-23 RSC. Also from the Interpretations Act a violation of a continuing nature is deemed to be a violation for each and every day it continues. (Page 3)

Comment - Roberts

68. The difference between zoning and community planning is accepted. It may not be, strictly, a legal power of the Council (note the report itself says this is questionable but does not say it is ultra vires) but it is a standard municipal practise to control development of a community and therefore community administration and services. It is obviously based on a professional planning concept. It may therefore be illegal but not necessarily bad. (Page 5)

69. The provision quoted in the second paragraph may be an attempt to control future Councils but if so it is a poor attempt since, if the current Council has the power to pass it, a future Council would have the power to amend or repeal it. On that basis, therefore, the provision may be a statement of the current Council's policy for administration purposes. (Page 5)

70. Agreed it is not likely that the Indian Act contemplated that a person may be imprisoned or fined for each day that an infraction existed. On the other hand if each day that the infraction continued could be considered as a separate charge, the net effect would be the same. (Page 5)

Overview

71. It appears from the viewpoints expressed by both Sparks and Roberts that there is another reasonable interpretation of this By-law that produces an opposite effect from that implied by Lawson, Lundell. The matter is of such importance, that it ought to be followed up with a legal opinion and possible legislative amendment as soon as is possible, particularly with respect to community planning.

By-law 1979-3: Waterworks Regulations". (This by-law provides for the basis on which water will be supplied by the Band to buildings on the Reserves).

Comment - Lawson, Lundell

72. The by-law cites as its statutory authority Subsections 81(a), (c), (l) and (r). (Page 18)

73. We understand that at present the Band does not collect any money under this By-law. If in future money is raised to meet the costs of supplying water service, then it would be unobjectionable. However, if the money raised were to have a profit component which is used to defray other unrelated expenses of the Band, then the imposition of the water use charges may be illegal. This is so because money by-laws may be made only under Section 83. Section 83 is not invoked by the By-law and, in any case, Section 83 does not seem to permit the raising of money through the imposition of water use charges. (Page 19)

74. Subparagraph 11.6(vi) (d) of the By-law provides that the Band may discontinue water service if "the applicant contravenes any of the provisions of this by-law. The legality of this is questionable as Subsection 81(r) stipulates that the penalty for a by-law infraction shall be a fine or imprisonment. It is likely that the only by-law infraction which would permit the discontinuance of service would be a failure to pay water use charges.

75. The By-law vests a considerable amount of discretionary authority in the person holding the office of Administrator. For example, paragraph 11.16(a) provides that "if, at any time, the Administrator shall deem it to be in the public interest it may direct that any or all services be reduced or discontinued until it shall be considered advisable to restore the same...". In the absence of an express provision in the Indian Act or other statute enabling the Band Council to delegate discretionary powers the Council can properly delegate only those powers which are administrative in nature. It follows that paragraph 11.16(a) and all others like it are void.

76. This By-law also purports to authorize the Band Council to make provisional decisions affecting water services when deemed advisable by the Council. For example, paragraph 11.10 provides that "it shall be lawful for the Band to reduce the quantity of water supplied to, or to entirely discontinue the service to any consumer... when, in the opinion of the Council, the public interest requires such action". A provision of this nature is void in that it purports to authorize the Council to do some undefined procedure that which it can do only by law.

77. Schedule "F" to the By-law identifies particular wells which are exempt from the By-law. If the exempted wells are all the wells of a certain type, this exemption may be valid. If on the other hand the By-law discriminates amongst water users on an irrational basis, then it may be invalid. (Pages 20-21)

Comment - Sparks

78. By-law 1979-3 (SOR/555). Lawson appears to have overlooked the fact that this By-law was enacted under both Sections 81 and 83. Thus it, in one instance, attempts to exercise a police power, (i.e. regulate the supply and use of water), and also to exercise the taxation power, (i.e. impose a fee or levy for the use of water resources). On page 19, paragraph 1, Lawson has raised the issue of whether water is a private property or public property of the Band as a whole. The By-law has attempted to fairly apportion historic patterns of ownership with current requirements for water supply. Schedule "F" of the By-law deletes from the By-law those private wells that existed at the date the By-law was enacted. In paragraph 3 on page 19, Lawson seems unduly concerned about whether there is a profit component which may be used to defray other unrelated expenses of the Band in the By-law. The Band is not deemed to be a "for profit corporation". It is a common practice in most local government jurisdictions to have revenue raised from the supply of one service in excess of the requirements of the cost of that service in order to defray the costs of other services. As you can see further in this particular paragraph, Lawson does not realize that this By-law is enacted pursuant to Section 83. Throughout the By-law it is important to note that the fee schedule is clearly defined as per Schedules B - C - D and E attached. There is no discretion with respect to the fees to be charged. The failure of the administrator to charge these fees will be discussed later. Lawson in their report on page 20, paragraphs 2 and 3, expressed considerable concern about emergency powers which seem to be vested in the administrator. This is a common principle contained in most local government ordinances relating to water and service supply. Whether it is valid or not is a matter for the courts to determine. In fact, the Westbank Indian Band by this By-law has undertaken to supply water. During the summer of 1984, because of the inability of certain wells to adequately meet the needs of certain water users, the Band, at its own expense, trucked water for several weeks. No additional fees were charged to the recipients of this service. (Page 4)

Comment - Roberts

79. In general the control of a water distribution system within a community and a charge or fee for that service is a standard local government function.

80. Page 18 and 19 - the report indicates the by-law may be invalid for those water supplies which are located, for instance, on CP lands. On the other hand it may not be. I for one, am unaware of any higher court which has delineated the extent of the "ownership" of the holder of a CP in respect to sub-surface water or mineral rights. In any event, if it is a matter of "may"; it ought to be settled by a Court and not by an arbitrary power of the Minister, such as disallowance.

81. Page 19 - the entire paragraph respecting the raising of money as profit is a "red herring". The report itself indicates the Band was not collecting any such fees, at that time. If in the future the Council levied fees, such as to make a profit, the action could be challenged.

82. Page 19 and 20 - the discontinuance of water service may be considered a penalty and therefore invalid. I would agree with that. But on the other hand, if that is so, on what basis does the writer of the Report indicate that it could perhaps be done for non-payment of fees. It seems to me, on a strict reading, that a penalty is a penalty.

83. Page 20 - agreed the subdelegation of authority to the Administrator at this time would be invalid and at that time may have been invalid since the By-law does not establish criteria on which the action would be based. It is also agreed that the provision for the Council to take some action would be void if it was the type of action requiring another by-law. If, however, it was strictly an administrative matter requiring an immediate re-action (e.g. a sudden drop in the water supply or pressure) I believe it would be permissible. The section, therefore, should more clearly indicate the basis for such an action.

84. Page 20 - the references to schedule "F" are again a "red herring" and not based on fact. I agree that if it is discriminatory it is wrong - but the writer does not show it to be so. It is pre-judging the actions of Council or the effect of the By-law.

By-law 1979-5: "to impose fees with respect to Rezoning and Development Permit Applications".

85. The purpose of this By-law is to charge fees for the processing of rezoning and development permit applications.

Comment - Lawson, Lundell

86. Again, if the fees charged are only sufficient to meet the Band's related expenses, it is probably unobjectionable. If there is a profit component in the fees, then the by-law is probably illegal as not being within Section 83. (Page 22)

Comment - Sparks

87. By-law 1975-5. This is enacted pursuant to both Sections 81 and 83 of the Indian Act.

88. Again, as referred to above, Lawson appears to be concerned about an alleged profit component. His arguments are not generally upheld by those knowledgeable of municipal law. It should be noted that the fees are quite specific. (Page 5)

Comment - Roberts

89. Page 22 - see previous comments respecting profits. Again it is pre-judging the effect of the by-law or the actions of Council. (Page 6)

By-law 1979-8: "for the regulation of the construction, repair, demolition, or removal of buildings and structures and to regulate the installation, alteration or repair of plumbing, heating and air conditioning, including appurtenant fittings, appliances and accessories".

90. This by-law is for the purpose described above and is administered by the Building Inspector. It is made primarily under authority of subsection 81(h).

Comment - Lawson, Lundell

91. This by-law is fundamentally bad. A properly conceived building construction and permits by-law will set forth the specifics of all of the conditions which must be met by an applicant for a permit so that the applicant will know with certainty, upon perusing the by-law, whether he is entitled to a permit. Expressed another way, a

building construction and permits by-law is not valid if it leaves the granting or withholding of a permit to the discretion of the official administering the by-law. The proper function for the official administering such a by-law is to determine whether the conditions contained in the by-law have been met, whereupon he is to issue a permit. (Page 23)

92. Insofar as section 81(h) authorizes by-laws regulating the "construction, repair and use of buildings", this by-law may be ultra vires in that under paragraph 5.2 it purports to regulate the demolition and the alteration of buildings and under paragraph 13 the relocation of buildings.

93. Paragraph 10.8, which authorizes the Building Inspector to revoke permits in certain circumstances, may be invalid on the basis that a by-law cannot contain a provision authorizing the revocation of a permit unless the statute enabling the by-law authorizes such a provision. (Page 24)

Comment - Sparks

94. Lawson appears to be unable to read a by-law which I have shown to several building contractors and engineers who find that the specific conditions which must be met by an applicant are clearly understandable. The by-law is an exercise of "police power" in that it attempts to control and regulate all forms of construction. Section 1 clearly defines the standards. Section 9 clearly defines the duties of the inspector. Section 12 provides an appeal mechanism; firstly to the inspector, then upward to the Band Administrator and finally to the Band Council. While it is not an absolute requirement that any enactment definitively include within the enactment a reference to the authority for the enactment, this practice is the preferred form of draftsmanship. It would appear that By-law 1978-8 is enacted purely under authority of Section 81, i.e. a regulatory or police power. Therefore, Appendices G and H may be inapplicable, as they attempt to levy a fee for service.

95. Lawson appears, when quoting paragraphs 10.15, 14.4 and 15.8, to ignore what may very well be a public duty imposed upon the Band Council by the very enactment of this By-law. That duty is to protect individuals and groups of residents within the lands reserved to the Westbank Indian Band and failing to do so would leave the inspector and the Band open for an action in Tort.

96. The comment with respect to paragraph 10.8 may generally be good administrative law, however, as pointed out above, the powers of a Band Council may not be limited strictly by permissive federal legislation but may be much broader and the federal legislation may only affirm existing powers. There is no doubt that if federal legislation explicity disallows a Band government from doing certain things, then any enactment by a Band government contrary to such legislation would be ultra vires. (Page 5)

Comment - Roberts

97. Page 23 - I would agree that this type of a by-law ought to set out the required conditions for the granting of a permit. However I would further think that many of the examples chosen are weak (e.g. it is correct to indicate that a person should not deviate from a proven plan without permission - but is it also not possible to assume that permission would be given if the proposed changes met the requirements of the By-law?)

98. Page 24 - whether construction and repair of a building would include demolition, alteration, or relocation of a building is a moot point. I think an argument could be made that alteration would likely involve construction (to some extent or another), and generally relocation would also require construction, (at least for a new foundation) and depending on how well it was moved, may require repair. (Page 6)

By-law 1979-9: "respecting the Administration and Management of the affairs of the Westbank Band of Indians".

99. This By-law sets forth the responsibilities of the Band Council, the procedures according to which the Band Council shall carry out its function, including the accounting system to be utilized, the manner of approving purchases, letting contracts and making expenditures.

Comment - Lawson, Lundell

100. The By-law is innocuous: most governing bodies make rules for the conduct of their own business. However, the By-law may be a nullity insofar as it attempts, by passing these rules as by-laws, to give them the force of law binding on the Band Council. The Band Council cannot impose laws and the liability for fines or imprisonment upon itself and future Band Councils. (Page 25)

Comment - Sparks

101. By-law 1979-9 does not impose liability for fines or imprisonment upon the Council or future Band Councils, but rather imposes fines or possible imprisonment upon individuals who may be members of the current or a future Council. (Page 6)

Comment - Roberts

102. Page 25. So the By-law may be a nullity so what! Insofar as future Councils are concerned see the previous note on the subject. (Page 6)

By-law 1979-10: "to establish procedures of the Council of the Westbank Band of Indians".

103. This By-law sets forth the procedures according to which meetings of the Council are to be held (e.g. "When the Chief is putting the question no member shall walk across the room".)

Comment - Lawson, Lundell

104. There is a possibility that the provisions of this By-law may be inconsistent with the Indian Band Council Procedure Regulations passed under the Indian Act. (Page 25)

Comment - Roberts

105. Page 25 - again, I would agree that parts of this By-law may be inconsistent with the Regulations, but since it applies to the Council the effect would not be devastating.

Comment - Sparks

106. By-law 1979-10 (SOR 80/154). This By-law is consistent with the Indian Band Council Procedure Regulations (being Chapter 950 of the Consolidated Regulations of Canada) and more specifically is consistent with Section 31 of those Regulations.

By-law 1979-12: "to Regulate the Subdivision of Lands".

107. This By-law is, as its title suggests, intended to regulate the subdivision of land.

Comment - Lawson, Lundell

108. The fundamental problem with this By-law is that there is not in the Indian Act any authority for the Band Council to make by-laws respecting land subdivision. notwithstanding that the Minister by letter dated October 6, 1980 to the Westbank Indian Band granted authority to manage surrendered portions of its Reserves.

109. A second problem is that, although presumably the by-law is intended to apply to the land within the Westbank Reserves, the By-law does not expressly provide that this is so: it is not clear which land is to be the subject of the By-law. (Page 26)

Comment - Sparks

110. By-law 1979-12. This By-law may be ultra vires. There is no authority cited for its enactment. One must remember, that at the time this By-law was enacted a request had been made by the Band for authority to regulate and manage the lands set aside for the Westbank Indian Band pursuant to Section 60 of the Indian Act. One of the powers requested was the Ministerial power contained in Section 19 which power enables the Minister to regulate the subdivision of land within a reserve. As will be indicated in this report and other reports, the Band at that particular date had every reason to believe that it had fulfilled the requirements for making an application for the granting of power by the government pursuant to Section 60 and that such application was being acceded to and that the power was to be vested in the Band momentarily. I concur with Lawson that this By-law could stand improvement in drafting. However, Section 86 does not require a by-law to be completely structured according to conventional form. (Page 6)

Comment - Roberts

111. Page 26 - I would agree that the Indian Act does not directly empower the Council to make by-laws related to the subdivision of lands (although that is a common local government power). I would also think that even if such authority existed, there is considerable unfettered delegated authority which is not acceptable. Nevertheless much of the By-law is or could be, related to power under the Indian Act e.g. health of residents, regulation of traffic; construction and maintenance of water courses, roads, bridges, ditches, fences and other local works, construction and regulation of water supplies.

112. Page 26 - the reference as to whether the by-law applies to land within the Westbank Reserve is strange - surely the writer did not think that the Council expected to control the land in the City of Vancouver! On the other hand, if he was trying to draw a differentiation between Band lands, lands surrendered for lease, and lands held under a Certificate of Possession, I would have thought a greater explanation would have been given. (Page 7)

By-law 1979-15: "to provide for the form, fee and procedure for the issuance of development permits".

113. The purpose of this By-law is as its title indicates.

Comment - Lawson, Lundell

114. It is not clear how this By-law differs from By-law 1979-5. The same comment as to any profit component made with respect to By-laws 1979-5 and 1979-3 can be made with respect to this By-law.

115. Paragraph 6 of the By-law provides that the Council is to determine by resolution whether any development permit applied for is to be issued. A provision to this effect is bad: to be valid a development permit by-law must set out the conditions to be met by the applicant and must then provide that the development permit will issue upon the satisfaction of those conditions. Put another way, the Band Council's power to regulate development must be exercised by by-law and cannot be exercised by resolution. (Page 27)

Comment - Sparks

116. This By-law, as its title indicates is for the purpose of regulating and collecting fees for development. The definition as was set out within the By-law quite clearly separates this By-law from By-law 1979-5. The latter By-law relates to zoning. Lawson's comments with respect to profit have already been addressed, and again in this instance, are probably inappropriate.

117. By-law 1979-15. sets out in Section 5 the process for application and Schedule B sets out the specific requirements. Schedule C sets the fees. I do not understand Lawson's final sentence in this paragraph as the Band has enacted an ordinance to regulate development and has provided, within that ordinance, a process where individual applications must be submitted to the administration; which puts them before Council, who by

resolution, makes a final determination. This is quite a different process than the application for a building permit, where a permitted use is clearly defined by by-law or for a rezoning, where the process is also clearly defined by by-law. I believe Lawson is mistaken in his opinion. (Page 7)

Comment - Roberts

118. page 27 - agreed. (Page 7)

By-law 1980-2: "to provide for the raising of money by the licensing of businesses, callings, trades and occupations".

119. The purpose of this By-law is as its title suggests. It is made under authority of Section 83.

Comment - Lawson, Lundell

120. Paragraph 14 of the By-law provides that business licences may be suspended for a number of reasons, including conviction of the licensee of an indictable offence or the licencee's being, in the opinion of the Licence Inspector, guilty of gross misconduct in respect of his business. (Page 28)

121. Because Section 83 authorizes the licensing of businesses as a means of raising money and not as a means of enforcing a code of morality, paragraph 14 is likely invalid. In other words, paragraph 14 contemplates that the Band Council has been vested with a policing power whereas the Indian Act does not in fact vest the Band Council with this power. Paragraph 14 is also bad insofar as it vests the Licence Inspector with discretionary power.

122. Paragraph 15 provides that an infraction of the By-law is an offence punishable on summary conviction. The authority of the Band Council to so provide is contained in Subsection 81(r). Subsection 81(r) appears to be applicable only to by-laws passed under authority of Section 81 and not to by-laws, such as this by-law, which are passed under authority of Section 83. Accordingly, paragraph 15 may be invalid unless the By-law can be construed as having been made under Section 83 and Section 81. Specifically, Subsection 81(c) might be authority for this By-law in that it authorizes by-laws for "the observance of law and order". However, the By-law invokes as its sole authority Section 83.

123. Paragraph 15(3)(ii) provides that the punishment of an Offence under this By-law is prescribed by Section 102 of the Indian Act. Section 102 of the Indian Act however prescribes the penalty for violation of the Indian Act and Indian Act Regulations. Paragraph 15(3)(ii) is therefore probably invalid. (Page 29)

Comment - Roberts

124. Pages 28 and 29 - I would agree that the Council has no authority to enforce a code of ethics. The words "gross misconduct" may be a poor choice in this respect as it appears to relate to the conduct of the business and not to the morals of the individual.

125. Page 29 - I would also agree with the comments respecting paragraph 15. However, if it can be construed as having been passed under Section 18 of the Act it is not necessary, as previously indicated, to quote the authority. As long as that authority does in fact exist the section would be intra vires.

126. Page 29 - comments respecting paragraph 15(3)(ii) are also correct. However, since I believe this is so self-evident, the section would not be considered probably, by a Court and therefore would have no bearing on the enforcement of the by-law. (Page 8)

Comment - Sparks

127. By-law 1980-2 (SOR 80/656). Lawson seems to have missed this by-law. This by-law is clearly enacted pursuant to Sections 81 and 83. That is to say, the by-law contains both police powers and revenue raising powers. Part 2 defines who shall be affected; who shall issue licenses on behalf of the Council and the procedure for application, (see Section 6). Sections 19 and 26 encompass the police powers envisaged by this by-law. Section 29 defines categories and the fees payable. I agree with Lawson's comment regarding paragraph 14 but not his reasons.

128. Please see comments above as Lawson appears to have missed the enactment.

129. Paragraph 15(3)(ii) makes reference to Section 102 of the Indian Act. Section 102 of the Indian Act describes the penalty for the violation of the Indian Act and Indian Act Regulations. If one looks at the Interpretations Act CI-23 one realizes that a by-law is in fact a regulation by definition. (Page 7)

Recommendation Regarding By-laws - Lawson, Lundell

130. The preceding review of by-laws indicates that problems with them are rife and that the deficiencies seen most often are the illegal delegation by the Band Council of discretionary power to Band officials and the lack of certainty in the criteria to be met to obtain permits. To the extent that tension and hostility on the Westbank Reserves are related to these and other deficiencies in the by-laws, the review within the statutory 40-day period by legal counsel for the Minister of proposed by-laws will prevent many future difficulties. We recommend that the Minister take proper action to carry out his responsibility for ensuring that proposed by-laws are valid and that for this purpose a procedure be established whereby all proposed by-laws are promptly reviewed by legal counsel for the Minister.

131. We also recommend that the Department use its influence to require the Band Council to amend the existing by-laws to conform with law. (Page 31)

Comment - Sparks

132. Lawson's comments with respect to a review of the by-laws indicating that they are "rife with problems and deficiencies" is a matter of opinion. The case law on Indian Band by-laws is quite limited. The B.C. Court of Appeal upheld Mathias Joe vs. Finley which is based upon a zoning by-law and land use control by-law enacted by the Squamish Band that defied all the rules of by-law drafting taught at any law school. On the other hand, the New Brunswick lower court in the Tobique vs. Lovelace, et al disallowed a well drafted by-law on the grounds that the Council had not observed the requirements of the by-law in its administration. Lawson seems to believe the Minister has a judicial responsibility which is not provided for in the Indian Act. The Minister's responsibility in the Indian Act with respect to by-laws is to determine that they are not repugnant to public policy. The courts, under the Canadian Constitution Act are still, for the most part, the only bodies that exercise judicial decision. This is not to say that the Minister's staff should not advise him on the probability of the validity of by-laws which are presented for his review, nor that they should avoid a public duty to advise Indian Bands concerning the validity and construction of their enactments. (Page 7)

Comments - Roberts

133. Page 30 - I disagree. The preceeding review of the by-laws does not indicate that problems with them are rife. The review only indicates that the by-laws, probably, have deficiencies in drafting (and the same could be said for many other laws, local, provincial, or federal, in retrospect). The attempted application of the by-laws may have caused problems, but to this point in the report no co-relation has been shown between those drafting problems and the difficulties on the Reserve. (Page 8)

134. In any event, had those persons being improperly charged under any of the preceeding by-laws gone to Court, a decision could have been obtained.

135. There is and has been for some years, a process in place where by-laws are reviewed by Legal Services and, if necessary, recommendations made to disallow. This process, however, is highly dependent upon timing, over which the Department has little or no direct control in many instances.

136. It should be noted that many by-laws these days are in fact prepared by legal firms (and most of these would fall within that category), and it is a difficult position for a Council, and the Department, to be caught between the opinion of two opposing legal counsels with no judge to make the decision on the technicalities - just the Minister's arbitrary right to disallow. (Page 9)

Enforcement of By-laws disallowed by the Minister

Comments - Lawson, Lundell

137. There have been instances of the Band Council assuming the validity of and enforcing by-laws disallowed by the Minister. This policy has caused considerable distress to affected parties. We have set out below some examples.

Example #1

138. By-law 1981-03 purported to give the Band Council the power to set the pad rental payable by trailer park tenants and the power to promulgate rules and regulations to be complied with by such tenants.

139. In 1981 the Band Council sent to tenants of its Mt. Boucherie trailer park notice that rentals were being increased to $150 per pad. The owners of other trailer

parks on the Reserve sent similar notices to their tenants and in these notices stated that the rent increases were as required by Band Council resolutions. Estimates of the changes in rent range from a 45% increase to a 90% increase. In 1981 the Band Council also sent to its tenants a detailed list of rules and regulations for observance in trailer parks. Most non-Indian mobile home park owners sent the same list to their tenants.

140. The imposition on mobile home park tenants of a rent increase and new rules and regulations created a furore. We understand that many tenants were dismayed at the prospect of having the minutiae of their daily lives subject to the control of the Band Council. These tenants appealed to the B.C. Rentalsman. He ordered that the pad rentals be rolled back and decided that the rules and regulations were invalid.

141. The Band Council appealed to the British Columbia courts, on the basis that the Band Rentalsman By-law ousted the jurisdiction of the B.C. Rentalsman. The Courts found that the Band Rentalsman By-law was invalid.

142. All of the expense, frustration and hostility involved in this controversy arose directly out of an attempt to enforce two by-laws which had been disallowed by the Minister. (Pages 31-34)

Example #2

143. In at least one mobile home park the operator set aside for public use and recreation a part of the leased area. This was done, the operator told us, to comply with a requirement contained in By-law 1979/80-11. We have been unable to obtain a copy of this By-law. We were told by the operator that failure to comply with this requirement would have meant that a development permit would not have been issued by the Band Council. The operator was led to believe that By-law No. 1979/80-11 had been approved by the Minister. In fact this By-law was disallowed by the Minister. The operator maintains that he has lost the business use of approximately 7.5% of his leased area to his financial detriment.

Example #3

144. By-law No. 1981-02 was passed by the Band Council and purported to impose an annual poll tax on all non-Indian tenants of mobile home parks on the Westbank Reserves.

That this fee would be assessed was reported in the Kelowna press in August, 1982, again resulting in dismay on the part of non-Indian residents. In fact this By-law was disallowed by the Minister.

Example #4

145. By-law 1980-03 was passed by the Band Council and purported to enable the Band Council to regulate the removal of soil from within Reserves and to levy fees for licences to do so. Notwithstanding that this By-law was disallowed by the Minister it is contained in the bound volume of by-laws published by the Westbank Indian Band and sold for $10 for the guidance of persons subject to the Band Council's jurisdiction. (Pages 34/35)

Comment - Sparks

146. This whole Section C entitled "Enforcement of By-laws Disallowed by the Minister" ignores some fundamental facts. Whether it be on an Indian Reserve or in the City of Ottawa, the onus is still upon individuals to be aware of the law and to enquire if he feels so disposed as to its validity. There is no evidence in the examples given that the complainants at any time approached the Minister or his Regional/District staff to determine wnether the by-laws were in force. Certainly the statements of Chief R.M. Derrickson in public did not add to the environment of competence that normal local governments attempt to put forward for the general benefit of their constituents. On page 34, example number 2, the Operator said he was "led to believe that By-law 1979-11 had been approved by the Minister" but he does not indicate by whom he was led to believe so. A simple phone call by the individual to the Regional/District staff of D.I.A. would have clarified his position, and his loss, that he alleges, would not have taken place.

147. As mentioned previously, By-law 1981-03 was passed by the Council on the presumption that they were obtaining authority under Section 60 momentarily. Had they done so, the status of this By-law would have been quite different. (Page 8)

Comment - Roberts

148. We do not appear to have received a copy of By-law 1979/80-11. If that is so, the By-law cannot be effective since the Act requires that a copy be filed with the Minister.

149. Example #1 - page 32 et seq - the attempted application of by-laws which were disallowed by the Minister under Section 82 of the Act, or conversely not approved, by the Minister under Section 83 highlights what has previously been said that is that the problem is not necessarily the drafting of the By-law but the implementation of the By-law by the Council.

150. None of the by-laws that fall under this category are effective - the Act is quite clear on this point - and therefore none ought to have been implemented.

151. As previously indicated the tenants ought to have checked to ensure the by-laws were in effect. The Department could (and for all I know perhaps the Regional Office did) so advise the Council and the tenants to establish whether there was a legal basis for the change. The hostility, etc. to which reference is made is not created by the By-law., to which reference is made prepared to force the issue regardless of the law. The Department may have some responsibility in this from some aspect of its mandate (e.g. peaceful enjoyment under a Lease), but does it have any on the basis of the law per se? (Page 9)

152. Example 2 - page 34; as previously indicated we have no record of By-law 1979/80-11 and can only assume it was not filed with the Minister.

153. Examples "3, 4" - pages 35 - as above.

Recommendations re Enforcement of Disallowed

By-laws - Lawson, Lundell

154. The people who are subject to the jurisdiction of the Band Council or directly affected by its activities or decisions ought to receive notice that a new by-law is under consideration by the Band Council and the Minister, and so have the opportunity to make their views known to the Minister and Band Council, and ought to be able to determine readily and with certainty which by-laws are in effect. Accordingly, adequate notice of a by-law pending approval should be published in a newspaper circulating in the local area as well as where Band notices are ordinarily displayed. If a by-law is disallowed notice thereof should be published in the same manner. Copies of approved by-laws should be printed by the Queen's Printer and be made available through the B.C. Regional Office of the Department. The publication of by-laws by the Band Council should be discontinued. (Page 36)

Comment re Recommendations - Sparks

155. The recommendations of Lawson are good. In fact, public notice from time to time by the Department of those regulatory sections of the Indian Act affecting lands, chattels and resources, including the removal of the same from Reserves, should be published. Likewise notice should be published promptly of any delegation of authority. And, in the same manner, there should be publication promptly of any withdrawal of that delegation.

156. I do not agree with Lawson that the by-laws should be printed at the Crown's expense. If Indian communities want to have local government they should also have the financial and other responsibilities that go therewith. (Page 8)

Comment Re Recommendations - Roberts

157. To legally require notification that a by-law was under consideration, publication in a newspaper, and similar publication of a disallowance would all require a change in legislation. In our workshops on by-laws we stress the need for member participation and notification but we cannot require it under the present Act.

158. Although I do not know B.C. legislation that well, it is not generally Provincial law that municipal councils advise their rate payers that by-laws are being considered or to subsequently require publication (only for some very specific types of by-laws is such action required).

159. There is also no legal requirement to publish by-laws by the Queen's Printer. Copies of any Band Council by-law could be available, now, from the Department or from the office of the Privy Council since they must be registered under the Statutory Instruments Act. The solicitors for the various tenants could have obtained copies from either of these sources, if requested.

160. I find it strange that on the one hand the report suggests that Councils should publicize their by-laws, but then suggests that the publication of by-laws by the Council should be discontinued. If the Council is to be the local government body then surely it has the right to publish its by-laws for the enlightenment of the members.

161. In this respect to require anything more than is required of municipal councils would be tantamount to discrimination. (Page 10)

Application of By-laws

Comment - Lawson, Lundell

162. The information given in the following section of our report was obtained from oral statements and written material obtained at our interviews. Again we must emphasize that we accepted these statements and material as being true and accurate. We did not endeavour to obtain a comment or response from the Chief or the Band Councillors to each complaint. This approach was taken for the reasons given on pages 8 and 9 of this report and because a great majority of the people we interviewed requested, and in fact urged us, not to identify them or disclose their individual complaints to the Chief or Councillors.

163. This unilateral approach necessarily affects the authenticity of the matters we set out. However, on balance, we believe the information given to us, although somewhat biased, to be basically true.

164. During our interviews we were given numerous examples of inconsistent action in the application of by-laws.

165. The most common complaints related to the uncertainty in ascertaining the requirements for a permit and the inconsistent and arbitrary fees that are charged for permits and other approvals. Examples of complaints are given below. (Page 35)

Note:

166. On pages 35 to 43 inclusive of their report Lawson, Lundell set out 13 examples of complaints received from various interviews with "operators". To facilitate brevity of this report the examples will not be reproduced here.

Comment - Roberts

167. Page 36 et seq - these comments merely prove what has previously been said on this topic. If a Council ignores an applicable law, be it their own or some other body's, it is not a matter of whether the by-law is good or bad - it is a matter of law in respect to the implementation.

168. I might add that the report, in this section, makes few specific references to the particular by-law in question, the specific faults of that by-law previously contained in the report, or whether a by-law which is not in effect

is the cause of the dispute. It is therefore difficult to make any concrete comments. For example (page 41, bottom) the report questions the authority of the Council for the $300,000 bond, makes an oblique reference to By-law 1979-8 but does not indicate what section of the By-law has any reference to such a bond or its applicability. Again under example 11 (page 42) the concern is expressed as to the arbitrary determination of the amount, but does not indicate the by-law, or its section, which was at fault to allow such an arbitrary determination. (Page 11)

Comment - Sparks

169. Application of By-laws. As pointed our above, Chief R.M. Derrickson intervened in an individual capacity, according to the information contained in Lawson's Report, in a manner that breached the Band's own by-laws. The Band had appointed a Band Administrator and by By-law 1979-09 had set out a series of administrative procedures. The appointee, for probably understandable reasons, abdicated his responsibilities under the Band's by-laws and allowed Chief R.M. Derrickson to usurp those responsibilities. The issue on several occasions, apparently from the information contained in Lawson's Report, should have been brought before Council who could have either constrained the actions of Chief R.M. Derrickson or, alternatively, either amended or revoked their Administrator and Administration by-laws. (Page 8)

Re Example 1:

170. In this example, the operator/lessee evidently found that the by-law was understandable and presented his application in accordance with the proper procedure to Council. There is no evidence that the mobile home park operator sought a Writ of Mandamus against Council.

Re Example 2:

171. Again while this example indicates that the operator/lessee obtained legal advice, it does not disclose the nature of that advice or whether specific action was taken by the D.I.A. staff in the Region/District. However, if the allegations are correct, and the D.I.A. staff were apprised of the situation, there appears to have been an omission of duty on the part of the D.I.A. staff in formally bringing the issue before Council and seeking Council's control of Chief R.M. Derrickson's activities.

Re Example 3:

172. This appears to be an example of Chief R.M. Derrickson not acting in accordance with Westbank's by-laws which set out quite clearly the development requirements for an operator. Likewise, the operator/lessee does not appear to have been aware of the by-law, or to have understood, if he was aware, what his financial requirements might be.

Re Example 4:

173. This complainant should have had legal advice. Throughout Lawson's comments, we are dealing basically with examples of commercial developments. A commercial development, whether it be at the Westbank Indian Band or in the City of Kelowna, is a major undertaking that requires, as a general rule, service support from engineers, planners, accountants and lawyers. As has been indicated in the general letter to which this report is appended, many of the operators on Westbank lands were inadequately financed and often opportunistic. As a consequence, they became a prey to what appears to have been a member of Council who believed that he had unlimited powers and was prepared to be arbitrary, unreasonable and may have, from time to time, actually breached his position of trust as an elected representative of the Westbank Indian Band.

Re Example 7:

174. This alleged complaint is typical of a number of complaints outlined by Lawson and other complaints of which the writer is aware. The Band Council, as mentioned above, had empowered their administrator to manage the by-laws and collect the fees. However, from time to time (more often than not), the Council (and in particular Chief R.M. Derrickson) usurped the administrator's prerogative, and apparently set arbitrary fees which were not supported by Band enactments. Certainly the operator/lessee had available to him the various by-laws and could calculate his fees. If the Band's solicitor set out in a letter that the fees were $23,432.51, one must presume that that figure was based in fact upon law. (Page 9)

Re Example 11:

175. This is another example of Chief R.M. Derrickson requesting fees for which there was no statutory or by-law basis. Chief Derrickson had intervened in a role that was more properly the role of the administrator. As

with many of the other examples contained in this part of the Lawson Report, there is no evidence that the Department was aware of these incidents. If there were such approaches made to the Department for relief, and the Department failed either to advise the enquirer of the correctness of their position or, alternatively, request the Band Council to substantiate its position, then an omission of duty on the part of the Departmental staff had taken place.

Re Example 12

176. Fees for this type of transaction are established by regulations pursuant to the Indian Act and are part of Chapter 947 of the Consolidated Regulations of Canada. As the field is occupied, the Band Council is barred from establishing fees for this service. The writer is aware that Chief R.M. Derrickson has quite recently attempted to impose a "registration fee" in addition to the fees payable pursuant to Chapter 947 of the C.R.C. I realize that an individual in the position of example number 12 in the Lawson Report could well feel that he would have to either pay or lose everything. Nevertheless, misconduct by any government cannot be overcome unless the citizenry are prepared to take such actions as are necessary to ensure that the law, as it is enacted, is in fact administered. (Page 10)

Recommendation Re Application of By-Laws

Lawson, Lundell Recommendation

177. The Department should use its influence to require the Band Council to amend the existing by-laws to conform with law. They must be within the express or implied powers of the Band Council, must not be repugnant to the laws of the Province of British Columbia or Canada, must be made bona fide in the interests of the inhabitants and not to serve a private interest, must not discriminate or create a monopoly, must be reasonable, should be duly published and perhaps most important must enable persons subject to them to know with certainty their rights and obligations, including fees payable and technical requirements for permits. (Page 43)

Comment - Sparks

178. I agree the Department should use its influence to require the Band Council to amend existing by-laws where necessary to conform with generally accepted legal practices. I disagree with Lawson that Band by-laws

cannot be repugnant to the laws of the Province of British Columbia. They cannot be repugnant to the Laws of Canada. Likewise, by-laws cannot be made to service a private interest, however, there is no evidence in Lawson's Report that this has, in fact, been the case. What there appears to have been, according to the contents of the Lawson Report, is an indiscriminate disregard on the part of members of the Band Council for their own by-laws and, consequently, there has been created within the Westbank Reserve lands a sense of uncertainty and a sense of unfairness. Again I would reiterate that the Band Administrator had a duty to bring these matters to Council and if he felt that he was not likely to have sufficient influence, he could have called upon Departmental staff to assist him. (Page 10)

Comment - Roberts

179. I would agree, subject to the previous comments, that the Department cannot require amendments. Again, however if it is the application of the by-law by the Council, these changes would be of little value in themselves.

By-Laws - Unlawful Remedies

Comment - Lawson, Lundell

180. The Council of a Band may by Section 81 of the Act make by-laws not inconsistent with the Act or with any regulation made by the Governor in Council or the Minister for the purpose of, inter alia:

> "(r) the imposition on summary conviction of a fine not exceeding one hundred dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section".

181. These are the exclusive remedies of the Band for by-law violations.

182. Numerous examples referred to elsewhere in this report reveal actions of the Band Council that amount to unlawful remedies in the enforcement of the bylaws. Of particular significance is the refusal to permit utility representatives to supply service to certain lots. (Page 44)

Recommendation Re By-Laws - Unlawful Remedies

Lawson, Lundell Recommendation

183. The remedies available to the Band Council should be utilized and unauthorized remedies should be discontinued. Possibly the remedies available to the Band Council under section 81(r) of the Act should be assessed with a view to increasing or broadening the penalties provided therein. (Page 44)

Comment - Sparks

184. When the Band Council has to use what amounts to unlawful remedies for the enforcement of by-laws, I concur with the recommendation of Lawson that the remedies available pursuant to the Indian Act should be assessed with a view to increasing or broadening the penalties provided. (Page 11)

Comment - Roberts

185. Page 43 and 44 - again I would agree, but again I would reiterate that these would have little effect if the Council was to continue its practices of disregarding the law.

The Role of the Department

Delegation of Authority: The 1977 Agreement

186. We refer to the undated Memorandum of Agreement (the "1977 Agreement") apparently executed in 1977 between the Government of Canada represented by the Department of Indian Affairs and Northern Development and an unnamed party intended to be the Westbank Indian Band, a photocopy of which agreement was given to us. (Page 44)

187. In our early discussions with Chief R.M. Derrickson and Mr. J.D. Leask of your Department considerable emphasis was placed upon the 1977 Agreement as a source of authority for decisions of the Chief and the Band Council relative to the administration of land, estates and Band memberships on behalf of Her Majesty. In a subsequent meeting with Chief R.M. Derrickson he de-emphasized the importance of the 1977 Agreement and stated that his authority to act on behalf of Her Majesty came from several sources. We requested copies of the relevant documentation but were not provided with it. We continue in the belief that Chief R.M. Derrickson and the Band Council do rely on the 1977 Agreement as the prime source of authority.

188. Chief R.M. Derrickson appears in particular to have relied heavily upon the provision in the 1977 Agreement that the Band Council is to have responsibility to negotiate "with lessees and permittees as to revision of rentals, new rentals and enforcement of terms and conditions in leases". This reliance was confirmed to us by several mobile home park operators.

189. It is our understanding the the B.C. Regional Office of the Department has encouraged the exercise of authority by the Westbank Indian Council, the reason being that the Band should be given greater autonomy over its affairs. The shift of authority from the Department to Indian Band Councils apparently started in 1977 in response to pressures brought to bear on the Department by several Indian bands. We were advised by B.C. Regional Departmental representatives that there were 11 other agreements entered into with other bands in 1977. We requested copies of these agreements. When they were furnished to us we learned that they were not agreements and were nothing more than Band Council resolutions with an appendix attached similar to Appendix "A" to the 1977 Agreement. Just prior to the implementation of the 1977 Agreement, the Vernon District Office of the Department was closed. We were told by Chief R.M. Derrickson and by members of the B.C. Regional Office of the Department that they would support the re-opening of this office. The lack of a Departmental field officer who has day to day contact with the Band members and Band Councillors has left a void in the involvement of the Department in the affairs of the Band. (Pages 45/46)

Note:

190. The Lawson, Lundell report discusses the "1977 Agreement" from pages 45 to 55 inclusive of that report. The discussion is dealt with under the following headings:

1. Effect of the 1977 Agreement (Page 47)

2. Intent of the 1977 Agreement (Page 48)

3. Validity of the 1977 Agreement (Page 50)

4. Form of the 1977 Agreement (Page 51)

5. Deficiencies in the drafting of the 1977 Agreement (Page 25); and

6. Execution and publication of the 1977 Agreement (Page 54). To facilitate brevity of this paper, the Lawson, Lundell discussion of the 1977 Agreement will not be reproduced here.

Recommendation Re 1977 Agreement

Lawson, Lundell Recommendation

191. The 1977 Agreement should be considered null and void and accordingly the rights and obligations purported to be granted by it should be extinguished. Any other letters or documents purporting to vest in the Band Council the authority to act on behalf of or instead of Her Majesty should receive the same treatment, unless specific statutory authority exists for such delegation.

192. Assuming from a policy standpoint that it is desirable that there be a delegation to the Band of responsibility for local government, that is consistent with law and Departmental policy, a proper agreement should be prepared by a competent draftsman:

i) reciting the intent of the Agreement;

ii) specifying the source of authority for any delegation of power or at least ensuring that there is authority for the delegation of power;

iii) separating the area of delegation of authority from those functions where only advice and assistance is required;

iv) clearly outlining the respective duties of the Department and the Band Council;

v) providing for a "monitor" or other method of periodic review to ensure that the duties and responsibilities of the Minister and the Band Council are being carried out;

vi) specifying the areas of participation by the Band as a whole;

vii) providing for publication of the agreement and disclosure of its contents to interested parties such as Band members, beneficiaries of estates, mobile home park operators and other lessees and occupants of lands in the Reserve; and

viii) providing a procedure for decisions to be made by neutral parties where conflicts of interest may exist.

193. We also recommend that the Department consider the re-opening of the Vernon District Office.

Comment - Sparks

194. The agreement is really a funding mechanism authorized by Treasury Board Minute (dated April 1st, 1974). The Treasury Board, in its capacity as defined in the Financial Administration Act, permitted the expenditure of Departmental appropriations by way of contributions to individual Indians, Indian Bands, and groups of Indian Bands for purposes of providing certain services to residents on lands reserved for Indians. The so-called 1977 agreement provided that funds would be paid to the Westbank Band of Indians if their Council and administration undertook certain clerical and administrative support functions normally carried out by federal public servants in the exercise of land management, estate and Band membership duties prescribed pursuant to the Indian Act. The agreement conferred no decision-making power relative to statutory matters upon the Council or the Band. The agreement, as mentioned above, was based on Treasury Board Minute 725973 and, as an agreement, became invalid April 1st, 1980 because of changes in Treasury Board requirements pursuant to Treasury Board Minute 763729. There was an omission of duty by the Regional/District D.I.A. staff in not advising Westbank Indian Band or its Council that the 1977 Agreement was no longer valid. It was a responsibility of the District/Regional staff to renegotiate an agreement by April 1, 1980 with respect to those services being funded and such an agreement should have been drafted in accordance with Treasury Board Minute 763729 and Treasury Board Minute 725973 (as amended by Treasury Board Minute 763729). Now there is no question from the evidence that Lawson obtained, and from others that the writer is acquainted with, that Chief R.M. Derrickson in particular, and his Council and its administration in general, attempted to attach, when it suited their particular purposes, a much more liberal interpretation upon the 1977 Agreement than the language of the agreement spoke to. Likewise, there appears to have been an omission of duty on the part of Regional/District staff in responding to enquiries from the public in general, and those members of the public in particular who had contractual arrangements with the

Crown, by failing to disabuse them of the assertions of the Westbank administration that it had, in fact, been delegated certain authority. While I find no evidence that the letters confirm that authority had been delegated, the nature and tone of the correspondence certainly could have been construed by the recipient that this delegation had taken place. I concur with Lawson that the 1977 agreement probably could have been more tightly drafted but I disagree that the intent is not quite apparent. Lawson, throughout his comments on page 48 to 54, continues to make reference to delegation. However, the language of the 1977 agreement is quite clear, and certainly no mention or implication of a delegation of Ministerial discretion or responsibility for Ministerial decision-making is indicated. (Pages 11/12)

195. An examination of the Treasury Board Minute referred to above, and the delegation of authorities document in effect in April 1977 clearly provided the Regional Director General with the authority to enter into a funding arrangement as envisaged by the 1977 Agreement referred to. I agree with Lawson that there should be publication of any delegation of authority such as the delegation under Section 53(1) of the Indian Act presently vested in the Westbank Council and the proposed order under Section 60 giving administration of the land over to the Band. (Page 12)

Comment - Clark

196. The 1977 Agreement was based upon Treasury Board Minute 725973 dated April 1, 1974. (TAB 21 in Appendix 1.). Annex "A" to the Treasury Board Minute (TBA) designated three distinct groups of programs. The 1977 Agreement between the Department and the Westbank Indian Band provided the administrative process and controls under the second category "Programs or functions which can be carried out by Councils under mutually acceptable terms and conditions":

- Community Planning
- Water & Sanitation Services (construction & maintenance
- Roads & Sidewalks (construction & maintenance)
- Electrification (construction & maintenance)
- Band Elections (except Appeals under Section 74)
- Control of Band Capital Funds
- Control of Band Revenue Funds
- Band Membership Functions
- Negotiations of Terms and Conditions of leases and permits

197. These were defined in Sections "A" and "C" in the Appendix to the 1977 Agreement.

198. The third category under the T.B.M. was Programs or Functions for which the Department must retain responsibility and administration because of statutory or other considerations. These included:

- Land Registry
- Land Surveys
- Land Acquisition and Sales
- Federal-Provincial Agreements with respect to Lands
- Legal Services relating to Lands
- Estate Administration

199. Under the 1977 Agreement Section "B" related to Estate Administration only under the provision of "advise and assist the Regional office" on all matters pertaining to the administration and management of estates of deceased Indians. (Page 2)

200. Lawson Lundell state at page 46: "However, the effect of the action of the B.C. Regional office in executing the 1977 Agreement is that it has abrogated the duties of the Minister under the Act." Refer to:

1. T.B.M. 725973 (Referred to previously)

2. Band Administered Membership Program Appointment of Westbank Band - Mr. Brian Eli (effective June 1, 1977) by the Registrar of Memberships ...(See TAB 16 Appendix 1)

3. Letter dated August 14, 1975 from Regional Director (Mr. L.E. Wight) to Bands previously within Kootenay-Okanagan and Thompson River District providing authority for Councils to provide services prevously supplied by District offices. (TAB 14 Appendix 1)

4. Letter dated March 11, 1976 from Acting Director General, B.C. Region (M.G. Jutras) to the Westbank Indian Band Council confirming that at the time the District office at Vernon was closed:

   "it was intended at that time that Bands would take over the management of their lands including the negotiation of new terms, conditions and rentals of leases on Indian reserves". (Page 8)

5. Letter dated October 6, 1980 from the Minister (Honourable J.C. Munro) to the Westbank Indian Band appointing the Chief and Councillors as managers of surrendered lands under Section 53 of the Indian Act. (Page 8)

201. Lawson, Lundell state at page 48: "The action of the B.C. Regional Director in purporting to delegate Ministerial authority, and the Band Council having exercised such authority would normally give rise to estoppel of authority. However the defence of estoppel cannot be invoked against Her Majesty. Possibly for public policy purposes Her Majesty may be reluctant not to support the action of the Regional Director."

202. As the senior Departmental officer of the B.C. Region, the Director General was carrying out duly authorized signing requirements provided by the Treasury Board and in accordance with government policy and financial authorities under the F.A.A. No Ministerial authority was delegated to the Band Council by the 1977 Agreement.

- See Clause 13, Appendix "A" of the 1977 Agreement (TAB 21 Appendix 1). (Page 12)

203. Also at page 48, Lawson Lundell state: "We understand that in 1977 in response to political pressures the Department determined that the Councils of 12 B.C. Indian Bands ought to assume the function of providing certain services to the Band members. The Westbank Indian Band was one of these Bands."

204. As previously stated under number 8 the process of transferring responsibilities was as a result of the 1975 closure of the Vernon office as well as the application of the 1974 T.B.M. Any 'political pressure' should be seen as a national trend towards self-reliance and self-government as supported by the changing policies of the government. (Page 13)

205. At page 51, Lawson, Lundell State: "In addition to the 1977 Agreement being incomplete and redundant, the questionable status of Appendix "B" thereto and its conflict with the main agreement, would in our view make the 1977 Agreement void for uncertainty."

206. Appendix "B" to the 1977 Agreement may cause some confusion. It is suggested that under Clauses 4 and 35 of Appendix "A" of the Agreement it is clear that this relates to the accounting of lease and permit fees being Indian revenue monies.

207. See Band Council Resolution of the Westbank Indian Band March 28, 1977 and approved by the B.C. Director General on April 5, 1977 which established the procedure for the collection & accounting of funds from leases. This in effect superceded the need for an Appendix "B" to the Agreement. TAB 19 Appendix 1. (Page 24)

208. Lawson, Lundell state at page 54: "We have not been able to satisfy ourselves that the B.C. Regional Director had the authority to settle this 1977 Agreement on behalf of the Department and in any event we consider his action in executing an agreement of such a deficient nature to be extremely unwise." The Authority is contained within:

1. TBM 725973 April 1, 1974
2. FAA

209. It is suggested that in view of the policy of the Department and the climate of Indian government to government relations in Canada it was the duty of the Regional Director to execute such an agreement which had the full support of the Westbank Indian Band. (Page 27)

210. At pages 54/55 Lawson, Lundell state: "In our interviews with mobile home park operators it was drawn forcefully to our attention that for several years the 1977 Agreement was not published or disclosed to parties who were directly affected by decisions purportedly made under its authority. A member of the B.C. Regional Office of your Department stated that he did not feel that the Department had any responsibilities in this regard."

211. The Department did not directly advertise that the Agreement was in place. However, at no time did the Region deny the existence of the Agreement nor the existence of letters and directives completed early in 1975 after the closure of the Vernon office.

- See letter dated August 14, 1975 from L.E. Wight (Director General, B.C.) to all Bands. (TAB 14, Appendix 1). Note that the reference to "Economic Development Services" includes lands, memberships and estates.

212. Again, Lawson, Lundel state at page 55: "The 1977 Agreement should be considered null and void and accordingly the rights and obligations purported to be granted by it should be extinguished. Any other letters or documents purporting to vest in the Band Council the

authority to act on behalf of or instead of Her Majesty should receive the same treatment, unless specific statutory authority exists for such delegation."

213. Authority exists and has been provided in accordance with:

- T.B.M. 725973 April 1, 1974
- F.A.A.
- Indian Act. Sections 53 and 69 (Page 29)

The Crown as Landlord of Unsurrendered Lands

Opinion - Lawson, Lundell

214. Locatee leases are entered into by the lessee and Her Majesty on behalf of the locatee. Her Majesty acts as landlord because the only mechanism for the leasing of locatee land is as provided by Section 58(3) of the Act, which permits Her Majesty to enter into leases for the benefit of an Indian. (Page 56)

215. It may be thought that Section 58(3) is anachronistic, that Indians have outgrown the need for protection and that the role of Her Majesty as lessor is an empty role, useful now only in satisfaction of a technical requirement. Nonetheless, the statute must prevail and Her Majesty is the lessor named in the lease and so is landlord of the premises. As such, Her Majesty is subject to the obligations at law of a landlord.

216. One of the obligations of a landlord is to provide the tenant with quiet enjoyment. This means that Her Majesty must assure to the lessee that he will have possession of the leased property without interference.

217. Numerous examples described under other headings in this report have come to our attention of interference by the Band Council with the quiet enjoyment of premises demised by locatee leases. (Page 57)

218. We believe that the Department owes to lessees, in addition to the strict legal obligations to assure quiet enjoyment, a moral obligation to ensure that lessees are dealt with in a fair and reasonable manner and that they are not frustrated in the normal use and enjoyment of their land by the activities of the Band Council, the Band and the Chief. The moral obligation arises from the fact that many lessees entered into leases with Her Majesty in the not unreasonable belief that they would deal with Department officials, and not the Band Council, on all lease-related matters. Certainly most and perhaps all persons who entered into leases before the existence of the 1977 Agreement became known were of this view. Many of them have found that their landlord-tenant relations deteriorated significantly when the Band Council assumed from Her Majesty the day-to-day function of landlord. (Page 58)

Comment - Sparks

219. While I can sympathize with Lawson in his argument, I must remind the reader that there is quite a difference between a landlord and a local government. It is true that, in some instances, the Band Council and certain members of the Council, appeared to be both landlord and government. Even that scenario is not uncommon in small communities. One must remember that in 1970, there was virtually no formal form of government over those lands set aside for the Westbank Indian Band known as I.R. No. 9 and I.R. No. 10. There were approximately less than 300 persons resident on these two Reserves. Within a 10 year span the on-reserve population had grown to over 3,000, a tenfold increase. Even a large city such as Ottawa, if it were to experience such an expansion from a population of approximately 500,000 to 5,000,000 in a 10 year span, would require a far more sophisticated form of local government and also the infusion of many millions of dollars in both hard and soft infrastructure in order to meet the legitimate requirements of the citizens within its boundaries. The Band Council had, during the 1970's and early into 1980, recognized the necessity of providing a scheme of law and order and also certain soft and hard infrastructure services such as social assistance, water, garbage collection and traffic control. These are quite different interferences with absolute freedom that a tenant might enjoy than those guaranteed by a landlord under a lease. The landlord guarantees quiet enjoyment subject to the law whatever its source. That includes the law existing in the community in which the demised premises are situated. While there may be a certain amount of conflict of interest, it is not entirely fair to say that the Westbank Band Council created an entirely unreasonable situation for the lessees of Her Majesty. The most serious concern, that may have some validity, is that the Region/District staff exercised a minimum degree of responsibility in carrying out their duties with respect to leases of the Crown. (Pages 12-13)

Comment - Clarke

220. We agree. We also believe that the Department owes an obligation to Bands to ensure that lessees undertake their contractual responsibilities which are for the sole benefit of the Band or Band members in a reasonable and fair manner. Whilst the rules and regulations for the use and development of Reserve lands can be confusing it is to be expected that prudent and reasonable development providing a fair economic return will be the standard for all parties. (Page 33)

221. Lawson, Lundell state at page 58: "Many mobile home park operators told us that the saleability of their investments and their ability to rent mobile home park pads were materially adversely affected when it became known that the Band Council had taken responsibility for lease administration. In fact, advertisements for leasing mobile home pads in local newspapers sometimes include the phrase "Not on Indian lands".

222. Whilst it may be true that with an over supply of mobile home sites, the preference of rentals may be to development off Reserve, the evidence is not consistent to support this theory. The location, facilities and management of a mobile home park are several of the key factors in attracting renters and purchasers. Poorly run, badly maintained, crowded, and inadequately planned parks do not attract a stable market. Several of the first mobile home parks on reserve tended to fall into this category. The Band attempted to improve these parks so that they would be comparable with such parks as Mount Boucherie which provides quality residential accommodation and facilities.

223. I would suggest that as, with the exception of Park Mobile Homes, all parks were developed, following the closure of District office, with the direction of negotiations through the Band Council and not with the Department, that the rules have remained consistent. (Page 34)

Recommendation - Lawson, Lundell

224. The Department should acknowledge its responsibility for landlord-tenant relations on locatee lands and comply with the legal and moral obligations owed by Her Majesty to the locatee leases. As stated in Section F(a), the 1977 Agreement under which the Band Council purports to exercise authority over locatee leases should be terminated. The Departmental employee referred to in Section H should discharge on a day-to-day basis the responsibilities of Her Majesty in this regard. (Page 59)

Comment - Clarke

225. It is suggested that the Agreement should be amended to take into consideration subsequent delegations of authority (Section 53) and superceded on confirmation of authority to the Band under Section 60. (Page 36)

Overview

226. It is, of course, beyond discussion that Her Majesty always strives to act within the highest of moral and ethical standards. Defining the reasonable boundaries of moral conduct has always been an elusive and oftentimes frustrating exercise in Canada. It may be that Her Majesty's agents may not have placed those boundaries in the same location as Lawson, Lundell. However, notwithstanding, the comments of both Sparks and Clarke clearly indicate that they have no difficulty in ascribing a moral obligation to Her Majesty.

227. The difficulty encountered here is that Lawson, Lundell appear to be fusing morality and legality to a confusing degree. Unquestionably the department owes a "... moral obligation to ensure that lessees are dealt with in a fair and reasonable manner ..." But this moral obligation must also be exercised within and tempered by the applicable legal framework. One cannot expect to be free to manoeuvre oneself into untenable or disadvantageous legal positions and then rely upon the invocation of a claimed moral obligation on the part of Her Majesty to evade the legal consequences of one's actions.

228. This, of course, is symptomatic of the pitfall of dealing only in "generalities". If specific examples of immoral neglect of duty were provided one could respond in a more positive and pragmatic sense. However, even working from the inference of the Lawson, Lundell view point, we are of the opinion that there is a moral obligation on the part of the Department to notify lessees, and other affected parties, when there is a delegation of powers which will effectively change the persons, and procedures, that they had customarily come to expect to deal with and within. These changes should be outlined in writing and detail the implications for the lessees. The Department should also have a general policy plan to deal with those lessees who expressly do not wish to continue as lessees under the terms of the proposed change. Other than this, and in the absence of specific fact situations, we see no further moral obligations that can be reasonably attributed to Her Majesty.

229. With respect to the Lawson, Lundell recommendation regarding the termination of the 1977 Agreement, this recommendation has been effected with respect to lands (see Band Council Resolution 1985-85/07 dated June 3, 1985).

Responsibilities

Lawson, Lundell Opinion

230. In this section we intend to deal with complaints received by the Department which do not concern areas for which the Minister has specific statutory authority, such as landlord-tenant relations, estates and Band membership.

231. Individual Band members and locatees often look to the Department in Vancouver for assistance. Very often the assistance requested is in obtaining relief from grievances against Chief R.M. Derrickson and the Band Council. Three examples are as follows: (Page 59)

Example #1

232. A mobile home park operator complained to the Minister that he had been required by a Band by-law to set aside 7.5% of his leased area for recreational purposes and that only after having done so he learned that the by-law had been disallowed by the Minister. The Department wrote to this complainant stating:

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

Example #2

233. A Band member wrote to the Department complaining that the Band Council had cancelled his application to the "Regional Agriculturalist for Social Economic Development, B.C. Region" for assistance to start a small farming operation. The Band member wrote "Why is this? I think I deserve a chance to start this operation." The Department replied stating:

> "Applications for assistance through Departmental programs usually require the support of a Band Council. If you have reason to believe that you are not receiving reasonable support we can discuss the situation with your Council. Your first action however would be to ascertain reasons for delay, assuming that this is still with your Council."

Example #3

234. A mobile home park tenant complained to the Department that electrical services had not been supplied to his trailer because of action taken by the Band Council. We understand that the Department's reply was that:

> "I understand that until the operators of (the mobile home park) comply with their lease which required that applicable by-laws be met, no services can be provided to these new mobile home pads."

235. Typically, three types of response are given by the Department to requests for assistance. The Department takes the position that the complainant should settle the matter with the Band Council, that the complainant should litigate the matter in Court or that, in effect, the complainant should forget his problems. That this assessment is correct was confirmed by members of the B.C. Regional Office of the Department. One of these officials told us that the B.C. Regional Office is intimidated by Chief R.M. Derrickson. There is a fear that Chief R.M. Derrickson would complain to Departmental officials in Ottawa about any attempt by the Regional Office to restrict the activities of the Chief and Band Council and to become more directly involved in affairs concerning the Westbank reserves, and that officials in Ottawa would support Chief R.M. Derrickson and not Regional Office officials. This accounts for the policy of the B.C. Regional Office, described to us as the belief that the boat ought not to be rocked. (Pages 60-61)

236. It would seem to us that the Department is probably correct in avoiding embroilment in disputes and squabbles between individuals and the Chief and Band Council: it is not the function of the Department and its officials to act as mediator or, as some complainants would require, as advocate for the complainants. We would make one exception from this general statement, and that is with respect to a petition made to the Department by a majority of the electors for the removal of Chief R.M. Derrickson. Under Section 78 of the Act the Minister has the power to remove the Chief of an Indian Band in certain circumstances. The B.C. Regional Office of the Department was not interested in this petition. The B.C. Regional Office takes the attitude, we were told by one of its members, that anyone can find majority

support in an Indian reserve for any petition. Chief R.M. Derrickson made a similar statement to us. We believe that this treatment of the petition represented responsible administration by the Department of its powers under the Act. (Pages 61-63)

Comment - Sparks

237. This Example #1 response, which is shown on the top of page 60, is typical of Departmental responses. The operator appears to have no advice as to whether or not the demands of the Band, for a portion of his lease area for recreational purposes, have validity in a Band by-law. It is not the responsibility of Departmental staff to interpret Band legislation and probably this should have been conveyed more forcefully to the complainant. In any event, the lessee should have determined from reading the appropriate by-law (which determination is quite possible), what lands might be required and then having complied with the by-law seek a Write of Mandamus to pursue his lawful purposes.

238. The Example #2 does not appear relevant to the purpose of the Lawson Report.

239. I agree with Lawson in his summary of the tone of the responses by Regional/District staff to complainants with respect to not only the Westbank Indian Band, but other Reserves. I believe that this is an omission of duty and that the Regional/District staff has a responsibility to clearly define the parameters of authority of the Department, the Band, and the Band Council. The writer, from his own knowledge, is aware that there were differences within the management of the B.C. Region with respect to the performance of Departmental duties in the events affecting the Westbank Indian Band. The then Regional Director General was very supportive of the Westbank Indian Band Council in its efforts to generate wealth and develop community government. There may have been a mistake in judgement exercised by Region/District staff with respect to the propriety of dealing in a less than objective manner with issues affecting the Westbank Indian Band. However, a number of the issues that have been raised really reflect disputes between sub-lessees and lessees (I.R. mobile home park residents). Unfortunately, from time to time the Chief and Band Council did intervene in these disputes and thereby embroiled the Department in the dispute.

240. Lawson makes some comments with respect to the removal of the Chief. A careful examination of the Indian Act discloses that Section 78(2)(a) empowers the Minister to remove or declare a position on Council as vacant when a person is convicted of an indictable offense, dies or resigns; becomes ineligible to hold office by virture of the Act; that he has been absent from a Council for three consecutive meetings without being authorized to do so; or was guilty, in connection with an election, of corrupt practices, accepting a bribe, dishonesty, or malfeasance. The best evidence available is that none of the petitions submitted to the Regional Office made allegations that fulfilled any of these requirements. (Page 13)

Comment - Clarke

241. The record also clearly establishes the position of the Region as available to assist in any disputes so long as the authorities transferred to the Band (Sections 53 and 69) and the covenants contained in any contractual agreements are fully considered as basic authorities.

242. I have been unable to find that any of those Regional Officers interviewed and identified in the report were of this view. The policy of the B.C. Regional Office "that the boat ought not to be rocked" is not supported by such facts as the recommendations contained in the report by the Director of Reserves and Trusts (B.C.) to the Directors General (B.C. and Reserves and Trusts). (See Appendix I Tab 1) (Page 38)

Comment - Roberts

243. Page 62 - petition to unseat Chief Derrickson. First I would agree with the statement that generally petitions are not a reliable document upon which to take action either in or out of an Indian Reserve. Signatures are easily obtainable on just about any question you wish to name, and generally there is no proof that the person named did in fact sign, was aware of what he was signing, had the power to sign, or did it freely, etc., etc.

244. In any event, Section 78 of the Indian Act limits Ministerial authority to relieve elected members of Council from office for very specific reasons only e.g., missing Council meetings, being convicted of an offence etc. The report does not indicate that the basis of the petition came within any of those permissible reasons. (Page 11)

Recommendation - Lawson, Lundell

245. Departmental officials in Vancouver should make it clear to complainants that the Department does not consider it appropriate to mediate or provide any assistance in connection with disputes between individual Band members, lessees and sublessees and the Chief and Council, which do not involve matters for which the Minister has specific statutory authority. A response to this effect should be the only response given. It will soon become known generally that complainants should direct their energies in other directions. At the same time, Departmental officials in Vancouver should maintain a posture of neutrality and objectivity. (Page 63)

Overview

246. With respect to the examples of complaints put forward by Lawson, Lundell one can only concur with their own basic assessment, i.e. "... the Department is probably correct in avoiding embroilment in disputes and squabbles between individuals and the Chief and Band Council: it is not the function of the Department and its officials to act as mediator or, as some complaints would require, as advocate for the complainant ..."

247. Lawson, Lundell attribute to the Department three basic responses to requests for assistance. In putting forth their views they appear to have missed the quintessential point that the Department, in all its operations, is bound first by the law and secondly by the policies of the government of the day, as both are found at any point in time.

248. Therefore, as has already been pointed out, with respect to the removal of a Chief or Band Councillor from office, the law is as set out in Sections 78(2) and 79 of the Indian Act. Neither the Department, nor anyone else, has the authority to deviate from the dictates of the Act.

249. It is particularly disconcerting to receive a statement, such as this one respecting removal of the Chief, from a group of barristers and solicitors. The failure to refer to Section 79 would appear to indicate, at best, an inattentive reading of the statute. In any event, the bland referral to Section 78, leaving the wide inference, as it does, that it gave the Minister the power to act to remove the Chief, is disappointing. Sections 78 and 79 are drafted in simple and clear language. A perusal of the Sections clearly indicates that there is no grounds

to be found in either of these Sections to support removal of the Chief from office under the circumstances set out by Lawson, Lundell. Clearly, unless the Chief's actions brought him within the scope of Sections 78 and 79 of the Act, then the remedy of the disgruntled petitioners is to exercise their democratic rights through the political process at the next Band Council elections.

250. In view of the wording of the Statute, we are of the opinion that Lawson, Lundell's conclusion: "... We do not believe that this treatment of the petition represented responsible administration by the Department of its powers under the Act ..." constitutes unfair comment on their part that cannot be substantiated by direct reference to the wording of the Act.

251. With respect to the other matters raised, they appear to be totally oblivious to the fact that successive governments, for at least the past 15 years, have steadfastly maintained a policy that the "paternalism" of the past was no longer appropriate to define the relationship between the Crown and Indian Bands. Certainly, for the past decade, successive governments have struggled to formally redefine the role of Indian Bands in the Canadian political mosaic.

252. Pending political redefinition, the Department has concurrently struggled to facilitate and promote government policy and long term objectives within the confines of the present Indian Act. The statute is now generally conceded to be antiquated and irrelevant to the 21st century and the new aspirations of Canada's aboriginals. Nevertheless, it is the law and until amended, or otherwise redefined, it is the basis of authority to which all Departmental acts must refer. Perhaps the concluded opinions of Lawson, Lundell might have been more beneficial had they given more weight to the difficult, if not totally untenable, position of the Department in these difficult matters.

Comment - Sparks

253. Recommendation of Lawson. It is quite clear and should be implemented.

Leases - Comments on Substance and Method of Execution

Lawson, Lundell Opinion

254. We have reviewed each of the leases (and supplementary material attached to such leases) being all the leases provided to us by the Department comprising portions of

surrendered and Reserve land in Tsinstikeptum Reserves 9 and 10. Schedule C to this report sets out relevant details of each of the leases which have been entered into between Her Majesty and corporations formed by the Band, individual Band members or non-Indian lessees.

255. As we have been required to review all aspects of selected land transactions as well as leases, we mention that complaints were made to us by Indians who claimed that their rights to the property concerned have been violated or extinguished. We were unable to substantiate these claims. However, if these complaints can be substantiated the right of the current locatee to the property may have been improperly acquired and may be of questionable validity. The historical review of those claims is extremely complex and time consuming and in many instances has previously been done by your Department or your consultants. The substantiation of these individual complaints for this report is not practicable and we made this quite clear to the Indians we interviewed. As there are several Indians who sincerely believe they have been aggrieved we are including a recommendation to assess their complaints under Section N where the initial evidence of complaint obtained under oath in the course of the public inquiry warrants further investigation.

256. The following aspects of the leases have been considered:

i) whether in the case of the leases made pursuant to Subsection 58(3) of the Act the locatee has made proper application to the Minister in connection with such lease as is required by such subsection;

ii) whether the Band Council has, pursuant to Departmental policy, as stated in Programme Circular, Indian and Inuit Affairs dated April 1, 1979, No. H-3, Section 18.04, approved the application for each lease made pursuant to subsection 58(3) of the Act.

iii) whether the leases have been properly executed on behalf of Her Majesty;

iv) whether each lease has been properly executed by the lessee. We express no opinion whether the signature is authentic or if the signing officers of a corporation had authority to sign on behalf of the corporation; and

v) the length of the term of each lease.

257. Before commenting on specific aspects of leases, we wish to draw to your attention a specific provision which appears in most of the leases which we have reviewed and which we have set out below in its entirety:

> "6.05 The Lessee agrees that if the building or improvements on the land are damaged or destroyed he will either (subject to clause 6.08) spend all insurance moneys received for the loss in repairing the damage or rebuilding in case of destruction, or if Her Majesty requires, and if Her Majesty releases the Lessee from his liability to repair or rebuild, will assign his entire interest in such insurance moneys to Her Majesty and surrender the balance of term to Her Majesty."

258. We are of the view that this provision is not one which should be included in commercial leases of this nature as it provides that in the event of damage or destruction, the lessor can require the lessee to pay over all insurance proceeds to it and then terminate the lease, notwithstanding that the lessee, in all probability, has constructed the improvements using its own funds. It seems to us that this provision is unreasonable. (Pages 65/66)

Comment - Sparks

259. This is within the Indian and Inuit Affairs Program Circular No. H-3, Section 18.04, which is referred to by Lawson in the Report. This operational policy is apparently based upon an opinion provided by a junior counsel in the Department of Justice and which is not generally supportable upon a reasonable examination of appropriate case law. There might even be a substantial case that could be made for breach of fiduciary duty on the part of the Minister or his staff for encouraging or constraining an Indian, who is in lawful possession of a portion of a Reserve, from entering into a beneficial financial arrangement, both to himself and his heirs.

260. Lawson's comments with respect to Section 6.05 have validity and should be generally implemented. However, there should be a provision that in the event of the lessee being insolvent, the proceeds of an insurance

settlement should be payable to the Crown to be applied against rentals due pursuant to the contractual obligations of the lease. (Page 14)

Comment - Clarke

261. This clause was included in all Crown leases at the request of the Department of Justice. (Page 43)

Overview

262. We concur in part with the Lawson, Lundell observation regarding the standard provision for the use and application of insurance proceeds. We were unable to substantiate Clarke's assertion that the clause was inserted at the request of the Department of Justice.

263. In any event, we are of the opinion that a clause of this nature is not necessarily unreasonable in such leases, but that the wording of this particular clause is both unreasonable and unfair. Accordingly, we are of the view that the clause ought to be referred to Justice with a request that it be redrafted so that the purpose for which it was intended can be achieved without its being unreasonable and inequitable to the lessee.

Reserve Land Register

Comment - Lawson, Lundell

264. We have also reviewed each Reserve Land Registry folio pertaining to Reserves 9 and 10 as supplied to us by the Department. In our review of the folios from the Reserve Land Registry, we are assuming that all entries in such registers have been made correctly and completely reflect the dealings with the various lands as such dealings are reflected in documents delivered to the Department. This assumption does not override our concern in certain cases that the documents do not reflect a proper transaction. Those folios dealing with the leases numbered 1 to 49 have been reviewed in detail. The remaining folios do not refer to registered leases. (Page 67)

Comment - Clarke

265. I believe that during my "interview" with Lawson, Lundell, I advised that the Reserve Land Registry abstracts should only be treated as a general information base and that:

1. specific agreements should be obtained using the folio number; and

2. there may be instances where documents or agreements were not yet registered. (Page 44)

Applications

Comment - Lawson, Lundell

266. Many of the applications of locatees pursuant to Subsection 58(3) of the Act are, in our view, inadequate. In certain instances, locatees have signed an application form directed to the Minister which sets out all pertinent provisions of the proposed lease. However, the most common form of "application" is to have the locatee sign the back cover page of the lease. In other instances, locatees have signed the Band Council resolutions which only in some instances set out the pertinent terms of the proposed lease. An application for a lease should precede the Band Council resolution and not follow the approval. This casual procedure is unsatisfactory in that the endorsement of a Band Council resolution does not properly constitute an application.

267. We also note that locatees in several instances have not consented to assignments of leases and amendments to leases at the commencement of the rent revision period. (Pages 67/68)

Comment - Clarke

268. This is a standard practice used across Canada in an attempt to satisfy ourselves that the locatee has seen and approves the agreement. In many instances the locatee has previously signed and approved the "Application to Lease Land" form.

269. At page 68 Lawson Lundell state:

> "We also note that locatees in several instances have not consented to assignments of leases and amendments to leases at the commencement of the rent revision period."

270. Direction and policy is vague on this. It is generally considered good practice and common sense to ensure that the Band Council/locatee are fully aware and informed of any changes or amendment. On the other hand, legal advice supports the position that the Band or locatee interest has been replaced by the lessees interest and only the benefit retained.

Comment - Sparks

271. There is no statutory requirement for the consent of assignments and amendments of leases on the part of the locatee.

Recommendation Re Applications: Lawson, Lundell

272. The Department in consultation with the Band should utilize its standard printed form of application to lease. This application would be sufficient if it also contained details of the shareholders of corporate lessees and blank spaces to accommodate any unique terms which may vary from the standard form of lease. Attached to the application should be a standard printed form of lease between Her Majesty and the lessee, to be completed and executed by the Department in Vancouver upon approval of the application. The application would be completed and signed by the lessee and the locatee at the completion of their negotiations.

Overview

273. With respect to applications for locatee leases it appears that Lawson, Lundell make a valid point regarding procedure. Discussions with National Headquarters and Ontario Region personnel indicate that the most common form of "application" accepted by the Department is the locatee's consent signature on the lease document.

274. The correct procedure is set out in the Lands Transaction Manual at chapter ?, page ?. All departmental personnel should be following this procedure and any deviation should be reasonably justified within the context of the facts of the particular case.

275. We have not been able to substantiate Mr. Clarke's assertion that "... legal advice supports the position that the Band or locatee interest has been replaced by the lessees interest and only the benefit retained ...". However correct this assertion may be at law, with respect to Band/locatee consent to amendments, we are of the opinion that legal services would probably wish the opportunity to revise this position to ensure consistency with the overall impact of the Guerin decision of the Supreme Court of Canada.

276. We disagree with Mr. Clarke's assertion that "... Direction and policy is vague on this ...". The policy is clear. See Lands Transactions Manual, chapter ?, page ?.

Comment - Lawson, Lundell

277. We note that the standard form of application has rarely been used in connection with the leases which we have reviewed and recommend that it be used in each instance.

278. We also recommend that prior to execution of a lease amendment agreement which sets a revised rent for a period of years, some evidence of the locatee's consent be required as it is the locatee who is receiving the rent. (Pages 68/69)

Comment - Clarke

279. We agree. After considerable negative response from some Bands, and even some officers of the Department, this has now become a standard practice required by policy.

280. Note that all the Bands in the original Kootenay-Okanagan District were provided with copies of these "Applications" together with guidelines for use in cases of lease applications. (Tab 14, Appendix 1) (Page 48)

281. Whilst this has been considered many times, the nature of leasehold and the need to involve Bands in negotiations has tended to prevent the development of standard printed forms with the exception of residential and agricultural leases.

282. This recommendation is worthy of further study and discussion with several Bands.

Comment - Sparks

283. Lawson's comments regarding a standard printed from of lease, etc. are quite agreeable to the writer, however, experience in property management by commercial developers discloses that this process simply is not practicable. For standard residential leasing, an application form of the nature suggested by Lawson would be in order. However, as most of the complaints outlined in the Lawson Report are in fact complaints by commercial lessees, experience has shown that the complexities of commercial arrangements generally preclude the preprinted form suggested by Lawson.

Overview

284. We are aware that the legal fraternities of most Provinces have developed "standard form commercial leases" for use within those Provinces. We are also

cognizant of the advantages of such a procedure. However, we are not convinced that the "standard form" can be effectively utilized to accommodate the complexity and individuality of commercial leases of Indian lands. Notwithstanding, there appears to be considerable potential merit in the proposal and we are of the opinion that its feasibility should be explored.

285. With respect to the obtainment of locatee/Band consent to amendments to leases, particularly with respect to revised rents, we are of the opinion that the Guerin decision would demand that this step be taken.

Length of Term of Lease

Comment - Lawson, Lundell

286. The length of the term of most of the leases does not comply with the policy of the Department as stated in Circular H-3, Section 18.04. The stated policy of the Department provides that where a lease is to be entered into pursuant to Subsection 58(3) of the Act a term greatly in excess of 21 years should be discouraged. Of the 52 leases reviewed, the terms of 46 are in excess of 21 years, 25 are in excess of 42 years and 14 are in excess of 97 years. Only six of the leases were for a term of 21 years or less. The acquiesence of the Department in approving these leases contrary to its stated policy is confusing to say the least. Leases of 42 years and more are normally considered a ground lease for a substantial permanent development. Many of the current uses do not fall into this category and in fact evidence a temporary or short-term use. Periodic rental adjustments are not sufficient to give proper benefit to the Indians and in our view the Minister has not discharged his obligation. (Pages 69/70)

Comment - Sparks

287. Lawson does not appear to understand what, in reality, some of the current uses are. This may be a matter of semantics. Many of the leases are referred to as trailer park leases, when in fact they are leases of land for the development of manufactured home subdivisions. They are not a temporary or short-term use. It is not yet determinable what the expected lifespan of a manufactured home might reasonably be. However, manufactured home parks have units which have survived close to 50 years in the United States, and as the developments in Westbank are certainly the product of the last 15 years or less,

it is probably that the lifespan will be as great or greater. Manufactured home parks usually are a denser use of land than ordinary single family dwellings, and therefore add to the value of the land and increase the lands' production of revenue both to the lessee and the lessor. (Pages 14/15)

Comment - Clarke

288. If Reserve lands are to be used to their highest and best use in British Columbia, then generally any commercial leases will have to be greater than 21 years. The exceptions may be small, unimproved recreational developments and agricultural uses.

289. The policy of the Department is to limit the length of the lease to its shortest term whilst ensuring that it is of a long enough duration to support a successful development. Where substantial financing is required under a mortgage of the leasehold it is unlikely to have terms any less than 30/35 years for good quality commercial leases. A shorter term would indicate an unsophisticated developer. (Page 50)

290. The great majority of leases at Westbank are for commercial purposes. Those for trailer parks provide security for a form of residential development more commonly termed "manufactured housing". Few of the improvements, once built, are capable of being moved.

291. The standards required to service such trailer parks are almost the same as any residential subdivision and the capital costs would not be protected by a short term lease.

292. The critical requirement is the ability for periodic review of rentals -- not the length of the lease. (See the Guerin decision) (Page 51)

Recommendation Re Length of Terms of Lease

Lawson, Lundell

293. Policy directives should be fully considered, clearly specified and properly enforced.

294. Proper short, intermediate and long-term planning is necessary to relate the term to the use. Mobile home parks may be the most economically beneficial short-term

use. But we do not think leases in excess of 21 years for this use are realistic for the benefit of the Indians. (Page 70)

Comment - Clarke

295. We concur that policy directives should be fully considered clearly specified and properly enforced. (Page 52)

296. See response to 51. We do not consider that the authors of the report had the competence or experience to comment on land development and real estate economics. (Page 53)

Overview

297. It is indeed disconcerting that, after allegedly reviewing 52 leases, Lawson, Lundell offer the bold conclusion that "... the Minister has not discharged his obligation ..." without feeling the need to refer to even one specific lease whereby concrete examples could be produced for review and scrutiny. Unfortunately, we are forced once again to deal with sweeping conclusions based on broad brush treatment and unsupported opinion.

298. Notwithstanding, we are of the opinion that the comments offered by Clarke and Sparks are substantially correct. Lawson, Lundell appear to have failed to appreciate that the "overriding policy" of the Department is to support and facilitate the bona fide business aims and objectives of locatees and Bands. It is not the role of the Department to frustrate a business venture of an Indian entrepreneur through the unwieldly application of some policy directive.

299. To ensure a proper appreciation of what is happening here, it is necessary to maintain the proper historical perspective of the role and function of "Policy" in a large bureaucratic organization. Statutes, and regulations passed pursuant to statutes, constitute the law and set the parameters within which all actions must occur. Policy is the interpretative statement of senior management which identifies and sets out guidelines to ensure that the mandate of the organization is fulfilled within, and is consistent with, the parameters set by statutes and regulations. Statutes and regulations are absolutely binding. Policy directives are non-binding guidelines designed to assist decision-makers in making management decisions consistent with the law on a day-to-day, situation by situation, basis.

300. In our opinion Lawson, Lundell have failed to fully appreciate the subjective basis of policy interpretation and application and its role in the overall Departmental process. Most assuredly, the policy is correctly identified and the number of occasions of non-adherence is correctly stated; but it does not automatically and necessarily follow from this that the Department has committed some error.

301. Having reviewed the subject leases, we are not convinced, certainly in the absence of any substantive reason whatsoever being offered by Lawson, Lundell, that the exercise of management discretion in interpreting and apply the policy in the case of these leases was improper. One has to remember that present policy also requires that locatee leases have the consent of the Band Council and that leases over 21 years be forwarded to National Headquarters for review and decision. It is, therefore, reasonable to assume that, before a lease for an extended term is approved, it has been thoroughly considered by Headquarters Departmental staff. These staff are not subject to the same pressures that District and Regional staff may be exposed to and, accordingly, can be presumed to have weighed the pros and cons of the decision-making process within a more objective framework. In the face of Band Council approval, the Department would reasonably be required to produce very cogent reasons if it were to frustrate a business objective of a locatee merely on the grounds that the term of the lease was considered to be excessive. And, of course, there is still the issue as to what liability, if any, attaches to the Crown should a substantial business opportunity be lost as a result of Departmental actions in disallowing a lease based upon the length of the term.

302. As is obvious, the situation is not as simple and straight forward as may appear at first blush. The Departmental officer (usually a senior official) required to make the final decision is usually subjected to considerable pressures both pro and con. Generally speaking, to date, this situation has not been a major source of complaint from the Indian Bands. If anything, Indian Bands have been reasonably content with the Department's activities in this area.

303. Accordingly, unless Lawson, Lundell are prepared to come forward with fully substantiated concrete examples of when, where and how the Department has been remiss in the interpretation and application of this policy, it is our

opinion that they have given a cursory review to a very sensitive and complex area of policy and, based upon this cursory review, formulated conclusions which are totally unsubstantiated and unwarranted. We also think that it is quite probable that Lawson, Lundell would reverse itself if it were to review this situation again today within the context of the Guerin decision.

Execution of Leases

Comment - Lawson, Lundell

304. We refer to the delegation of authority under the Act signed by the Minister and dated June 10, 1980, the first page of which we attach as Exhibit D, and also regulations passed pursuant to the Act with respect to the execution of documents. From reviewing the leases, the Act and the delegation of authority, we doubt if the leases, which have been entered into pursuant to Section 58(3) of the Act and which purport to have been executed pursuant to such delegation of authority, have been validly executed on behalf of the Minister. Section 58(3) of the Act gives the Minister alone a discretion to exercise with respect to the leasing of Indian land and he has purported to delegate the exercise of that discretion, without guidelines, pursuant to a power of delegation which the Act does not support. It follows that the execution of these leases on behalf of the Minister pursuant to the delegations of authority dated April 21, 1976 and February 8, 1978 is also invalid. (Pages 70/71)

Comment - Clarke

305. This observation should be addressed by our legal council who originally recommended the existing delegation of signing authorities.

Comment - Sparks

306. Generally agree with Lawson's comments, but I would draw your attention to Section 3(2) of the Indian Act which "authorizes the Deputy Minister or the Chief Officer in charge of the Branch to perform and exercise any of the duties, powers and functions that may be or are required to be performed or exercised by the Minister under this Act or any other Act of Parliament."

Recommendations Re Execution of Leases

Comment - Lawson, Lundell

307. We recommend that any one of three senior B.C. regional officials of the Department sign all leases. The delegation of authority for execution of leases should be specified under a specific section of the Act. (Page 71)

Comment - Clarke

308. At the present time most authorities delegated to the B.C. Region are for either two or three senior officials.

309. For clarity and ease of performance, evaluation, review and consistency, it would be beneficial that the authority rested with only one officer.

Overview

310. Lawson, Lundell's comments with respect to the invalidity of the Minister's delegation of authority are a cause for considerable concern. Should they be correct the implications may well be far reaching indeed, perhaps to the extent of special deeming legislation to legitimize the errors of the past. In any event, if the Department has not already done so, we recommend that this matter be referred immediately to legal services for opinion on a priority basis.

Specific Comments Re Leases

Note:

311. From pages 71 to 76 inclusive of the Lawson, Lundell Report, they have provided specific comments on individual leases. Mr. Clarke has responded individually to some of these observations. We have reproduced the Lawson, Lundell comment followed immediately by Mr. Clarke's comment on an observation by observation basis.

Lawson, Lundell:

312. For leases numbered 4, 26, 33, 34, 37, 39, 44 and 47, no Certificate of Possession has been provided to us although we requested these and for leases numbered 7, 10, 13B, 23, 35, 41, 42 and 47, no Band Council resolution has been provided to us. (Page 72)

Clarke:

313. I can find no request to provide this information. Certificates of Possession or Notices of Entitlement and B.C.R.s are available for these leases. (Page 56)

Lawson, Lundell:

314. We note that in many instances, the assignment of leases and lease amendment agreements which set a revised rent for the ensuing period of years are not accompanied by a Band Council resolution. (Page 72)

Clarke:

315. The policy of the Department does not require any subsequent B.C.R.s unless a lease agreement is amended. The revision of rental and any assignment is part of the original contract which has received the consent of the Band prior to acceptance by the Minister. (Page 57)

Lease No. 5

Lawson, Lundell:

316. The plan attached to the sublease to Park Mobile Home Sales Ltd. appears to include the road which has been the subject of some controversy. (Page 72)

Clarke:

317. The plan, together with a compilation of the acreage, provides evidence that the roadway was not part of the lease. Although the copy of the plan (Appendix II Tab 3) is confusing, a review of the original to determine the extent of area coloured red should be made.

318. Clearly the road is not part of either Lot 31 or Lot 32. (Page 58)

Note:

319. We are advised that the recent sale of Park Mobile Home Sales Ltd. to Ross Management Ltd. has resolved this outstanding controversy.

Lease No. 7

Lawson, Lundell:

320. We have not been provided with a copy of the sublease to Fuchs which is registered under number 52130. (Page 72)

Clarke:

321. This sublease is registered under number 53230 on Lot 24-2-2. (Page 59)

Lease No. 24

Lawson, Lundell:

322. The folio shows no evidence of a survey having been carried out although one appears to have been carried out prior to the issuance of the Certificate of Possession. This should be confirmed. (Page 73)

Clarke:

323. This refers to Parcel FF 2 I.R. No. 10.

324. Parcel FF 2 was transferred from N.C. Derricksan to R.B. Derrickson on June 29, 1977. There is no survey, but a surveyor's sketch from the Surveyor General is registered on the Notice of Entitlement No. 9111 (not a Certificate of Possession). (Appendix II Tab 4) (Page 62)

Lease No. 27

Lawson, Lundell:

325. The Band Council resolution refers to Parcel FF 14 instead of Parcel FF 5. We recommend that the Department review its records where the original documents are filed to ensure that this is only a clerical error. (Page 73/74)

Clarke:

326. By B.C.R. dated November 7, 1978, the Council corrected the previous resolution and clarified that the lease was on Parcel FF 5. (Page 64)

Lease No. 28

Lawson, Lundell:

327. It appears that this lease has been incorrectly signed on behalf of Ronald Carriere by his attorney, Lindsay May Carriere and therefore may be invalid. (Page 74)

Clarke:

328. The lessee's power of attorney was given under notary to his lawyer on a form which was used by the other provincial lands office pursuant to Section 45(1)(a) of the Entitlement Act of the Province of Alberta. This is an acceptable form for the Land Registrar's requirements, both in Alberta and Ottawa. (Page 65)

Overview

329. No comment was received regarding leases 29, 30, 31, 33, 35, 40, 45, 47 and 48. Perusal of the substance of these observations, including the one's upon which Mr. Clarke commented, clearly indicates that, in the interest of maintaining the integrity of Lands Registry records, they should have been referred immediately to the Registrar of Indian Lands for review, verification and rectification, if and where required. For reasons still unknown, the Department elected not to act upon the contents of the report. To the contrary, an unfortunate decision was made to restrict distribution of the report and to treat the whole matter as a "hush-hush affair". Consequently, to this day, no action has been taken regarding the observations concerning specific leases as set out in the Lawson, Lundell Report. If the Lawson, Lundell observations are correct, then the integrity of the Indian Lands Registry records has been compromised all these years and continues to remain compromised. Whether the records are in fact compromised or not is now irrelevant. The fact that Lawson, Lundell raised the individual matters in their report effectively passed a positive onus of duty to the Department to enquire and inform itself, to its reasonable satisfaction, that the observations were in fact correct or incorrect. The failure on the part of the Department to take this step constitutes a serious omission of duty.

Leases: Process of Negotiation

Comment - Lawson, Lundell

330. From our numerous interviews, discussions and review of material, we can advise that the current practice is that, normally, a locatee lease is negotiated and settled in the following manner: the locatee and the lessee settle the basic terms of the lease, often with the assistance of Chief R.M. Derrickson; the particulars agreed upon are approved by Band Council resolution and communicated to the Department in Vancouver; the lease

document is prepared by Departmental officials in Vancouver, by the lessee's solicitor or by the executive assistants for Chief R.M. Derrickson; it is then sent to the Band Council or to the lessee's solicitor; the lessee executes the lease; the lease is delivered to the Department in Vancouver which may seek the advice of a Department of Justice solicitor in Vancouver; Departmental officials in Vancouver execute the lease on behalf of Her Majesty, in some cases after obtaining approval of the form and substance from Headquarters staff in Ottawa, and the lease is then forwarded to Ottawa for registration.

331. Most locatee leases provide for a rent review and increase after a number of years. The determination of the renewal rent and the documentation of it is handled essentially according to the same procedure for the settlement of the initial lease.

332. There are a number of weaknesses inherent in these procedures and persons interviewed by us have described many problems which have arisen as a consequence of these deficiencies. These weaknesses are described below. (Page 76/77)

The Provision of Assistance By The Chief

Comment - Lawson, Lundell

333. As mentioned above, Chief R.M. Derrickson assists many locatees in settling the terms of leases and in negotiating renewal rents. Generally speaking the locatees are grateful for this assistance as Chief R.M. Derrickson is an able and experienced negotiator. We were in fact told by Chief R.M. Derrickson that even before he was elected as Chief he settled, on behalf of locatees, 95% of all leases of locatee land within the Westbank Reserves.

334. The Band Council is normally paid for the provision of the services of Chief R.M. Derrickson. Perhaps strangely, the locatee does not pay for this service. The lessee pays for the service, the payment taking the form of a "document processing and administration fee". We were told by the Band Administrator and two Councillors that there is no formal authority for the levying of this fee and that it is calculated according to the complexity of the negotiations and the time spent by Chief R.M. Derrickson on the matter.

335. We were told by a lessee that in one instance he was charged $15,500 as a lease and debenture registration fee. Of this $15,500, $6,500 was the fee the Band Council charged for having Ottawa register the debenture. Chief R.M. Derrickson offered to reduce this amount to $3,000 if paid within seven days. We were told that Chief R.M. Derrickson and Band Council in fact had no involvement in the preparation of the debenture. The remaining $9,000 was a lease registration fee. The lessee was told by Chief R.M. Derrickson that the lease document would not be prepared until this amount was paid.

336. In another instance a mobile home park operator was charged $1,000 as a fee for "debenture registration", notwithstanding that the debenture was registered in Ottawa without any participation by the the Band Council into the processing of the document.

337. This indicates that the provision of assistance by Chief R.M. Derrickson to locatees is utilized as a means whereby the Band Council may derive not insubstantial income from lessees. It is of interest to note that, as told to us by an official of the B.C. Regional Office of the Department, no fees are charged by the Department when it assists locatees on other Indian Reserves in negotiating and settling leases. Similarly, in these instances the Department does not charge registration fees.

338. By virtue of his office, the Chief is in a much more powerful position than the locatee he is assisting. Often Chief R.M. Derrickson has employed this power in lease negotiations. For example, when difficulties arose over the determination of renewal rent payable by Golden Acres Ltd., Chief R.M. Derrickson worte to the Royal Bank of Canada stating:

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

Chief R.M. Derrickson signed this letter on behalf of the Westbank Indian Council. As a consequence the operating line of credit of Golden Acres Ltd. was frozen, until a letter was written by your Department to Chief R.M. Derrickson, with a copy to the Bank, stating that the lease was in fact in good standing and was fully

paid. Again writing on behalf of the Westbank Indian Council to the lessee in an attempt to assist the locatee dealing with Golden Acres Ltd., Chief R.M. Derrickson stated:

> "We can in effect cancel your lease for the above illegal infractions, and we therefore suggest you execute the lease as previous (sic) agreed."

339. The criticism which we offer of the above is that while it may be appropriate for Chief R.M. Derrickson or some other person to provide uneducated and inexperienced locatees with advice and assistance in dealing with lessees, it is not proper for the Chief to employ the influence and power of the Band Council in this regard.

340. There is the additional problem that the Chief, in using in this way the powers and influence vested in him by virtue of his holding an elective office, benefits personally in those situations in which he is the locatee. This was in fact the case in the Golden Acres Ltd. dispute: Chief R.M. Derrickson and his father are the locatees of the land involved.

341. In another example involving land of which Chief R.M. Derrickson was locatee the renewal rent was increased to $42,908 from $9,600. The lessee wished to have this reviewed in Court; he commenced Court action for this purpose but then discontinued it as he was concerned that his litigation and appraisal costs would be prohibitive, while, as he had been advised by Chief R.M. Derrickson, the costs of the Band Council would be paid by Her Majesty. During the period that the renewal rent was being negotiated, the lessee experienced a number of unusual difficulties with the Band Council. The lessee stated that up until April 1981 he had had no problems with the Band or the Department. The review of rent caused disagreement and notwithstanding that his park development had been completed five years previously his file was reviewed and numerous demands were made. In addition to stating that the rent specified by the Band Council must be accepted or the lessee's required financing document could not be registered, the Band Council made additional requirements by letter dated April 21, 1983, reading as follows:

> "In reviewing your file the following items have come to our attention:

1. We require a copy of your insurance policy so we can determine if you are carrying adequate coverage.

2. We do not have a copy of the Dominion Fire Marshall approvals.

3. We do not have a copy of the National Health and Welfare approvals.

4. We have never received a copy of your soil tests.

5. We require 8 copies of your complete lot layout with all design changes or change orders.

6. We require a copy of your "as builts" which must have an Engineer's seal.

7. Require your final survey plan.

You have fourteen (14) days in which to comply with our request. Failure to do so may result in appropriate action being taken under the terms and conditions of your lease.

Yours very truly,

WESTBANK INDIAN COUNCIL"

342. These difficulties ceased as soon as the new rental had been set.

343. In a further example, the Chief's executive assistant told a lessee that if he did not pay a $9,000 real estate commission to a real estate agent within 24 hours his lease would be terminated immediately. Documents show that in fact the Commission should have been paid for by Margaret Derrickson, Chief R.M. Derrickson's mother.

344. Chief R.M. Derrickson and the Band Council would likely answer part of the criticism in this section by stating that the actions taken by Chief R.M. Derrickson in assisting locatees to settle leases are actions taken pursuant to the 1977 Agreement; that he was, in effect, authorized and directed by the Department to take these actions. As stated elsewhere in this report, we are of the view that the 1977 Agreement does not give the Chief and Band Council this authority. (Pages 78-82)

Comment - Sparks

345. Chief R.M. Derrickson probably is providing many locatees with valuable service in assisting them in negotiating the terms and conditions of leases and in rent renewals. However, he must exercise greatest care and be certain that all the parties involved in the negotiations are very clear that he is providing the assistance as a professional advisor and not as the Chief and Chairman of the Council of the Westbank Band of Indians. He should also have a business licence under the Band's by-law if he is collecting a fee.

346. Lawson is mistaken in his regarding the Band Council being normally paid for the provisions of the services of Chief R.M. Derrickson. It is, in fact, the Band that is normally paid, and the Band, in turn, pays Derrickson. There is no basis for this document processing and administration fee as has been mentioned above. The practice should be stopped immediately.

347. In this recommendation Lawson reinforces the recommendations of the writer contained above.

348. With respect to the comments of the Chief's executive assistant regarding the prepayment of a $9,000 real estate commission. If these matters were being handled by the Band administrator, as provided for in the Band by-laws, there would by no reason for Chief Derrickson to be involved and consequently, Council could control Chief R.M. Derrickson.

349. The supposition Lawson has put forward here reinforces the writer's belief that the Westbank Band and its Council used the 1977 Agreement and its various interpretations to their own benefit. (Page 15)

Overview

350. The situations set out in this section exemplify the difficulties faced by the Department in attempting to encourage self-reliance leading eventually to self-government on the part of the Bands within the context of an antiquated and irrelevant Indian Act.

351. Presumably, the recent delegation of Section 60 powers to the Band will now result in more clearly defined parameters of operation between the Band and the Department. The 1977 Agreement having been superceded by

the Section 60 delegation, the uncertainties and abiguities of the former will no longer confuse and glaze the division of responsibilities between the Band and the Department.

352. With respect to the modus operandi of the Chief, the Department will have to seriously reflect upon the allegations raised by Lawson, Lundell. Once again, the difficulty raised by the report is that serious allegations are made, but no names or other form of proof is provided. It is, we think, most unfair for business people, who negotiate at arm's length (and presumably with the benefit of independent legal advice) to allow themselves, for whatever reasons, to be cajoled or coerced into paying illegal and substantial sums of money without due enquiry into the necessity or legality of the demand and then, months or years later, when they have reason to suspect the validity of the payment, to expect the Department to shoulder the full blame for the result. If these people are not willing to come forward immediately with formal complaints of what they perceive to be illegal or inequitable treatment, then it is difficult to comprehend why they should not, at a later date, be personally liable for the results of their failure to come forward at the appropriate time. In our opinion, even if one assumes for the moment that the allegations are true, it is quite probable that those who now complain did not do so at the time because they, rightly or wrongly, felt there existed a business advantage to not complaining. Now that the business relationship has gone sour, they wish to come forward (again surreptitiously, as we still do not know who they are) and have the Department assume full liability for all the alleged wrongs which they suffered. In our opinion, in failing to make due inquiry, in failing to file a timely complaint, in acquiescing to the alleged demands and (allegedly) in actually paying over the moneys, the complainants were essentially the authors of their own misfortune. It must be remembered that, as a result of the Lawson, Lundell report, the RCMP were requested to, and did in fact, investigate certain activities of the Chief. The RCMP report was turned over to the local Crown prosecutor who concluded that there were no grounds for the laying of criminal charges against the Chief.

353. If there is no criminal activity present, then the only other possible illegal activities of the Chief and Band Council would be if a tortious act were committed which would attract civil liability. Only the courts are in a position to decide whether or not a civil wrong has been committed.

354. Those who complain, and are not yet statute barred by limitation, are now, and always have been, fully entitled to have their grievances brought before the court for determination. If they refuse to pursue their own civil remedies, it is difficult to comprehend why the Department should be expected to assume liability.

355. We note that, in the example given with respect to Golden Acres Ltd., the Department, when advised, responded quickly by notifying the Royal Bank of Canada that the lease was in fact in good standing.

Uncertainty Over Matters Agreed Upon

Comment - Lawson, Lundell

356. The uncertainty as to the lease terms has in many instances caused hardship for the lessees. For example, Park Mobile Home Sales Ltd. understood that its sublease from West-Kel Holdings Ltd. included a roadway running between Lots 31 and 32. This was disputed by the locatee who took the position that the roadway had previously been acquired by him from the Band. Development of the park expansion was delayed pending settlement of the matter which was accomplished by the payment of approximately $20,000 by Park Mobile Home Sales Ltd. to the locatee and an agreement to pay $500 per month thereafter as additional rent for the roadway area.

357. The recurring problem over uncertainty and the resulting hardship ought to be avoidable. (Pages 84/85)

Comment - Clarke

358. The records provide clear evidence that when this land was leased from the Crown to West-Kel Holdings in June 1971, the road between Lot 31 and 32 did not form part of the leased lands. The subsequent sub-lessee, Park Mobile Home Sales Ltd. made an error in developing lands that were not under their sub-lease. (Page 77)

Abrogation of Responsibility by the Department

Comment - Lawson, Lundell

359. Locatee leases are formally granted by the Minister on behalf of Her Majesty, acting under Section 58(3) of the Act. Under this Section 58(3) the Minister is given the power to grant the lease, but it must be "for the benefit of the locatee".

360. In our view this puts the Minister in a fiduciary relationship with the locatee or, if not that, at least obligates the Minister morally to ensure that the lease does benefit the locatee.

361. If the locatee has been subjected to undue influence in deciding to enter into a lease, then the lease may not be for his benefit. If the term of the lease or the use to which the land will be put are not consistent with the locatee's long-term plans for himself and his family, then it will not be for his benefit. And if the lease rent is less than market rent, then it will not be for his benefit.

362. The obligation of the Minister to the locatee commences with the negotiation of the initial lease and continues throughout the term of the lease. The continuation of this obligation means that the Minister must protect the locatee's interests not only when renewal rent is being determined but also in the enforcement of the lessee's covenants contained in the lease.

363. We believe that the Minister has abrogated this responsibility. By way of the 1977 Agreement the Minister has purported to delegate to the Band Council the responsibility for negotiating "with lessees and permittees as to revision of rentals, new rentals and enforcement of terms and conditions in agreements". The Minister also charged the Band Council with responsibility to review "land agreements to identify date of annual rental, date of review and expiry dates and breaches and defaults and advise the Regional Office accordingly".

364. In our view the Minister cannot relieve himself of his obligation owed to the locatees by delegating the responsibility to someone else. That the Minister has in fact purported to do so is apparent from a letter dated August 8, 1980 from Mr. Peter Clarke to a mobile home park operator in which Mr. Clarke states:

> "Please note that the members of the Westbank Band have given their approval to the Band Council to administer and manage Reserve lands on behalf of the Crown under authorities within the Indian Act. This means in practical terms, that the Band Council has the equivalent authority of this office in negotiating and approving any changes or amendments to the existing lease and to the performance of the covenants within the agreement."

365. We believe that the B.C. Regional Office has in effect abdicated its responsibility to the Band Council. Additional discussion of this point is contained in Section F(b). (Page 85-87)

Comment - Sparks

366. While I agree the locatee may be disadvantaged if he is subject to undue influence. One has to recognize the cultural values and the trade-offs that a locatee may make in terms of what he deems to be of best benefit for himself.

367. As has been explained previously, the 1977 Agreement did not purport to delegate to the Band Council the responsibility for decision making with respect to leases and lease payments. Rather it was a contract to pay money to the Westbank Indian Band in return for the Band performing support and administrative services which might have been alternatively provided by public servants.

368. The conclusions of Lawson that the Regional Office abdicated its responsibilities are concurred in by the writer. There was an omission of duty on the part of the Director of Lands, Membership and Estates in clarifying in his letter of August 8, 1980 that the final decision with respect to leases rested with the Crown. (Page 16)

Note:

369. The issues raised respecting the 1977 Agreement have been superceded by the recent delegation of powers to the Band pursuant to Section 60 of the Indian Act.

Recipient of Rent Payment

Comment - Lawson, Lundell

370. If, as in most cases, rent is to be paid by the lessee to the Band Council for payment to the locatee, the lease should contain a direction by Her Majesty to this effect. The lessee is entitled to know the party from whom he should obtain a proper receipt. (Page 87)

Comment - Sparks

371. Lawson discusses the recipient of rent payments, but fails to address the authority of the Band under Section 69 (formerly Section 68) and the regulations thereto. As

shown on Appendix B-1, attached is a copy of Order-in-Council 1968-381 (dated the 29th day of February, 1968) which empowered the Band to manage and expend its revenue funds and also made the Financial Administration Act inapplicable to the Westbank Band of Indians. General regulations with respect to Indian Band revenue monies were passed in 1973 and are now known as Chapter 953 of the Consolidated Regulations of Canada and are attached hereto as Appendix B-2. (Page 17)

Delays in Processing Documents

Comment - Lawson, Lundell

372. After a locatee lease has been settled it is executed by the lessee and then executed on behalf of Her Majesty by officials of your Department, in Vancouver or Ottawa, and then it is recorded in Ottawa.

373. We have been advised that in certain circumstances officials of the Department in Ottawa will review a lease before sending it back to Vancouver for changes. When this happens apparently a delay of two and one-half to four months often occurs in putting the lease documents in final form for registration. Apart from serious disruptions in occupation and commencement of construction or improvements by the lessee, the lessee may also require the lease to obtain project financing or to retain the interest of his investors. The delay can be very costly.

374. We are informed that the B.C. Regional Office processes lease documentation promptly and that delays, when they arise, arise in Ottawa.

375. In assessing a proposed lease transaction, before giving its approval as required by Departmental policy, the B.C. Regional Office of the Department does not look into any conflicts of interest to which the Councillors and Chief passing the Band Council resolution, the locatee or the proposed lessee (either directly or through a limited company) may be subject. The lack of an effective procedure to identify conflicts of interest and have them examined objectively is a serious deficiency in Departmental procedure. Had this been in effect in the past many current problems could have been avoided. We do not believe it is any justification for ignoring conflicts of interest to say that most of the people in the Band are related and it would be virtually impossible

to avoid conflicts. A conflict situation demands the active role of the Department to ensure that decisions are properly made and that those involved in the transaction do not participate in the decision. (Pages 87/89)

Comment - Clarke

376. With so many small Bands in British Columbia who have few members willing to take key roles on Band Council, it is inevitable that many circumstances exist which may give rise to allegations of conflict of interest. Without clear regulations to assist Departmental and Band staff, it is difficult to answer this problem.

Comment - Sparks

377. I concur with Lawson's remarks with respect to conflict of interest situations.

Recommendation Re Leases

Comment - Lawson, Lundell

378. The Department in consultation with the Band should utilize its standard printed form of application to lease. This application would be sufficient if it also contained details of the shareholders of corporate lessees and blank spaces for any unique terms which may vary from the standard form of lease. Attached to the application should be a standard printed form of lease between Her Majesty and the lessee, to be completed and executed by the Department in Vancouver upon approval of the application. The application would be completed and signed by the lessee and the locatee at the completion of their negotiations.

Overview

379. The question of "conflict of interest" has long been of concern to the Department, particularly since the 1980 decision of the British Columbia Supreme Court in Leonard v. Gottfriedson. The geographical, social, political and cultural situation of most Indian Bands renders it virtually impossible to develop conflict of interest rules which would not seriously affect the overall well being of the Band. The dilemma of the Department has always been how to best promote active involvement in the affairs of the Band by those most able and qualified to provide the leadership and initiative required to advance

the overall well being of the Band. The general tendency of the non-Indian is to want to apply to the Indian societies, holus-bolus, the conflict of interest guidelines developed by his own society over many centuries. But, however laudable and rational these rules may be in the non-Indian society, they are not so easily adaptable to small, closed societies that are tantamount, in effect, to enclaves.

380. Even the case law appears divided on the issue and certainly reflects the difficulty of the situation. In Leonard v. Gottfriedson (referring to a Band Council Resolution allocating an interest in land) the Supreme Court of British Columbia stated that:

> "... The Chief was clearly disqualified by reason of interest from taking part in any such resolution. Furthermore, he was sufficiently experienced to know that ..."

381. In Boyer v. Her Majesty (again referring to a Band Council Resolution allocating an interest in land) the Federal Court of Canada (Trial Division) stated that:

> "... I had some concern about Mr. Corbiere voting as Chief with respect to this resolution but I am advised the regulations under the Act use the words "may abstain" ... At worst ... it is a procedural irregularity and internal between the Band and the Department ..."

382. We are of the opinion that the obiter dicta of the Federal Court judge is correct and that the matter of "conflict of interest" rules is an internal matter between the Band and the Department. Lawson and Lundell state that:

> "The lack of an effective procedure to identify conflicts of interest and have them examined objectively is a serious deficiency in Departmental procedure. Had this been in effect in the past many current problems could have been avoided."

383. Yet, Lawson, Lundell again fail to indicate what form an "effective procedure" would take and how it would have avoided many of the current problems. It would have been far more helpful if they had indicated what, in their opinion, rules for conflict of interest should be applied.

384. Assuming that the last sentence constitutes a "hint" as to their thinking, let us consider the effect. They state:

> "A conflict situation demands the active role of the Department to ensure that decisions are properly made and that those involved do not participate in the decision."

385. In the case of Westbank, the Band Council is composed of three members, two of whom are directly related. If we apply the "normal" rules of conflict of interest, then in every case where a Derrickson is involved in a land or other business transaction, the Band Council is rendered powerless to act. In effect, the people who historically have done the most to develop the economic wealth and political relevancy of the Band would be forced to decide whether to forego personal advancement to work for the Band in a political role or to turn their backs on their Band and devote their energies and expertise full time to the attainment of personal wealth.

386. The situation at Westbank, in reality, is very much analogous to the situation encountered in the Boyer case. Consider the following quote from the Boyer case within the historical perspective of the Westbank Band.

> "... In the early years, the Reserve population, i.e. those actually residing there, numbered about 10 or 12 families. It was described by many as a destitute community. Under the stewardship of Mr. Corbiere the Band flourished, people returned and today his evidence is that about 300-400 people live there and he estimates ... the tangible assets at $4,684,000. He also lists what he calls intangible benefits that exist for the Reserve community's benefit ... The development under then Chief Corbiere was significant ... His contribution to the well-being of the Reserve and its people was exemplary ..."

387. In our opinion a very much analogous statement could be made regarding the Derrickson family with respect to the development of the Westbank Band during the past 20 years. In the absence of any alarm from the Indian community itself, we are not convinced that the present

guidelines as set out in the Regulations are insufficient to meet the needs of the Bands. It must also be remembered that Bands are at liberty to develop guidelines should they so desire. In those few occasions where exception is taken it is clear that judicial redress is available and the Band's are willing to seek a determination in that forum.

Comment - Lawson, Lundell

388. We note that the standard form of application has rarely been used in connection with the leases which we have reviewed and recommend that it be used in each instance.

389. The standard form of lease should provide a method for determining renewal rent. For example, the lease could provide that negotiations to determine renewal rent be commenced six months before the expiry of the term and that if those negotiations are not concluded within three months, then the matter be referred for determination by a third party. This might be specified to be done by binding arbitration, by a Departmental official or by an independent qualified appraiser appointed on application by either party to the Court. The lease should also contain directions to the lessee as to the manner of paying rent. (Pages 89/90)

Comment - Sparks

390. The Federal Court Act appears to be the governing legislation which determines how contracts between the Crown and individuals are to be arbitrated. (Page 16)

Comment - Clarke

391. Standard form leases are rarely suitable for commercial developments. It should be noted that all leases within the Lakeridge subdivision are on a special standard residential lease. (Page 82)

392. All leases with the Crown provide a method for determining renewal rent. Comparable market value of the leasehold interest is the general measure which may be more specific in certain circumstances. (Page 83)

393. Rent in all cases is required to be paid either to Her Majesty or to the Band as determined by the lease. (Page 84)

Lawson, Lundell

394. The involvement of the Chief and the Councillors, while holding office, in the lease negotiation process should be eliminated, at least in those instances in which they are not the locatees. One of the steps to give effect to this ought to be termination of the Department's policy requiring that Band Council resolutions be passed to approve leases. The function of the Band Council in regard to leasing matters would then be the enactment, administration and enforcement of properly conceived by-laws.

395. The Department should allocate an independent and qualified person, resident within a reasonable distance of Westbank, to represent the Department at Westbank, whose job would include advising and assisting locatees in lease negotiations. Locatees should be informed of the availability of the services of this representative. The recommendation in this paragraph is particularly important if the recommendation in the preceding paragraph is adopted by your Department.

396. There should be included in the application to lease a section to be completed and signed by the Departmental representative whereby he certifies that the locatee understands the nature and effect of the proposed transaction and has had independent advice in that regard, that the lease terms are in the circumstances fair and reasonable for the locatee and that the locatee has not been subjected to undue influence to agree to the lease terms. The Departmental representative could in this section certify, in the alternative, that the locatee has refused to accept his assistance.

397. Full responsibility and authority for form and substance of the leases and to execute leases should be vested by the Minister in a very few Departmental officials in Vancouver. Departmental officials in Ottawa should record leases promptly without reviewing them. (Pages 90/91)

Comment - Sparks

398. I agree with Lawson that a Chief and Council while holding office should not be involved in the lease negotiation processes.

399. I agree that the Department should have within a reasonable distance of Westbank and of other Bands a competent individual whose job would include advising and assisting not only locatees, but the Band Council in lease negotiations. (Page 16)

400. I agree with Lawson's recommendation. (Re responsibility and authority for form and substance of lease.) (Page 16)

Accountability of the Chief and Band Council to Band Members

Comment - Lawson, Lundell

401. The information which we have received indicates that approximately three to five Band meetings are held each year with such meetings being called when considered appropriate by the Band Council.

402. Formal reports to Band members by the Band Council have been discontinued since 1977. This, allied to the fact that the minutes of meetings are not distributed, results in many Band members being unaware of events affecting the Band and of projects being undertaken by the Band Council. As a result, there are complaints that Band members do not know what the Band Council is doing with Band funds, that Band members have no input into the formulation, drafting and passing of by-laws and that Band lands are commercially developed without proper input from the Band membership.

403. A common complaint is that there are no formal agendas for Band Council meetings circulated to all members sufficiently in advance of Band meetings, thereby depriving Band members of an opportunity of considering matters to be discussed at the meeting and requesting that a further matter be discussed. No open discussion or comment is permitted by members on matters not intended for discussion at the meeting by the Band Council. Chief R.M. Derrickson states that Band members do normally receive agendas in advance of Band meetings.

404. We understand that voting at Band meetings is normally done by a show of hands and not by secret ballot. We were told that as a consequence some Band members do not feel free to vote as they might wish to.

405. We understand that interpreters are not normally available at Band meetings and that the result is that Okanagan speaking members do not normally attend meetings.

406. An allegation has been made to us that non-Indians are hired to fill positions in the Band office in order to maintain confidentiality. (Pages 91-93)

Comment - Roberts

407. Although most of what is contained in this section makes considerable sense, and is so recommended by the Department when the opportunity arises, the fact remains that there is no legal requirement for the holding of Band meetings on a continuing regular basis, and no regulations respecting such Band meetings. The recommendations in this section would require a change to the legislation or the passing of regulations.

Comment - Sparks

408. The Band Council is subject to the Band Council Meeting Regulations and also to its own Band Council Meeting By-law. There is an omission of duty if the Department becomes aware that breaches of the regulations are occurring regularly. There is a responsibility within the Band's own by-law for the Band administrator to bring to the attention of the Band Council the violations of its own by-laws. Furthermore, both the regulations and the Band Council by-law (which are not in conflict with each other), provide a specified agenda for each and every Band Council meeting (other than special meetings). (Page 17)

Recommendations Re Accountability of Chief and Councillors

Comment - Lawson, Lundell

409. Band meetings should be held not less than quarterly. An agenda of the meeting should be posted in the Band office and circulated to all members at least seven days prior to the meeting. Band members should be permitted to give notice to the Band Council requiring that additional matters be placed on the agenda.

410. Minutes of all Band meetings should be distributed to the Band members.

411. More use should be made of regular periodic reports from Band Council to Band members apprising them of matters affecting the Band or of general interest to its members such as anticipated or projected development of the Reserves.

412. The Band Council should be encouraged to hire Indians for Band office positions.

413. Provision of an interpreter at Band meetings should be available to any Band member requesting such assistance of the Band Council.

414. All voting at Band meetings on matters of substance as opposed to procedure should be conducted by secret ballot.

415. In our view, it would also be desirable to amend the Act to provide for a larger Band Council. If the ratio of Councillors to Band members were increased, the positive results ought to be three-fold. First, it would be more difficult for a strong Chief to dominate the Band Council. Second, there should less often be situations in which some factions within the Band membership are represented on Band Council while other factions are not. Third, it would make the handling of conflicts less difficult. (Pages 93/94)

Comment - Sparks

416. There is no statutory requirement for Band meetings. However, the Band Council Procedures By-Law could provide for such meetings and set out the procedures for notice, order and recording decisions.

417. The provision of an interpreter is an interesting one but, at this point in time, Lawson does not make any suggestions as to who would pay for the service.

418. I concur with Lawson's recommendation. A three member Band Council is really impractical, particularly in view of the complexity of the ventures being considered in contemporary times.

Distribution of Christmas Dividends

Comment - Lawson, Lundell

419. Chief R.M. Derrickson has stated that $500 is paid at Christmas out of Band revenues to each person who attends at least three Band meetings in a year or who proves to the satisfaction of the Band Council that he participated in the affairs of the Band.

420. There have been allegations that this grant is not being consistently administered in respect of persons who are not living on the Reserves. However, we believe that

this inconsistency may be explained on the basis that the persons not living on the Reserve who are receiving the grant are participating in the affiars of the Band.

Comment - Clarke

421. These funds are from the Westbank Band Development Co., not from Indian monies.

Overview

422. Clarke's comment here is all too flippant a response. The Chief and Band Council have consistently claimed that the WIBDC is a Band owned Corporation whose shares are held "in trust" and that a trust instrument to this effect is on record. Band revenue funds, as well as public funds, have been funnelled through this corporation to finance its business ventures. In the face of the "trust agreement" it cannot be said that the "profits" and other assets of the corporation are not "Indian" monies. Most assuredly, they are not "Indian monies" as defined by the Indian Act but they are, nevertheless, Band monies pursuant to the "trust agreement" executed by the shareholders. Therefore, each Band member is a beneficiary and, accordingly, has an equitable interest in the trust. As such they are entitled to expect and receive consistent, fair and equitable administration of all activities of the Corporation. As Lawson, Lundell indicate, there may well be an acceptable explanation for the alleged inconsistency but, notwithstanding, this does not derogate from the right of the Band membership to demand and receive fair and equal treatment.

Right of Indians to Live Elsewhere on the Reserves Than In The Band Subdivision

Comment - Lawson, Lundell

423. Complaints have been made that persons are being required to live on the Band subdivision rather than being permitted to build and live on their own lands.

424. Chief R.M. Derrickson, however, has advised that in many instances it is impractical to provide the necessary services to a single dwelling as the cost of providing such services is too high. He has pointed out that it is more economical to provide such services to one area such as the Band subdivision thereby extending the servicing dollar to a wider group of persons.

Comment - Sparks

425. Lawson's comments are self-evident. It is, in fact, more economical to provide the multitude of infrastructure services in denser configurations.

Overview

426. We concur with the comment of Sparks in this regard. There is no statutory right of individual Indians to live wherever they choose on the Reserve. Such a right would be clearly inconsistent with government by Band Council and would frustrate the orderly and planned development of Reserve lands and communal life, not to mention the prohibitive and pragmatic economic reasons identified by Chief Derrickson.

Elections of the Chief and Councillors

Comment - Lawson, Lundell

427. We have included the subject of the election of the Chief and Councillors on the list in Section N of matters which should be investigated formally.

428. However, we think it appropriate in this context to make one particular observation and two recommendations.

429. Under the Act, a person is eligible to vote for the election of a Chief and Councillors only if he is a member of the Band, 21 years of age or older and ordinarily resident on the Reserve.

430. Under the Indian Band Election Regulations, an electoral officer is charged with the responsibility of preparing a list of all electors.

431. The electoral officer is normally a person appointed by the Band Council with the approval of the Minister. The electoral officer is sometimes a member of your Department and other times is a member of the Indian Band holding the election. We understand that the appointment of the electoral officer is approved by officials of your Department in Ottawa.

432. In speaking with the members of the B.C. Regional Office of your Department we learned that the list of electors is prepared by the Band Council and that no steps are taken by the electoral officer to verify the eligibility of the people on the list, unless a Band member raises an

objection. Where the electoral officer is an official of the Department he is totally dependent upon the Band Council in the preparation of the electors list. We also learned that 40% of all Indian Band elections in British Columbia are appealed to the Minister and that in 90% of these cases the dispute is as to whether a person on the electors list was ordinarily resident on the Reserve. (Pages 94/96)

Recommendation Re Election of Chief and Councillors

Comment - Lawson, Lundell

433. The Chief and Councillors, who prepare the electors list, should be required to give the Department an affidavit in which they state that to the best of their knowledge, after due and reasonable inquiry, all of the persons on the electors list are eligible to vote in the election to which the list pertains. If a false affidavit were sworn by the Chief and Councillor, they would be subject to criminal proceedings and removal from office.

434. If this practice were adopted it ought to eliminate or reduce drastically the number of instances in which electors lists include individuals whose eligibility is dubious. As a consequence there would be a reduction in the number of election appeals and in the possibility of election fraud.

435. We also recommend that the appointment of electroal officers be approved by the Minister at the Regional or District level, where there is a greater likelihood that Department officials will be acquainted with the appointee, if he is from the Band membership.

436. We also recommend that candidates for Band Council and the office of Chief be required to furnish the Band membership with information concerning any contracts they have entered into with the Band Council or Band-owned corporations and that they disclose their land holdings within the Reserves. Disclosure of this sort would be comparable to the disclosure required of persons standing for election as directors of public corporations. (Pages 69/97)

Comment - Roberts

437. Pages 95 et seq - again most of what these sections contain are accurate. However, what they point out is a need for the electoral officer to perform his function

correctly, e.g. a list from the Council is the point of beginning: it is the electoral officer's responsibility to ensure the accuracy of the final voters list. The other primary difficulty with this is the definition of "ordinarily resident on the Reserve" and the requirements of the Act for this. Over the years we have been unable to define this term in such a way as to clearly identify in all circumstances who is or is not ordinarily resident. In any event if the electoral officer ignores his responsibility, the definition would be of little value.

438. The Program maintains that voting privileges may be extended to Off-Reserve members, if the Band so desires. However, lately, the Standing Committee on Statutory Instruments is objecting strongly to the use of Section 4(2) of the Indian Act for this and other purposes. It is a moot point, therefore, as to whether we will be able to continue in this way.

439. The recommendations listed would require amendments to the legislation except for the delegation of authority to approve the appointment of electoral officers, with which I agree. I might add I think it would be a retrograde step to allow the sitting Chief and Council, with or without an affidavit, to prepare the voters' list.

Comment - Sparks

440. Re paras 1 and 3: I agree with Lawson's recommendation.

441. Re para 4: I agree with Lawson's recommendations and this matter has been a subject of recommendations by various officers within D.I.A. for a number of years. However, these recommendations have not been acted upon by either the senior management or the Minister.

Recommendation for a Public Inquiry and Investigation

Comment - Lawson, Lundell

442. For the reasons given in the introduction to this report, we recommend that a public inquiry and/or departmental investigation be authorized by the Governor-in-Council and/or the Minister. The person making the inquiry or investigation should have full power to summon witnesses, to require evidence on oath and the production of documents. The scope of the investigation and report should include the following matters, many of which we have reviewed in this report to the extent practicable in the circumstances.

1. Activities of administrative officials under by-laws.

2. Complaints by lessees and sublessees on land within the Band's Reserves.

3. Purchase of locatee interests by the Band or Band members from other Band members.

4. Elections.

5. Possible abuses of power by the Chief and Band Council.

6. Possible conflicts of interest of the Chief and Councillors.

7. Disbursement of Department of Highways trust moneys.

8. Distribution of welfare payments.

9. Administration of wills and estates. (Pages 99/100)

Overview

443. We note at the outset that although many people over the past two years have insisted that Lawson, Lundell recommended a public inquiry, the fact is that they recommended either a public inquiry or a Departmental investigation. The irony is, of course, that the Lawson, Lundell report was itself intended to be part of a Departmental investigation ordered by the then Minister.

444. In our opinion, eight of the nine matters recommended by Lawson, Lundell for inclusion in any investigation constitute matters purely internal to the Department or between the Department and the Band. As well, we are also of the opinion that the review itself does not provide sufficient evidence of possible criminal wrongdoing, public fraud, gross misconduct, dereliction of duty or other public interest sufficient to warrant the expense and exposure of a public inquiry.

445. In our further opinion, the present Minister has chosen the more prudent and pragmatic approach to confronting the issues. However, we also are of the view that to ensure the wisdom of the present approach, it is absolutely essential that there be immediate follow-up on the part of the Programme to address in depth and resolve, to the satisfaction of the Deputy Minister/Assistant Deputy Minister, each and every issue

raised in the Lawson, Lundell Report. This is not to say that every issue raised by Lawson, Lundell is necessarily valid. However, we are of the firm opinion that it would be in the best long term interests of the Department and the Programme if each and every issue raised was followed up by the appropriate Directorate and validated or invalidated as to its accuracy. Where validation is found, further and appropriate follow-up on the part of the Programme to remedy the problem would be in order; in fact, we think, would be mandatory.

Departmental Security and Confidentiality

Comment - Lawson, Lundell

446. A very common complaint made to us relates to the lack of security and confidentiality in your Department. Many people stated to us that information furnished to your office very quickly becomes known to individuals outside of your Department. We were told by Chief R.M. Derrickson that he obtains this information almost immediately. He claimed to know, for example, the contents of the preliminary draft reports we gave to your Department in November 1982 notwithstanding that we stressed the necessity of keeping those draft reports confidential.

Comprehensive Comment on Lawson, Lundell Review - Walchli

Note:

447. At the time when most of the critical events occurred which led eventually to the decision on the part of the department to conduct the Lawson, Lundell and the Hobbs Reviews, Mr. Fred Walchli was the incumbent Director General, British Columbia Region. In view of the sensitive nature of his position at the time, in terms of ultimate responsibility and accountability for all events occuring within B.C. region; further, in view of Mr. Walchli's expressed concerns regarding the failure of both reviews to afford him the opportunity to fully participate in the review and to make full answer to the allegations that, directly or indirectly, adversely reflected upon the integrity and professional ability of him and his subordinates; we have elected to set out hereunder, in its entirety, without comment and with a minimum of editing, Mr. Walchli's recollections and opinions regarding the Lawson, Lundell review.

Comment - Walchli

448. In June 1982, the Standing Committee on Indian Affairs submitted their annual report to the House of Commons. It, among other things, recommended that an independent investigation be conducted into the affairs of the Westbank Band. In particular, the roles of the Chief and Council and certain senior officials of the Regional Office. Specifically the Committee wanted an investigation into the refinancing of the Toussawasket Trailer Park, the administration of certain trailer court leases and the validity and application of Band by-laws to those trailer courts under lease hold. This set into motion a set of events which led to an internal review of the actions of the Westbank Band Council and the officials of the regional office of the Department of Indian and Northern Affairs. The following is my recollection of the events which took place from the period of June 1982 until April 1983.

449. Upon learning of the recommendations of the Standing Committee the Chief of the Westbank Band immediately requested an independent investigation which was rejected by the Department of Indian Affairs. Instead, the Minister of Indian Affairs arranged for the Chief to meet with him in Ottawa on July 12, 1982. Present were the Minister; Assistant Deputy Minister, Indian Affairs; Director General Reserves and Trusts; Acting Director General of Economic Development; Regional Director General; the Band's accountant; and the Minister's Executive Assistant.

450. It was agreed that no minutes would be taken.

451. The Minister informed the Chief that the Standing Committee, while having made some serious allegations, did not provide him concrete evidence to support the charges, even though he had repeatedly challenged them to do so, both in the House of Commons and in private meetings. He therefore, decided to undertake an internal review of the affairs in Westbank, and he further stipulated that if the review produced any evidence of wrong doing, a more formal investigation would follow. Chief Derrickson agreed to the internal review and committed the Band to fully co-operate subject to the review being conducted under the local government guidelines for evaluating programmes transferred to Bands. Specifically the Chief wanted agreement on the

terms of reference, the selection of an acceptable consultant, and the right to review their work before the report was submitted to the Minister. He also wanted assurances from the Minister that any further press releases would not be made without both himself and the Minister approving them. The Minister agreed to the Chief's conditions. It should be noted that in stipulating these conditions, the Chief had in mind the process outlined in the 1974 T.B. Minute 725973, governing the transfer of programs to Bands. The process requires that when problems arise in Band-managed programs a joint evaluation would be undertaken by the Department and the Band Council. This was the process established in 1976 in the B.C. Region and one in which the Chief was familiar since his Band was subject to a joint evaluation in 1979.

452. There is some doubt in my mind as to whether the Minister, the ADM and the Directors General fully understood the nature of the commitment, particularly since this Minute was never given to Lawson and Lundell. There is, however, no doubt in my mind that the Minister did agree to follow the process outlined in the Minute and gave Chief Derrickson assurances that this would be done. This fact can be attested to by Messrs. Lett and Walchli.

453. The Minister informed the Chief that he wanted to retain an independent law firm, one which was not known for its political support of the Liberal party to undertake the review. The Chief agreed, subject to him having a say in the selection of the firm. The Minister agreed.

454. The Minister then informed the Chief he intended to appoint the ADM, the Acting Director of Economic Development and the Director General of Reserves and Trusts to act as a three-man team to conduct the internal review. The Chief promptly invited them to visit the Westbank Reserve and obtain first-hand knowledge of the development and issues which were raised. All three agreed to accept the Chief's invitation. This invitation becomes an important point in the events which follow because of the allegation by the team that the Chief refused to co-operate with the investigation.

455. The meeting ended in a very cordial mood and Chief Derrickson left fully believing that an open and thorough review would be conducted. Walchli and Lett were of the same opinion.

456. At this point it is necessary to comment on the processes which were available to the Minister to conduct a thorough review of the allegations at Westbank and to indicate why the process which was followed did not succeed.

457. The Minister had several legal processes available, any one of which would have ensured a complete and thorough investigation of all the allegations. Specifically he could have appointed a Royal Commission, or some other form of independent inquiry under the Inquiries Act or laid an information with the RCMP and have them investigate. Any one of these processes would have required that the evidence which was given would have been sworn under oath and that all parties would have the right to challenge such evidence as well as call their own witnesses. It would have ensured that the individual's rights would have been thoroughly protected.

458. The Minister quite correctly, because of the lack of hard evidence to support the allegations of wrong-doing, elected for an internal review, the success of which depended on a high degree of co-operation between the Band and the Department. The 1974 Treasury Board Minute authorizing the transfer of programs to Band Councils clearly stipulated the process under which such reviews were to take place. The Westbank Band having entered into an agreement with the Department in 1975 committed themselves to following that process. It should be noted that the process stipulated in the Treasury Board Minute recognized the fact that if the results of an investigation were to be acceptable to both parties it would have to be done jointly. It further recognized that unless the Department conducted investigations under the proper legal processes outlined above, it had no authority of its own to conduct any formal investigation which would compel the Band to co-operate. It was therefore necessary to establish a joint process which would involve the co-operation of both parties.

459. Under the terms of the Treasury Board Minute the process which was established in the B.C. Region to deal with concerns of mismanagement were as follows:

1. To advise the Band Council of the problems.

2. To obtain Band Council approval to undertake a joint evaluation.

3. To retain outside consultants, if necessary.

4. Reach joint agreement on the terms of reference.

5. Agree on the selection of a firm of consultants.

6. Jointly co-operate with the consultants in providing information.

7. Have the report reviewed by both the Band and the Department before the work was accepted.

460. It should be noted that the Band had signed an agreement with the Department in 1975 agreeing to follow the terms of the Treasury Board Minute and as well, these conditions were stipulated in the 1977 Agreement.

461. It therefore logically follows that the Band and the Department had a contract stipulating the form of evaluation and Chief Derrickson and the region automatically assumed that the Westbank review would be undertaken according to the terms of that contract.

462. Neither the Band nor the Region had any reason to believe that any other approach would be followed. The review team did not see fit to advise either the Band or the Region that a different approach had been chosen and to explain the basis for their decision.

463. Chief Derrickson regarded the approach being followed as a serious breach of contract and filed, on behalf of the Westbank Band, a statement of claim against the Crown and the three members of the Task Force. This law suit is still pending.

464. The Task Force began their work immediately and proceeded to hire an outside legal firm. Unfortunately, the terms of the verbal agreement were broken by the Task Force. Lawson and Lundell were selected without Chief Derrickson's consent and the Terms of Reference were issued without his input. He received notice of the appointment of Lawson and Lundell through a telex and later from a letter sent him by Lawson and Lundell requesting to meet with him. Press releases continued to be made by the Department without Chief Derrickson's consent.

465. Derrickson protested to the Minister and to the ADM that all the conditions which had been agreed to by the Minister had been broken but his protests were not responded to. Several telegrams and phone calls were made but they did not illicit any form of response other

than an acknowledgement. Walchli, upon the Chief's urging took up the issue with the ADM but was informed that he had no operative role in the review. Derrickson, after realizing that the Task Force had no intention of respecting the agreement that he had reached with the Minister became suspicious of the true intent of the review. He immediately instructed his solicitor, Mr. John MacAfee to advise both the Minister and Lawson and Lundell that he would hold them both accountable if the review was not conducted in accordance with the Treasury Board Minute or if his rights were jeopardized. His suspicions, as it turned out were well founded, particularly when he learnt that the intent was not only to review the issues raised by the Standing Committee but to do a complete investigation of all Band activities dating back over a period of ten years along with an investigation into the personal affairs of him and his brother Noll. What was to have been an internal review designed to respond to the issues raised by the Standing Committee now became a full fledged investigation done by a Task Force who attempted to assume investigative powers for which they had no authority.

466. It is safe to say, that had Chief Derrickson known the true intention of the Task Force he would not have agreed to an internal review but would have persisted in his earlier demand for an independent inquiry done under the Inquiries Act, where his rights would have enjoyed the protection of the law.

467. It should also be noted that Walchli and other regional officials also shared Derrickson's suspicions about the intent of the review, particularly when they were required to provide the program information on issues which had no bearing to the Standing Committee's request and on the private activities and personal financial state of both Noll and Ron Derrickson. The unwillingness of the Task Force to take the regional officials into their confidence along with the type of investigation being conducted against the regional staff confirmed, in the minds of the region, these suspicions.

468. Lawson and Lundell initiated their work in September of 1982 but only made contact with the Band Council in December. Chief Derrickson, despite the breach of his agreement with the Minister, agreed to provide access to Band files and make himself and his Council available for interviews, even though this was against his better judgment. Prior to Christmas of 1982, the Band Council

gave Lawson and Lundell access to information on a number of the land transactions in their office. During Christmas the review was suspended, or at least they thought so.

469. Derrickson left for an overseas holiday in late December and returned in the early part of January. While he was gone, Lawson and Lundell obtained the services of Derrickson's political opponent to organize meetings with various groups of Band members on the Reserve. Notices were sent to each Band participant which clearly informed them that the consultants were undertaking an investigation, not an internal review. This was contrary to the agreement with the Minister. The interviews were conducted in the homes of each Band member without the benefit of any written minutes. At least one of the Band members had the presence of mind to tape record the conversations. A type-written transcript is available.

470. Derrickson, upon returning home, learnt of the actions taken by Lawson and Lundell and took great exception to their actions. He had not been informed of Lawson and Lundell's intentions to meet with the membership behind his back. He was very suspicious of the manner in which these meetings were organized, particularly when his political opponent was hired to set up the meetings. Further he was not allowed to know the nature of the discussions. He, therefore, promptly refused to co-operate any further with the "investigation" unless it was clearly understood that Lawson and Lundell would agree to certain conditions. These conditions were made known to Lawson and Lundell in a meeting which took place between Derrickson, the principles of Lawson and Lundell and Derrickson's lawyer. Basically, he wanted the consultants to identify the files that they required, to identify the concerns which they were investigating, to be given the right to review the findings of the consultants before they were put into a final report. Lawson and Lundell promptly rejected these demands and Derrickson refused to extend any further co-operation to Lawson and Lundell. He immediately ordered them off the Reserve and he advised the Department that the Review Team would not be allowed to enter onto the Reserve either. This action was taken in retaliation against the Review Team because he held them responsible for the actions of Lawson and Lundell.

471. It should be noted that Derrickson had extended the invitation to the Review Team to visit the reserve in July 1982, but that none of them saw fit to arrange a

visit to the Reserve. They had four months to meet with Derrickson and to obtain a first-hand knowledge of the situation. Later it was charged that Derrickson failed to co-operate but this is not substantiated in the fact.

472. Derrickson did agree to meet with Lawson and Lundell on two or three occasions in the offices of Lawson and Lundell but with his lawyer present. These meetings were not very productive and were conducted in an environment of hostility.

473. It is my view that the major reason why Lawson and Lundell failed to complete their review of the events in Westbank is because they failed to follow the process which was stipulated in the Treasury Board Minute and which was followed in the B.C. Region.

474. The second major weakness in the review process was the limited role the Regional staff were permitted to play in determining the facts, explaining the critical events, and clarifying, and producing supporting information.

475. The regional role was limited to:

a) Gathering and forwarding copies of all known files and reports for a ten-year period (1972-1982).

b) Reviewing and recommending on the selection of appropriate law firms. It should be noted that two firms were identified, Lawson and Lundell and Tupper and Bull. Walchli was requested by telex to obtain Derrickson's consent to retain Lawson and Lundell but was unble to do so because he was ill with pneumonia. Walchli advised Leask, by telex, that this was the situation but the decision was to proceed with the retention of Lawson and Lundell without Derrickson's consent.

c) In the course of the work additional information was provided as requested, i.e. land records and agreements.

d) Regional staff attended interviews, as requested by Lawson and Lundell. Six regional staff: Walchli, Clarke, Massey, Novak, McCullaugh and Erwin were required to attend interviews in late March. These interviews took place toward the end of Lawson and Lundell's work and a few days before they filed their final report. The interviews lasted from twenty minutes to two hours depending on the individual

being interviewed. The format of the interview was for Lawson and Lundell to question the staff based on a set of predetermined questions. Staff were never informed of any of the concerns or allegations which later emerged in the report and therefore were never given an opportunity to clarify their role or respond to the allegations. Walchli was under the impression that these sessions were of a preliminary nature with more detailed interviews to follow. This did not take place.

e) Forwarding concerns expressed by Chief Derrickson and other Band Council members to the review team in Ottawa.

476. The review process was deficient in nearly every phase of its operation. The major deficiencies are:

a) The Terms of Reference were prepared without any Regional input and their scope went far beyond what was required to respond to the Standing Committee's concerns. They required the consultant to not only inquire into the events, policies and practices of the Region in relation to land transactions at Westbank but also into the personal conduct of the staff and the Band Council. The Terms of Reference made it clear:

> "I understand that there is a view that the review and your role in it is to be a very narrow one dealing with only specific claims from two or three trailer court owners and not going much beyond it. That is not correct; the requirements of the Standing Committee on Indian and Northern Affairs is that the inquiry address all other relationships between the Regional Office of Indian and Northern Affairs in Vancouver and the Westbank Indian Band, and of course that includes everything."

b) This wide-open mandate gave cause to the fears of both the staff and Band Council that a "witch hunt" was underway with the intent of using the information to make staff changes rather than to determine the facts. The scope of the Terms of Reference, the total exclusion of the staff in any meaningful way in the process, along with the cavalier way staff were treated by the consultants reinforced these fears.

c) The Review Team did not at any time during the period of the review explain to the Regional staff what the purpose of the review was or to ensure them that they would be given an opportunity to adequately present their side of the story. Through the course of the review no attempt was made by the Review Team to personally meet with staff to inquire into their perception of events or to answer questions.

d) The Assistant Deputy Minister, visited Vancouver on several occasions to meet with Lawson and Lundell but only on one occasion did he meet with the Regional staff and this was for the purpose of instructing them to appear before Lawson and Lundell. Walchli journeyed to Ottawa to meet with the ADM on four separate occasions for the purpose of expressing the Region's concerns; on the way the interview was conducted and on the roles required by Regional staff. Twice the meetings were cancelled upon arrival and on another two occasions the time allocated for these meetings was reduced to less than an hour, and at those meetings either Hobbs or Leask were present and the discussions centred on their roles in the review and on other issues. The Regional concerns were never discussed with the Review Team.

e) In February 1983, Walchli arranged a meeting with the Deputy Minister, the ADM and a representative of the Department of Justice to voice his concerns about the review. Walchli advised that the consultants had turned the review into an investigation and were using tactics to avoid the Band Council with the result that Chief Derrickson had decided to withdraw from any further Band participation in the review. Walchli also brought to the Deputy Minister's attention the concerns of staff and their request to be represented by legal counsel when appearing before Lawson and Lundell. The Deputy Minister promised to review the situation but took no action in resolving the problems.

f) Lawson and Lundell despite the fact that their offices and the Regional Office of DIAND are one block apart did not avail themselves of the information, knowledge or advice available in the Region. Had they done so many of the errors contained in the report would have been avoided and the staff could have correctly interpreted the policy and clarified events. Furthermore, much of the information in the Band Office was available in the Regional Office.

g) Given the nature and scope of the Terms of Reference and the manner in which the review was conducted, Regional staff requested that they be provided with legal advice when appearing before Lawson and Lundell. This request was made to the ADM and subsequently rejected by him with the concurrence of Ivan Whitehall of the Department of Justice. Staff were informed that they were required to attend the Lawson and Lundell interviews and that legal advice was not necessary. On hindsight, this proved to be a mistake because the report which was completed is both slanderous and defamatory to Regional staff. Had they not attended, Lawson and Lundell could not have given the impression that staff were given a fair opportunity to present their side of the case.

h) The ADM and the Justice representative assured Walchli that the L.&L. report would be reviewed by the Region before it was accepted. No such review took place. Had this happened all the errors and deficiencies in the report would have been corrected before it was accepted.

i) The decision to select the legal firm without any previous knowledge is questionable. What is worse was the decision to issue Terms of Reference which implied a lot of wrong doings, while at the same time denied the Regional staff the opportunity to provide information which would have ensured the correct understanding and interpretations were given.

j) The review was conducted in an environment of suspicion and hostility. The Standing Committee's persistence in demanding an investigation clearly persuaded the Review Team that the Region and the Chief and Council had seriously mismanaged the affairs of Westbank and therefore felt certain that a lot of wrong doings existed. The general attitude of distrust was evident in the way Regional officials were treated, right from the outset, and influenced the whole review from start to finish. Regional staff or the Band Council were never given the benefit of the doubt. The Band's decision to withdraw from the review and the concerns expressed by the Region with the manner in which the review was conducted was cited as evidence that the Region was attempting to scuttle the process and it gave validity to the view that the Region was attempting to cover-up serious mismanagement.

k) The method in which information was conveyed to Lawson and Lundell left a lot to be desired. Files were copied in the Regional Office, forwarded to Ottawa, where they were screened and then the information was given to Lawson and Lundell. The information was given on a selected basis and it was apparent in the discussions with Lawson and Lundell that they were missing much of the information which would have provided an explanation of the events which took place, particularly that information which governed the conduct of Regional staff in managing the affairs at Westbank.

477. One of the major issues which has emerged out of this review is whether the Region had the authority to authorize the Westbank Indian Band Council to undertake the administration of many of the land management functions on the Westbank Reserve. It is clearly evident that Lawson and Lundell were either not aware of or deliberately chose to ignore the authority conferred on the Department by the 1974 Treasury Board Minute. This Minute authorized the Department to transfer many programme functions to Band Councils including a number of land administration functions. This included the authority to negotiate leases and permits on Indian Reserves.

478. In order that the Region's position on the question of giving authority to the Band Council is clearly understood, it is necessary to set out the sequence of events which took place and to explain what was intended by the 1977 Agreement.

479. In 1975 the District Offices were closed because of the demand of many Indian political leaders. This left an administrative vacuum in the Okanagan. The Regional Director General of the day, acting on instructions from Ottawa, and in conformity with the 1974 Treasury Board Minute, committed the Department to providing resources and transferring the responsibility for land management to the Bands.

480. Walchli, in 1976 was transferred from Alberta with the mandate to proceed with:

1. Establishing better Indian-government realtions.

2. Transferring as many of the responsibilities as possible to Band Council.

3. To down-size the Department.

481. Given this mandate it follows then that all actions taken by Walchli were directed at transferring the authority to Bands and building up their staff.

482. Walchli, in continuing the directions set by his predecessor, transferred many of the land management functions to Indian control in the Okanagan. This was done in conformity with the Treasury Board Minute.

483. In order to understand clearly what was intended in the 1977 Agreement with Westbank, it should be pointed out that the authority was given to the Band to carry out many of the functions which normally would have been carried out by the District Office. The functions included the responsibility to negotiate lease agreements, however, it did not include the authority to execute lease agreements. In other words, the Band Council acted as the agent of the Crown in the negotiations but the execution of any agreement remained with the Department. The agreement does not and was never intended to give any authorization for the Band Council to execute agreements. A review of the record will clearly indicate that Chief Derrickson has not during the 1977-1983 period executed any Band agreements on behalf of Her Majesty. Furthermore, it should be noted that when the Westbank Agreement was entered into, it was with the understanding that the Band Council would apply for and had every reason to believe that they would be given full delegation of authority from the Governor-in-Council under Section 60 of the Indian Act. The major difference being that Band Councils would be given the authority to execute agreements on behalf of Her Majesty as opposed to simply negotiating them which was the limit of authority provided under the 1977 Agreement.

484. It is extremely important to understand the distinction between the authority under the 1974 Treasury Board Minute and confirmed in the 1977 Agreement and the authority which would be given under Section 60, Delegation of Authority.

Comprehensive Comment on Lawson, Lundell Review - Derrickson

Note:

485. By letter to the Minister, dated February 25, 1985, Chief R.M. Derrickson, incumbent Chief of the Westbank Band of Indians, set out his views and comments with

respect to the Lawson, Lundell Report. Since Chief Derrickson, both personally and in his capacity as Chief of the Band, is a central figure in all of the outstanding matters regarding the Westbank Band, we thought it equally appropriate that his response should also be set forth in its entirety, without comment and with a minimum of editing.

SUBMISSION to the Honourable David Crombie,
Minister of Indian Affairs and Northern Development

Re. Lawson, Lundell Report of April 20, 1983
concerning Westbank Indian Band

Introduction

486. After constant attempts to obtain a copy of the Lawson, Lundell Report subsequent to its delivery in April 1983 to the Honourable John Munro, former Minister of Indian Affairs, the Westbank Indian Council finally succeeded in this endeavour only this month, February 1985. Having now had the opportunity to review this Report, we find it completely objectionable and we unreservedly condemn both its content and the manner in which the work of the Report was carried out.

Process of Review

487. In order to provide for the explanation of Indian Band control of Departmental programs, Treasury Board Minute No. 725973, dated April 1, 1974, set forth three groups of programs: those which could be operated by Band Councils completely under local authority, those for which the Federal Government had responsibility but the administration of which could be delegated to Band Councils on mutually acceptable terms, and those few programs for which responsibility had to continue to rest with the Department. Programs in the first group would be subject to the general guidelines developed by the Department and those in the second would require appropriate agreements spelling out the terms under which the Band Councils would be carrying out the listed programs. In the event of difficulties arising, there was the following provision:

> - To take account of the possibility of non-compliance with the guidelines or with the terms of specific Agreements, Councils will be required to agree beforehand that -- when this occurs -- a program that has been transferred to local authority may be moved back to an intermediate "co-management" arrangement, where the Council and the Department will each

discharge specified, complementary functions. This arrangement can continue until the local difficulties are overcome -- at which time the program can revert to local authority once more.

488. In further demonstration of the Department's commitment to Indian Band control of its programs and the ancillary development of consultative and co-operative processes, the document also noted this:

> 6. To provide for smooth transition from current administrative arrangements, the Department proposes to:
>
> a) provide under existing programs all training which may be required by Councils, Council staff, and community residents;
>
> b) assume that advisory services will be supplied to Councils to assist them to discharge their management responsibilities;
>
> c) approve reasonable budgets which will allow Councils to function effectively as local authorities;
>
> d) provide regular monitoring and evaluation, in co-operation with the Councils.
>
> (emphasis added)

489. Acting under the authority of Treasury Board Minute No. 725973, the Department of Indian Affairs, through its Regional Office entered an Agreement with the Westbank Indian Band in April 1977 transferring to the Band certain duties stipulated therein for the administration of land, estates and membership. The expressed policy reason for this transfer of duties and functions was the Federal Government's longstanding recognition that Indian Bands had "... the right to exercise the fullest degree of responsibility for local government that is consistent both with law, and the customs and traditions of the Band." No Government of Canada in more than thirty years has deviated from this principle; in fact, if anything, it has been increasingly enhanced. Nonetheless, to clarify federal policy considerations even further, Appendix "B" to the Agreement had also provided the following:

2.2 Indian Bands can exercise this right and its related obligation without:

a) diminishing their unique and continuing relationship to the Federal Government; or

b) relieving the Federal Government of its responsibilities to meet commitments under law or the various treaties;

c) affecting adversely the special status of Indians and Indian lands; or

d) reducing the number or quality of local services available to Band members.

490. One of the duties transferred under the Terms and Conditions of this Agreement was the negotiation of leases and permits, and this had been provided for within the second group of programs described in Treasury Board Minute No. 725973. Questions about the Band Council's handling of this duty, as well as questions about the funding of the Mount Boucherie mobile home park and the validity of Band by-laws passed pursuant to Sections 81 and 83 of the Indian Act, had resulted in an expression of concern on the part of the Standing Committee on Indian Affairs and Northern Development. The Honourable John Munro, then Minister of Indian Affairs, decided to act on this concern, and what happened next is fully described in my testimony of May 25, 1983 before the Standing Committee:

> "In early June of 1982 the Minister announced that an internal review would be conducted pursuant to the concerns of the Standing Committee as expressed in your report of June 1, 1982.
>
> On July 12, 1982, I met with the Minister of Indian Affairs, Mr. John Munro, to discuss the inquiry. He stated that he wanted an internal review done on the concerns of the Committee since they did not and would not provide him with any hard evidence of wrongdoing to justify an independent inquiry. We talked about it

and we agreed that the following actions would take place. There would be an internal review, not an inquiry or an investigation. It would be done in co-operation with the Band as stipulated in a 1974 Treasury Board Minute on such types of review.

Mr. Don Goodwin, Assistant Deputy Minister, would head the review committee consisting of the Band Council, a representative of the B.C. Region, and the selected law firm. The selection of the law firm to review the legal issue would be done in concert with the Band. The scope of the review would be to look at the concerns of the Standing Committee; namely, the funding of Mount Bouchiere mobile home park and the allegation about the appropriateness of the by-laws.

I would point out that the Minister could have opted for a Royal Commission, a judicial inquiry, or lay an information with the RCMP and have them investigate. In any one of the three methods, the Band's rights would have been protected, witnesses would have been sworn, witnesses cross-examined and the Band Council could call their own witnesses.

When I agreed with the arrangement with the Minister, I entrusted the Band's rights to the integrity of this agreement. Under the agreement, the Band's rights are protected by: agreeing to the Terms of Reference of the review; agreeing on the selection of a perceived neutral law firm; to be able to review the draft reports to ensure the facts are correct and to ensure there is no unsupported allegation. There also would be no press releases without our mutual consent.

In this case, what has happened is that the law firm of Lawson, Lundell, Lawson and McIntosh were retained by the Department without the Band having any say in the selection ..."

491. Moreover, the Terms of Reference to Lawson, Lundell were never submitted to us; we were not told what allegations they were looking into and, hence, had no opportunity to respond; we did not see the report until this month; and, overall, were entirely excluded from the review process. We even found out that, contrary to our agreement with the Minister, releases were unilaterally being made to the press -- see, for example, this extract from the Kelowna Courier of July 14, 1982:

> Indian and Northern Affairs Minister John Munro has decided to conduct an internal investigation into the activities of the Westbank Indian Band "to clear the air" over allegations concerning federal loans.
>
> The investigation will be headed by Don Goodwin, an Assistant to the Deputy Minister. The probe should be complete within six weeks and the results should be made public, a spokesman for Munro said Tuesday ...

492. Concerned at the burgeoning deviation from the terms of our agreement, I sent the following telex to the Honourable John Munro in August 1982:

> This is to advise that I am deeply disturbed that since our meeting in Ottawa on July 12, 1982 it appears your staff has broken absolutely every single condition of our joint agreement to have an internal review done jointly by your Department and the Westbank Indian Band and I quote under Treasury Board Minute 725973 dated April 1, 1974 Clause 6D "In regard to any review of Band operations the Department will provide regular monitoring and evaluation in co-operation with the Council" ...

493. Regrettably, the Honourable Minister failed to respond.

494. We are left with an important question: What really did happen here?

495. The retention of Messrs. Lawson, Lundell did not flow from our agreement of July 12, 1982 with the Minister of Indian Affairs.

496. The Terms of Reference given to Lawson, Lundell did not reflect the principal concerns of the Standing Committee.

497. To this day, we remain unaware of the Federal Government authorization by which this firm's services were retained, the authority for payment of their fees, the origin and justification for the Terms of Reference provided by the Department, and the explanation for the firm's extensive deviation from these Terms of Reference. It is no wonder that Lawson, Lundell described the task assigned to them as "unique". If, as we suspect, there was no authority for what they did, we would hope that Lawson, Lundell's work would indeed have been unique.

Content of Report

Pages 1 - 11 (and Sundry References)

498. At page 8 of the Report, Lawson, Lundell explained their intention: "... to produce an accurate report". In fact, from examinig their own cautionary comments, it becomes evident that this would not have been possible:

> In conducting our interviews we face serious problems concerning authenticity and confidentiality. (Page 3)
>
> We have not been able to confirm as factual much of the information given to us. (Page 5)
>
> In accordance with our instructions, no oaths were administered by us and we did not cross-examine anyone on statements made by him. We accepted statements as made and documents as submitted. (Page 5)
>
> We accepted files and material delivered to us in the form and content submitted. Our cross-checks in some cases revealed that some files were not complete and appeared self-serving in nature ... The incompleteness of some files made our examination of them of limited benefit. (Page 6)
>
> ... we thougnt it necessary to examine the Band's files relating to leasing matters and allotments ... On two occasions we

> were permitted access to these files ... However, we were denied further access to the Band's files. (Pages 7 and 10 and see later comments)
>
> Your representatives sent to us numerous Departmental files and assured us that all additional information we requested would be furnished promptly. This policy was conscientiously adhered to by your representatives. However, it must be recognized that the Departmental files are voluminous and those we examined were a very minor part of them. (Page 9)
>
> As a consequence of these problems relative to authenticity, confidentiality and access to and review of files it must be acknowledged that, the accumulation and assessment of all information relevant to our inquiry is not practicable. Furthermore, we are sure that some of the information we did obtain may be exaggerated or otherwise false. (Page 9)
>
> Again we must emphasize that we accepted these statements and material as being true and accurate. We did not endeavour to obtain a comment or response from the Chief or the Band Councillors to each complaint ... This unilateral approach necessarily affects the authenticity of the matters we set out. However, on balance, we believe the information given to us, although somewhat biased, to be basically true. (Pages 36 and 37)
>
> We do not believe the informal approach we adopted to obtain information on the other matters in our report would be appropriate and may frustrate a full review of estates. (Page 98)

499. It is difficult to see how any fair-minded reader could be assured of the accuracy of the Report given this range of admitted constraints and partial investigation. But at least Lawson, Lundell did identify these difficulties. Unfortunately though, in other passages, they appeared to be trying to fortify the process undertaken. Thus, at page 100, the unsupported, unsworn comments of the interviewees are suddenly transformed:

> We have incorporated in our report many of the facts as given to us by those people we interviewed.
>
> (emphasis added)

500. And, at page 5, the nature and purpose of giving evidence under oath is conveniently bypassed:

> As we interviewed interested parties we naturally received conflicting evidence. However, the fact that the people we interviewed were not making statements under oath made them, we believe, more open and relaxed and candid in their discussions with us.

501. Even the firm's decision not to obtain "... a comment or response from the Chief or the Band Councillors to each complaint" is dealt with by a speculative process of the three lawyers involved. Hence, at page 82, occurs this remarkable piece:

> Chief R.M. Derrickson and the Band Council would likely answer part of the criticism in this section ...

502. This is the trouble with a one-sided process. You have to acknowledge that it is fundamentally unfair. Or else resort to conjecture about what the other parties would say if only you were to ask them.

503. In the matter of access to the Band files, the Band Council set three conditions before Lawson, Lundell could have further access:

1. that they were to specify which files they wished to see;

2. that they were to provide the reasons for wishing to see these files;

3. that they were to undertake that, after their inquiry was completed, they would inform the Band Council of their concerns and of the allegations made so that there would be an opportunity to respond to these concerns and allegations.

504. To us, these were fair and reasonable requirements (can anyone seriously disagree?). As I commented before the Standing Committee in May 1983:

"The Federal Government will not let you see their files without you telling them what you want the files for and they screen them before they give them to you. Should not a Band have the same right?"

505. But Lawson, Lundell were unable to comply with our conditons. They explained that, if they were to do so they would to a large extent be providing "some of the substance of this report" and, in consequence, acting in contravention of their instructions to provide the Report to the Minister on a confidential basis. Thus, Lawson, Lundell felt precluded from proceeding fairly.

Pages 12 -44

506. The review of our Band by-laws by Lawson, Lundell reveals ignorance and a certain vindictiveness on their part. As with all sections of the Report, we are perfectly able to respond line by line and we expect to be able to be given this opportunity at a later date (see IV. Conclusion). For the moment, however, we restrict ourselves to the overview, specifically:

i) The firm seems to be unaware that all by-laws passed pursuant to the provisions of Section 83 of the Indian Act have to be specifically approved by the Minister and that, at least since I have been Chief, it is similarly the practice to vet all Section 81 by-laws, usually through the Department of Justice. Thus most, if not all, of the by-laws so cavalierly dissected by Lawson, Lundell have been previously reviewed by the Department. The recommendation at page 31 that the Minister carries out his responsibility to ensure that proposed by-laws are valid is, hence, superfluous and, in any event, not entirely achievable. Only the courts can decide if by-laws are valid, as correctly perceived in the Departmental policy statement cited at page 14. It is all very well for Lawson, Lundell to be blithely recommending that you "... require the Band Council to amend the existing by-laws to conform with law" but what is that law? Everyone practising in this area knows that it is a constantly evolving and changing field, and that your Department would be unable to guarantee the subsequent enforceability of all our Band by-laws no matter what changes were made. So let the normal judicial process decide.

ii) The language used by Lawson, Lundell in this section indicated sloppiness of research and an almost grim determination to raise issues. For example, the formulation, "There is a possibility that the provisions of this by-law may be inconsistent with the Indian Regulations passed under the Indian Act", occurs no less than four times. It strikes us that, within the purview of their terms of reference, Lawson, Lundell could have examined the appropriate Regulations in each case to see if, in their opinion, there was any inconsistency. Instead they choose to scatter a little mud but not to back it up with anything solid. In fact, Lawson, Lundell seem remarkably fond of the subjunctive tense, further examples of which follow below:

> Unless Subsections 81(c) and 81(g) in combination permit the adopting of community plans (which is at the least questionable) this by-law in its entirety may be invalid. (Page 17)
>
> This provision may be invalid ... (Page 17)
>
> ... the by-law may be invalid insofar as it applies to water supplies which are not public. (Page 19)
>
> We understand that at present the Band does not collect any money under this by-law. If in future money is raised to meet the costs of supplying water service, then it would be unobjectionable. However, if the money raised were to have a profit component which is used to defray other unrelated expenses of the Band, then the imposition of the water use charges may be illegal. (Page 19)

iii) This passage is also an example of what we mean by "a certain vindictiveness" on the part of the authors. It seems akin to this: "you are innocent today but, if you start beating your wife next week, you will be guilty". Except, of course, that Lawson, Lundell still prefer to say "may".

> ... this by-law may be ultra vires ... (Page 24)
>
> Paragraph 10.8, which authorizes the Building Inspector to revoke permits in certain circumstances, may be invalid ... (Page 24)
>
> The by-law is innocuous; most governing bodies make rules for the conduct of their own business. However, the by-law may be a nullity ... (Page 25)

iv) All that Lawson, Lundell are confirming in these passages is the sheer difficulty of knowing whether Band by-laws do or do not conform to law. Indeed, if it were Lawson, Lundell charged with carrying out the responsibility for advising the Minister as per their own recommendation at page 43, they would apparently have great difficulty. And that is the whole point.

v) The "examples" used by the firm are none too convincing. For instance, in Example #1 at page 31, Lawson, Lundell appear to have even more difficulty when discussing an actual legal proceeding. They write at page 32:

> These tenants appealed to the B.C. Rentalsman. He ordered that the pad rentals be rolled back and decided that the rules and regulations were invalid..
>
> The Band Council appealed to the British Columbia courts, on the basis that the Band Rentalsman by-law ousted the jurisdiction of the B.C. Rentalsman. The Courts found that the Band Rentalsman by-law was invalid.

vi) Had Lawson, Lundell taken the trouble actually to look at this proceeding (and not merely recited the gossip of laypeople), they would have found:

- The B.C. Rentalsman did <u>not</u> decide that the rules and regulations were invalid. He held that Rule 7 (i.e. "All travel trailers, utility trailers, wheeled or unused vehicles must be removed from the park") was "unreasonable".

- The B.C. Rentalsman's order with respect to Rule 7 was remitted to him for reconsideration by Mr. Justice Locke of the Supreme Court of British Columbia.

- The decision of Mr. Justice Locke, far from finding "... that the Band Rentalsman by-law was invalid", made absolutely no mention of it.

vii) It is difficult to have confidence in a Report that exhibits such complete sloppiness, particularly when the effect of this sloppiness is to cast the Westbank Indian Band in a bad light.

viii) As with many other specific "examples" in the Report, Example #2 is whited out, professedly in compliance with the requirements of the Privacy Act and the Access to Information Act. We thus do not know what is being said, and we can therefore make no response. Where is the fairness of this?

ix) With Example #3, we have no control over what the press says; that is obvious. Example #4 is rather more interesting however. We thank Lawson, Lundell for pointing out that the Department of Indian Affairs, in binding the Band by-laws on our behalf, had inadvertently included disallowed By-law No. 1980-03. This now having been brought to our attention (albeit two years after its discovery by these lawyers), we will take the steps necessary for its rectification. Our regret is that, if only Lawson, Lundell had not opted to proceed with a one-sided process, simple items like this could have been mentioned to us and dealt with quickly and without fuss.

x) Finally, the by-laws referred to in Examples 1, 2 and 4 all substantiate what we have said at page 10: In each case, the by-law was reviewed by Department staff.

xi) Since the Honourable Judd Buchanan, former Minister of Indian Affairs, pronounced in 1975 the existence of a "regulatory vacuum" over Indian lands, the Westbank Band has been at the forefront of efforts to establish proper jurisdiction. As a member of The Alliance, we struggled for years to have the Indian Act amended to overcome the regulatory

vacuum and to allow for an effective and comprehensive by-law regime. But the Federal Government would not accede. Similarly, we are one of the most visible and determined Bands in Canada in our pursuit of Indian self-government, and we are working hard to develop the constitutional mechanisms necessitated by this important step forward. So we, as much as anyone, from our commitment to governmental progress, know and understand the weaknesses of the current by-law situation.

507. But what should we have done in the meantime? Can it be seriously suggested that we should have sat back and waited for the Indian Act to be revised or for full self-government? Should we have waited until November 1, 1984 (when the Musqueam Band won) after which we could sue the Federal Government for its breach of fiduciary duty in allowing the regulatory vacuum to occur and continue? No, not at all! We have done what we could to act responsibly while lobbying for change. Working within an admittedly vulnerable statutory framework, we have passed the most ambitious and far-reaching Band by-laws in this Province. For this effort, we deserve to be commended, not criticized. Lawson, Lundell entirely disregard all of this, this context that is so crucial to an understanding of our by-laws. It is not sufficient to go running to Rogers, The Law of Canadian Municipal Corporation; the concept of Indian self-government is gradually emerging to definition and it cannot be found in Rogers.

508. We stand proudly by what we have done: in difficult circumstances, to have made a start towards Westbank self-government.

Pages 44 - 63

509. Lawson, Lundell severely criticize the Agreement of April 1977 (page 44 onwards) yet appear to be oblivious of its source of authority, Treasury Board Minute No. 725973. Had they taken the trouble to examine all this relevant documentation, their conclusions would have been more worthy of analysis. It is similarly the case with their lack of diligence in determing what authorities our Band actually does have. Of course, we are delegated to act under Section 53(1) and Lawson, Lundell could have easily found this out from the Department. Instead, they choose to narrow their signts onto a single agreement. Perhaps this makes their job easier but it hardly reassures the reader of the Report's accuracy.

510. In recommending that the rights and obligations "purported to be granted by" the Agreement of 1977 should be extinguished and that the Vernon District Office should be re-opened (a re-opening to which, by the way, I am completely opposed, notwithstanding Lawson, Lundell's misquotation at page 46), Lawson, Lundell show scant understanding of contemporary Federal/Indian relations. they seek to impose a return to paternalism. And in speaking of the Department's "moral obligation" to lessees, they conveniently fail to mention your primary duty to Indian people (as now determined by the Supreme Court of Canada). Going beyond this, just look at the jumbled nonsense emanating from the Lawson, Lundell belief in a "moral obligation":

> The moral obligation arises from the fact that many lessees entered into leases with Her Majesty in the not unreasonable belief that they would deal with Departmental officials, and not the Band Council, on all lease-related matters. Certainly most and perhaps all persons who entered into leases before the existence of the 1977 Agreement became known were of this view. Many of them have found that their landlord-tenant relations deteriorated significantly when the Band Council assumed from Her Majesty the day-to-day function of landord.

511. In fact, Her Majesty never did carry out "the day-to-day function of landlord" on the Westbank Reserves. Every single lessee on our lands has dealt with the Westbank Indian Council since the inception of our Reserves. There was no transition and the so-called "... not unreasonable belief", apparently the foundation of Lawson, Lundell's "moral obligation", if it existed at all, would be entirely unreasonable.

512. When it comes to the attitude of the Regional Office officials towards Westbank, Lawson, Lundell get themselves in quite a knot. One official tells them "... that the B.C. Regional Office is intimidated by Chief R.M. Derrickson" yet four of the six Regional officials interviewed by Lawson, Lundell, the four who work closely with the Band, speak absolutely in our favour. They even go to the length of personally guaranteeing that we "... were guilty of no improprieties". This remark immediately gets turned around by Lawson, Lundell to this snide rebuke:

> The B.C. Regional Office takes the attitude, we were told by one of its members, that anyone can find majority support in an Indian Reserve for any petition.

513. No one working with Indian people would support this disgraceful proposition.

514. To top it off, Lawson, Lundell's "Recommendation" at page 63 appears to embrace what they have previously said of the manner in which the Department handles complaints. Nothing is added to the current practice by this recommendation -- other than a perhaps dubious interpretation of "... a posture of neutrality and objectivity".

Pages 64 - 77

515. Item 2 of the Terms of Reference given to Lawson, Lundell required them "to review subleases negotiated between the holders of headlessees on the Westbank Indian Reserve and tenants at selected trailer courts which have been established on the Reserve and to render opinions about the correctness of the process, the authorities and the substance of those subleases." Lawson, Lundell chose not to do this. Why? Because there were "... few complaints received from tenants living in mobile home parks". So this changes the intent of the work. It is not so much a matter of carrying out the Terms of Reference as of responding to complaints. On this principle, "selected land transactions" is interpreted to include complaints by Band members with respect to their own property rights about which complaints Lawson, Lundell comment:

> We were unable to substantiate these claims. However if these complaints can be substantiated the right of the current locatee to the property may have been improperly acquired and may be of questionable validity.

516. Thus, Lawson, Lundell disregard what they were supposed to do and move into an area which, in our submission, was outside the purview of their assignment. This whole question of individual interests in our Reserves was thoroughly canvassed by Mr. H.M. Thornton of the Federal Department of Justice in his report of November 13, 1970. Lawson, Lundell should read it.

517. There follows in the Report a prolonged series of what could be fairly described as minor criticisms by Lawson, Lundell. As stated at page 10, we could respond line by line for we certainly have an answer to every point. But this is not what we are trying to achieve with this Submission. What we want is the establishment of a proper forum in which to make these detailed responses, and we will return to this consideration in our Conclusion. Before moving on though, we must refer to the doubt expressed by Lawson, Lundell at page 70 that leases executed by your Department pursuant to Section 58(3) have been validly executed. If this is the case and damage occurs to the Band in consequence, we will be filing an action in respect of your breach of fiduciary duty.

Page 77 - 97

518. It is in their comments about our Band and its internal workings that Lawson, Lundell go most astray. Firstly, let us set the record straight on one very important item: contrary to the indications at page 83, every single member of the Westbank Indian Band can read and only two (elders) are unable to write. As a people, we are most proud of this attainment; we do not relish fancily-educated lawyers casting disparagement on our educational achievements. Nor do we relish the perpetuation of defamatory myths about Indian people and alcohol. Why is the following even mentioned?

> Interviewers have told us that in some instances locatees have made the decision to give up possession of their land after having been plied with alcohol over a period of two or three weeks. We received no evidence or statement in support of this allegation from a directly involved person.

519. We repeat: Why was this gratuitous insult mentioned in the Report?

520. After these hurtful remarks, Lawson, Lundell really get into their stride. They have the effrontery to recommend "The Band Council should be encouraged to hire Indians for Band office positions" when, in fact, our record of employing our own people is second to none. They show no understanding of how Band elections are organized, how Band or Band Council meetings are conducted and their suggestion to amend the Indian Act "... to provide for a larger Band Council" is fatuous. Their insistence on a return to paternalism, previously remarked on, becomes even more evident in this passage:

> There should be included in the application to lease a section to be completed and signed by the Departmental representative whereby he certifies that the locatee understands the nature and effect of the proposed transaction and has had independent advice in that regard, that the lease terms are in the circumstances fair and reasonable for the locatee and that the locatee has not been subjected to undue influence to agree to the lease terms.

521. They go further still in proposing "... the termination of the Department's policy requiring that Band Council resolutions be passed to approve leases". It is as if Lawson, Lundell were determined to oust the authority of the Band Council, the elected representatives of the Westbank people. See, for example, their suggestion at page 84 that the "independent source" advising locatees should have "official powers and authority to enforce his will ..." Yet this is certainly not reflective of my own role in negotiations; here, everything is arranged consensually. (A fair hearing would soon prove this!) To keep trying to foist outsiders on our people -- without any real knowledge of the facts -- is contrary to the entire trend of Indian government in this country.

522. In all seriousness, what is going on with this? The extraordinary interference in our Band affairs by Lawson, Lundell is not justified by the Terms of Reference they were supposed to be operating under. Why did they do it? The Westbank Indian Band will not cease asking this question until we find the answer. By what power can we be so gratuitously insulted and put down?

Pages 98 - 102

523. The impetus for an inquiry came from the Standing Committee on Indian Affairs; they wanted particularly to know about "the funding of Mount Boucherie mobile home park". But Lawson, Lundell appear unconcerned by this. They brush off "The Toussawasket affair" because "this matter has been closely studied by the Select Standing Committee ... (whited out passage)". In a similar vein, they declare themselves unable to carry out the estates portion of the Terms of Reference. With the subleases; it was because of the dearth of complaints. Now it's because "... the informal approach we adopted to obtain information on the other matters in our report" would not be appropriate. What they mean by the delicate word

"appropriate" is really "fair". It would not be fair. And we can certainly expand on this: The informal approach adopted throughout the Report is neither appropriate nor fair. Why is estates any different?

524. Lawson, Lundell remain consistent to the last in their determination to create issues. Look at this for a perfect non sequitur:

> We received few objective complaints relative to estates and it appears that those we did receive had been raised on past occasions and were reported on by your Department and/or involved the advice of independent legal counsel.
>
> Thus we are recommending that this be the subject of an item in the public inquiry ...

525. The word "thus" has seldom had to straddle such a chasm! And even the subject of allotments is vaguely suggested for inclusion in the public inquiry because of what Lawson, Lundell describe as "our being denied access to Band files". No mention here of the "voluminous" Departmental files of which those examined by Lawson, Lundell "were a very minor part ..." They just shirked the work.

526. All in all, a curious business in which the Terms of Reference are ignored by pretext and other issues are dragged in without authority. Even the Deputy Minister could not fully comprehend the sheer bloody mindedness of what was taking place here. The quote at page 101 from his remarks to the Sechelt Band Council makes Mr. Tellier sound somewhat naive in the midst of this abortion of due process:

> "As is usual in such cases, the outcome of such reviews should initially be made known to and discussed with the principals involved. This will be the case in the present circumstances ...:

527. If only the Deputy Minister had been right ... if only he had known what was really going on right under his nose.

Conclusion

528. How many times do we have to say it? We want a comprehensive inquiry to be carried out by a qualified, independent commissioner with all the usual procedural

and evidentiary safeguards built in. But the list of issues to be investigated cannot possibly be restricted to those listed by Lawson, Lundell on page 100. It must include these as well:

1. The origins of the Lawson, Lundell Report, how it was authorized and how it was paid for.

2. A complete review of the manner in which Lawson, Lundell carried out their work.

3. The involvement of Departmental officials in what took place.

4. A review of the Westbank Band's achievements within the context of Indian development in Canada.

5. The Westbank Band's position on everything dealt with to date.

529. Because the Lawson, Lundell Report is being circulated so freely among the Westbank lessees and community, we have to act quickly to stem the resultant damage to our reputation. We have accordingly instructed our solicitors to investigate the possibility of our taking legal action against the authors, John Tennant, Alastair Miller and Christopher Baldwin, either individually or through their firm or both. Regardless of the outcome of this investigation, we will be complaining of these gentlemen to the Law Society of British Columbia. As far as we are concerned, their conduct in preparing this Report exceeds any possible bounds of professional behaviour and is an affront to legal standards in Canada. We must have justice.

PART III

REVIEW OF FINANCIAL TRANSACTIONS AND RELATIONSHIP - WESTBANK INDIAN BAND AND BRITISH COLUMBIA REGION, DIAND

(THE HOBBS REPORT)

Introduction

530. The Review of Financial Transactions and Relationships - Westbank Indian Band and British Columbia Region, DIAND, (commonly referred to as the Hobbs Report) was submitted on July 14, 1983. Although no formal terms of reference for this review have been uncovered the opening paragraph of the report states:

> "Consistent with the direction provided by the Minister of Indian Affairs and Northern Development, the purpose of this review was to identify areas of possible concern in relation to financial transactions and relationships between the Department, the Westbank Indian Band and certain individuals and corporations.(1)"
>
> Note 1: "This review was intended to parallel and complement the review of land transactions, estates and by-laws undertaken by Lawson, Lundell, Lawson and McIntosh, Barristers and Solicitors."

531. As far as can be ascertained this review was conducted solely by Departmental personnel and did not involve any outside input whatsoever. The report was initially classified as "Secret" and was treated as such until its declassification in April 1985.

532. Unlike Lawson, Lundell, who at least had some form of contact with affected Departmental personnel, this report openly acknowledges that none of the affected personnel were contacted other than to require that they produce documents. The report states at paragraph 2, page 1:

> "This preliminary review was limited to documentation provided by Departmental Headquarters and the British Columbia Regional Office. The review team did not interview Westbank Indian Band members nor B.C. Regional employees, but rather assessed available documentation. The B.C. Region (Mr. F.J. Walchli) was requested formally to provide all background documentation for the purposes of this review."

Background

Note:

533. A very succinct summary of the historical background of the course of events that ultimately set the stage for the Hobbs review is set out in a letter dated June 17, 1982 authored by the Director General, B.C. Region to the Assistant Deputy Minister, Indian and Inuit Affairs Program. The letter is set out in its entirely hereunder.

Toussowasket Enterprises Ltd.,
Noll C. Derricksan and Ronald M. Derrickson,
Westbank Indian Band,
Loan and Contribution Arrangement - Parliamentary Standing Committee Issues

534. Further to your verbal instructions, I have reviewed all the relevant files with respect to the above-noted matter, visited the Westbank Indian Band, Noll Derricksan, and the Westbank Indian Band Development Company, examined their records and books, and satisfied myself that the following summary is an essential synopsis of the material facts. In addition, I am attaching a series of documents extracted from the files and obtained from the records of the aforementioned persons and corporations, which sets out the essential facts to substantiate the hereinafter general summary.

535. During the early part of 1974, in conjunction with our Vernon District Office, Mr. N.C. Derricksan commissioned a study to determine the possible viability of developing a mobile home park on Lot 33-2 of Tsinstikeptum I.R. No. 9 which lands are set aside for the use and benefit of the Westbank Band of Indians, which lot is held by a Certificate of Possession by Mr. N.C. Derricksan. Mr. Derricksan also holds Notices of Entitlement or Certificates of Possession to several other parcels of land in I.R. No. 9 and I.R. No. 10. This study was undertaken by Heritage Realty Projects Ltd. under the direction of Mr. D.A. Weir, a former employee of the Department, and delivered to Mr. Derricksan on or about September 16, 1974. Subsequently Mr. Derricksan, on the basis of this study, had prepared conceptual plans for the development of a 60-unit mobile home park as stage 1 of a 3-phase development. Mr. Derricksan approached a number financial institutions who declined to provide financing. Subsequently, arrangements were made with the Federal Business Development Bank (then known as the

Industrial Development Bank and hereinafter called F.B.D.B.) with a plan that called for a $200,000 loan from the F.B.D.B., and concurrently approached the Department with an application for a loan of $72,000. The balance of the capital required for the development of the park was to come from Mr. Derricksan by way of contribution of his land towards the project, plus $30,000 of his own money. The loan of $72,350 was conditionally approved by the Department. When the conceptual plan was transferred into detailed working drawings and costed, the actual cost increased substantially. Concurrently, Mr. Derricksan incorporated a firm known as Toussowasket Enterprises Ltd. and requested that the Minister grant a lease to Toussowasket Enterprises Ltd. pursuant to Section 59(3) which lease was executed by Toussowasket, approved by the Department, signed on behalf of the Minister by Gordon A. Poupore, Manager of Indian Lands and registered in the Indian Land Registry. The execution of this lease was delayed as a result of differences of opinion between various Departmental staff as to its appropriateness and wording. Thus it was not until May of 1975 that the lease was in place and the proceeds of the loan application could be disbursed. In July of 1975, the Federal Business Development Bank determined that they would only advance $170,000 towards the project. On the advice of the Department of Justice, the Articles of Incorporation of Toussowasket Enterprises Ltd. had to be amended.

536. In early 1976 it was determined that the amount of financing required would have to be increased, the I.E.D.F. loan portion of the total financial package was determined to be $117,350. In early 1976 negotiations were undertaken by Underwood, McLellan and Associates, engineering and planning consultants, who acted as project managers on behalf of Toussowasket and Derricksan, and they negotiated a contract with Donaldson Engineering and Construction Limited for the sum of $310,000.00.

537. A modification of the lease was necessary to extend the term of Toussowasket's lease. Again after negotiations with the prime contractor and the consulting engineers, in a review of the total financial package, it was determined that the Departmental loan under the Indian Economic Development Regulations should be $197,350. In the interim, Toussowasket negotiated with Homeco Industries Ltd. to pre-rent a certain number of the projected mobile home pads at a guaranteed rate. Homeco

subsequently went bankrupt, and could not perform under this arrangement. A firm contract was entered into on March 23, 1976 with Donaldson Engineering and Construction Limited for a total price of $299,631. The disbursement of the Department's contribution monies was put in the hands of Mollard and Company, solicitors in Kelowna, under the condition that the Indian Economic Development Fund loan of $197,350 and the Federal Business Development Bank loan of $170,000 be disbursed equally as the contractor met his draw requirements.

538. Several difficulties were found during construction which required additional costs and the standards for construction were changed by the Provincial government. This contributed to an increase in the overall costs of the project of an, as yet, undetermined amount at that time.

539. It was agreed by Noll Derricksan that the rental due from Toussowasket Enterprises Ltd. for the land would, in fact, be reinvested in Toussowasket Enterprises Ltd. in the form of shareholder loans thus no cash actually flowed between Toussowasket Enterprises Ltd. and Noll C. Derricksan or the Crown. Under the revised financing formula, Noll C. Derricksan was to have put in $40,000 of his own money and, in fact, he did in 1976 put in $39,928 which was substantially the proceeds of a term loan obtained from the Royal Bank of Canada.

540. At this time, the market for rentals of mobile home park sites softened. The cause of this was largely due to a general decline in the economy in the Okanagan Region and the establishment of a number of competitive parks off-Reserve. Mr. Derricksan spent a great deal of time, along with our economic development officers, in trying to secure additional financing so that all the accounts could be satisfied. However, these efforts were not generally successful. A request was made in April 1977 for a contribution of approximately $75,000 which was declined by the Department. Payments were to have been made on both the I.E.D.F. loan and the F.B.D.B. loan. A request was made in 1977 to have a portion of the I.E.D.F. loan either written off or alternatively, to secure additional funding under the Regional Stabilization Review in order to clear the outstanding obligations to Donaldson Construction and Underwood, McLellan and Associates. These requests were denied.

541. A change in marketing strategy was conceived in late 1977 whereby tenants of the mobile home pads would be given a longer term permit in return for a cash payment made in

advance. As a consequence, the lease was modified the 19th of January, 1978. In the spring of 1978, Donaldson Engineering and Construction Ltd. commenced legal action for the sum of $54,359. This modification again ran into internal difficulties with the Department resulting in an extensive exchange of correspondence between the Region and Branch Headquarters.

542. Donaldson Engineering and Construction Company then approached their Member of parliament, Mr. Ron Huntington, regarding the unpaid account, and Mr. Huntington continued to pursue on behalf of Donaldson Construction, this matter with the Minister. In June 1978, Chief Ronald M. Derrickson, on behalf of Noll C. Derricksan, submitted a request to the Department for additional funding and reorganization of the loan. These requests were denied. Because of pressure by creditors, and the Provincial taxing authority, the locatee and Band Council requested the cancellation of the lease to Toussowasket Enterprises Ltd. This would have resulted in Toussowasket being a shell company with liabilities of approximately $100,000 to creditors other than the I.E.D.F. and the Federal Business Development Bank. At the same time, the market started to improve. This request was denied. In November of 1978 the Department was advised by the solicitors for Toussowasket Enterprises Ltd. and Mr. Noll C. Derricksan that unless financial assistance could be provided to either of the parties, Toussowasket Enterprises Ltd. would probably be forced into bankruptcy.

543. On February 5, 1979 the Federal Business Development Bank called its loan. A receiver was appointed to manage the park on behalf of the Federal Business Development Bank.

544. During the latter part of 1979 and early 1980, numerous discussions were held between Department officials, both at Region and Headquarters level, and also between the Department and the principal shareholder of Toussowasket Enterprises Ltd. Mr. Noll Derricksan. On March 27, 1980 a meeting was held between Departmental officials and officers of the Federal Business Development Bank. A suggestion was put forward that the Band acquire a half interest in the park on the basis of a certain amount of contribution from the Department to the Band, and an agreement to reduce the current I.E.D.F. loan to a level that would permit the revenue earned from the rental of mobile home pads to meet the debt load and operating expenses.

545. On July 15, 1980, the Westbank Indian Band requested the cancellation of the Toussowasket Enterprises lease on the grounds that it had not made payments nor complied with several of the conditions of the lease. This request was denied. In September of 1980, it was determined that by increasing the rents, with good management, all the creditors could be satisfied by year fourteen of operations. The receiver was not prepared to increase the rentals.

546. The receiver did not give a reason for his decision. It should, however, be noted that a year later the Westbank Band was forced to roll back the rent increases they imposed on the same park by an order of the B.C. Rentalsman. A subsequent judicial decision by the Supreme Court of B.C. confirmed the application of the Provincial law in this case. Therefore, the analysis done by D.I.A. Economic Development in 1980 demonstrating the viability of this project became in fact invalid. Given the fact that the project was not allowed to generate more revenue and that the costs of the loans, along with other operational costs, continued to increase, the project clearly was headed toward bankruptcy.

547. In the summer of 1980, Mr. Guy Lavigueur, President of the Federal Business Development Bank, met with Mr. Walchli in Vancouver to discuss the financial problems associated with Toussowasket Enterprises Ltd. F.B.D.B. were concerned that if they were forced to put the trailer park into bankruptcy and liquidate the debts, they would be forced to realize on their security, namely taking the lease and assigning the leasehold interest to a non-Indian. The land in question has never been surrendered and, therefore, they felt that their freedom to assign the lease was restricted. It is the policy of the Department to seek the concurrence of the Band Council and the locatee before any assignment is made. In this case, the Band Council made it clear they would not agree to an assignment. This decision placed the Minister in an embarrassing position because he would have to reject the Band's position and allow the assignment to proceed or reject the F.B.D.B. request and subject the Department to litigation brought on by that organization. F.B.D.B. found both options unacceptable for the following reasons:

a) even if the Minister agreed to the assignment, it would be extremely difficult to find a tenant who would be willing to accept the lease given the fact that the Band Council are against an assignment;

b) it is doubtful whether any litigation involving two federal agencies could proceed. (The Crown suing the Crown).

548. F.B.D.B. suggested that some other way be found to settle this account. They offered to work with the Department in exploring other options.

549. The existing policies (I.E.D.F.) in the Government do not allow the Department to liquidate the debt of a bankrupt organization. When debt deletion is proposed, the Department is required to provide out of the economic development budget, the equivalent amount. It was, therefore, felt that rather than pay the $300,000 owing on this loan to general revenue, it would be better to invest the money in completing the project and retiring the outstanding debt against the corporation. The Department was not prepared to make a contribution to one individual even though this is permissible under the I.E.D.F. Rather it was felt that any contribution must benefit all of the Band members.

550. The Band Council put forward a proposal whereby the Band, through their company (Westbank Development Company), would acquire a 50% interest in the trailer court and in turn, would complete the development of the court. The Band Development company would put up $1,000,000 and the Department $300,000) to complete the development and retire the debts. This proposal was accepted by the Department.

551. On the 20th of May, 1981 an agreement was entered into between Toussowasket Enterprises Ltd., Westbank Indian Band Development Co. Ltd., Noll C. Derricksan, and the Westbank Indian Band. The essential provisions of this agreement were that Toussowasket would assign a 50% interest of its lease to Westbank Indian Band Development Co. Ltd. (on behalf of the Westbank Indian Band) in return for the Westbank Indian Band through its corporate entity Westbank Indian Band Development Co. Ltd., assuming 50% of the liability to the Federal Business Development Bank, and all of the liability to the Indian Economic Development Fund. The management of the mobile home park was to be put in the hands of the Band or its development company, and it was considered that in the very near future, phase 2 and 3 of the original proposal would be implemented. Additional funds were to be injected by the Westbank Indian Band, either directly or through its development company, for this purpose. The Westbank Indian Band obtained from the Department an Economic Development contribution of $300,000 payable over three years, to assist in meeting this new agreement.

552. Westbank received its first advance under this contribution arrangement in the latter part of August and subsequently paid the sum of $100,000 through its development company, to D.I.A, to pay in part the outstanding arrears and interest of the I.E.D.F. loan.

553. The Band took over the administration of the park and promptly raised the rentals to a level equal to other parks in the general area. At this point in time, the B.C. Rentalsman entered the picture on behalf of a few tenants, and ordered the rent increases rolled back. Concurrently arrangements were being made for a partitioning of the lease Toussowasket Enterprises Ltd. had over lots 33-2-2 and 33-1-A. When it was determined that the Rentalsman was going to force the issue of rental rollbacks, a new arrangement was negotiated between the Westbank Indian Band and Noll C. Derricksan.

554. The essential elements of this new arrangement are that Derricksan would place lots 33-2-2 and lot 33-1-A under the administration of the Band. Westbank Indian Band would pay out the I.E.D.F. loan and also the Federal Business Development Bank loan and complete phase 2 and phase 3 of the project. Upon this completion taking place on or before September 20, 1983, the Band would assign any interest it was deemed to have in the mobile home park on the above noted lots in return for clear title to lot 180 on I.R. 10. Lot 180 on I.R. 10 has an approximate market value of $3,200,000. Thus Westbank Indian Band would undertake construction and payment of debts aggregating somewhere in the neighborhood of $1,300,000 in return for clear title to a parcel of land valued at about $3,200,000. The Band then requested that the balance of its contribution arrangement entered into in May 1981, be accelerated so that it would receive the full balance ($200,000) to assist it (the Westbank Indian Band) in its undertakings. The Band has now (as of May 21) paid off all the indebtedness to the Federal Business Development Bank, the Indian Economic Development Fund, and has commenced the construction of an additional forty pads. To date it has expended approximately $1,000,000 and will expend an additional $300,000 prior to completing its obligations as required under an agreement dated April 23 between Noll Derricksan and the Westbank Indian Band giving effect to the above-noted arrangement. An inspection of the works indicates that they are going forward promptly and are well managed.

555. We now have the situation where the Westbank Indian Band has management and control of the existing trailer park and adjacent lands, is developing the adjacent lands as per original plans, and will upon completion, transfer these works to Noll C. Derricksan in return for a parcel of land on I.R. No. 10 which has a value of about $3,200,000. Proceeds of the D.I.A. contribution has paid back the unsatisfied loans to the I.E.D.F. and the F.B.D.B. In addition, Noll Derricksan and the Band jointly have an agreement with Dave Loudoun Enterprises Ltd. to pre-rent additional pads at the rate of $4,000 per pad upon its availability. As of this date, $216,000 has been received from this source.

556. The indebtedness to Underwood and McLellan, and Donald Construction and Engineering Ltd. remain outstanding against Toussowasket Enterprises Ltd. which has no assets. It should be noted that neither company registered a lien or judgement against the leasehold interest, and therefore, when the Department agreed to the surrender of the lease, it was free and clear of all encumbrances. The lease between Toussowasket Enterprises Ltd. and the Crown has been surrendered. This action was necessary to remove the application of the Provincial Rentalsman's law governing rent increases. Without a rent increase this project could not be viable.

557. Careful examination of the records and books of account of Westbank Indian Band, the Westbank Development Corporation, and Toussowasket Enterprises Ltd. indicates that no monies have gone to Noll C. Derricksan personally nor has Ronald Derrickson received any personal benefit.

558. The above is forwarded to you for your information and, if necessary, action.

Review and Commentary

559. As with the Lawson, Lundell Report, the Departmental personnel most affected by the Hobbs report were asked to review it and to provide their comment. In offering the responses of Departmental personnel to the Hobbs Report the same format will be utilized as that used in the Lawson, Lundell segment.

Statement - Hobbs Report

560. This preliminary review was limited to documentation provided by Departmental Headquarters and the British Columbia Regional Headquarters and the British Columbia Regional Office. The review team did not interview

Westbank Indian Band members nor B.C. Regional employees, but rather assessed available documentation. The B.C. Region (Mr. F.J. Walchli) was requested formally to provide all background documentation for the purposes of this review. (Page 1)

Comment - Sparks

561. This paragraph contains blatant misinformation. The review team did indeed interview members of the B.C. Regional staff. Ms. F. Benoit spent several days interviewing not only the writer, but Loans Officers and supervisors in the Economic Development and Lands activity units within the British Columbia Region. The B.C. Region formally forwarded in June of 1982 all background documentation that was requested for the purposes of the review undertaken in the Hobbs' Report.

Statement - Hobbs Report

562. "Much information germane to this review has not been available. This was caused both by the incomplete state of information provided by the B.C. Region, and by the total unavailability of information in respect of the network of individuals and corporations which had instrumental roles in many of the subject developments." (Pages 1/2)

Comment - Evans

563. The findings of this analysis indicate that much of the information available to the Hobbs "Team" was either overlooked, disregarded or misunderstood. The Hobbs' Report makes numerous references to a contribution made to the Westbank Band without the requisite authority. An example illustrates this point most clearly, yet a memo dated 16/12/82, signed by the Senior A.D.M. Fournier, to F.J. Walchli states quite clearly that the Regional Director General had the authority to make the contribution.

1. Rather than treating the arrival of such an opinion as a definitive piece of evidence Hobbs appears to have treated this input as meddling.

2. Departmental files are retained on Band Corporations that have business dealings with the Department. The Region did not maintain files or seek business information from Band or private Indian-owned Corporations that did not have business dealings with

the Department. A professional approach to such research would have required a direct approach to the corporations in question. To blame the Region for not maintaining such information is devoid of reason. (Pages 8/9)

Comment - Sparks

564. No attempt was made by the Headquarters team who provided the information for the Hobbs' Report to obtain credible information. The Indian Affairs Program has a responsibility for Indians, and does not maintain, as a general rule, files on individuals and corporations who may be sublessees of Indian lands. The Department has no mandate for this exercise, nor in the normal course of fulfilling its statutory obligations does it have the need for such supplementary data. (Page 1)

Comment - Clark

565. I was not aware or even informed of the report prepared by Mr. Hobbs. I have seen no terms of reference. All files of the B.C. Region were available then, as now, for review and research. (Page 1)

Statement - Hobbs Report

566. The review has identified a number of areas of concern of a substantive nature. Given the limitations of the review process, a number of the areas of concern identified require a more in-depth review, utilizing additional investigative approaches, in order to fully understand the implications and interrelationships of certain transactions. The areas of concern fall into two broad categories. (Page 2)

Comment - Evans

567. No comment - general statement explaining that the team was short on facts. (Page 10)

Comment - Sparks

568. The Hobbs' review staff had available some 10,000+ pieces of information. It carried on its research in excess of six months. It would seem, given the resources and the time that the Hobbs' team utilized, that a sufficient, indepth review could have been carried out if competent and professional management of the process had been in place. (Page 1)

Statement - Hobbs Report

569. In the first instance, the review has established the fact that several Band members receive benefits to an extremely disproportionate extent. A corollary is that fundamental concerns exist with respect to the degree of benefit received by other Band members from dealings related to their land base. In the establishment, maintenance and development of this situation, the review found evident an interweaving of personal, official and commercial roles and relationships and many of the involved transactions, no matter how unusual, have received senior Regional DIAND consideration and approval. The following report reviews four specific areas of concern that support this conclusion, as follows:

1. Toussowasket Enterprises Limited;

2. Westbank Indian Band Development Company Ltd.

3. Ronald M. Derrickson - Band Payments; and

4. Land Lease Transactions (Pages 2/3)

Comment - Sparks

570. This paragraph suggests that certain Band members received certain benefits at the expense of, or that were not available to, other Band members. However, nowhere in the Report are these alleged beneficiarcies identified nor are the benefits identified. Economic Development by its nature is an interaction of roles and individuals, both government, Indian and Business entrepreneurs. (Page 2)

Comment - Evans

571. The fact that Band members receive disproprotionate benefits is a statement of the obvious. Benefits are linked to two main factors - size of land holdings and entreprenurial interest, activity and aptitude of the individuals concerned.

572. The size of the Band and the limited pool of leadership talent, leads to an interweaving of personal, official and commercial roles. Guidelines which define the degree of acceptable "arms length" relationship have been under review at the national Headquarters' level for some years. No definitive direction on this matter has been given to Regions. It is not an easy question to solve.

573. It is interesting to note that Westbank is one of the few Bands in British Columbia that has, as a result of Band commercial activities, generated a Band cash flow from which dividends are paid to Band members. (Pages 11/12)

Comment - Clarke

574. Under the Indian Act it is the Band Council that consents to the issuance of a Certificate of Possession. The role of the Minister is purely one of approval of a prescribed process followed by registration. It is true that many Bands in British Columbia have elected to provide C.P.s to a minority of members, although generally every family has some land ownership.

575. Further reference to this area of concern is made following. (Page 2)

Statement - Hobbs Report

576. "The second category of concern relates to British Columbia Region maladministration in regard to relationships with the Westbank Indian Band. The review identified a consistent pattern of administration by the B.C. Region which is below acceptable standards." (Page 3)

Comment - Evans

577. Observations on this statement are best made under the specific points raised by Mr. Hobbs. Note should be made, however, of the fact that much of the decision-making authority credited by Mr. Hobbs as being made in the Region is in reality made at National Headquarters, e.g., approval of 98 leases. (Page 13)

Comment - Sparks

578. Again there is a suggestion that there was maladministration within the British Columbia Region in relationship to the administration of the Indian Program to the Westbank Indian Band. Nowhere in this report is there evidence of and identification of maladministration. (Page 2)

Statement - Hobbs Report

579. With respect to the second category of concerns, related to B.C. maladministration, it is recommended that senior Departmental management direction be provided to senior B.C. Regional officials with reference to the necessity

of adhering to Departmental and governmental regulations and procedures in transacting the affairs of the Department and exercising Ministerial authorities. (Page 4)

Comment - Evans

580. No comment - data provided in the body of the Report casts doubt on any conclusions. (Page 15)

Comment - Sparks

581. There is no evidence contained within this Report, or appended thereto, that British Columbia Regional officials did not adhere to Departmental and Governmental regulations, legislation and procedures. Likewise there is no evidence of senior officals within the Indian Affairs Program having audited or inspected the British Columbia Region and found such breeches of duty. (Page 2)

Statement - Hobbs Report

Toussowasket Enterprises Ltd.

582. In June 1973, Mr. Noll Colin Derricksan, by BCR No. 158, was allotted possession of lot 33-2 on Indian Reserve No. 9 on which Mt. Boucherie Mobile Home Park, operated by Toussowasket Enterprises Ltd., was subsequently built. The BCR No. 158 was signed by Mr. N.C. Derricksan, then Chief and Band Administrator, as well as his mother, Mrs. Margaret Derrickson, who was then councillor. Both were owners of Toussowasket Enterprises Ltd. Lot 33-2 was then leased to Toussowasket Enterprises Ltd. by the Crown, for the benefit of the locatee Mr. N.C. Derricksan. (Page 5)

Comment - Sparks

583. The Band Council Resolution No. 158 was passed with two Councillors who had a conflict of interest in the subject thereof. Given that the Band only had three Councillors at this time, it is improbable that any transaction could have taken place where there wasn't a conflict of interest. Mr. D. Hett, District Supervisor at the time, was satisifed that the interests of the Band as a whole were not jeopardized by this action. In fact, the action in 1973 merely re-regularized a situation which had existed on I.R. No. 9 prior to a general surrender for leasing in the 1960's which was subsequently ammended returning the bulk of the land back to Reserve status and the individual Band members which had historically or

legally been in possession were merely being reinstated. Attached as Appendix "A-1" are the details of the transactions of a sale from Bert and Grace Wilson to Noll Derricksan for valuable consideration. (Page 2)

Statement - Hobbs Report

584. "In May 1975, the Department (Mr. D.G. Meredith, Departmental Headquarters), approved an Indian Economic Development Fund (I.E.D.F.) loan to Toussowasket Enterprises Ltd. in the amount of $72,350. This loan was subsequently (1976) increased to $197,350. Available documentation is inadequate to determine if this increase was justified. The Federal Business Development Bank (F.B.D.B.), in 1976, advanced a loan of $170,000. to Toussowasket Enterprises Ltd., taking as security a first mortgage on the leasehold (lot 33-2) and a personal guarantee of Mr. N.C. Derricksan in the amount of $50,000." (Page 5)

Comment - Evans

585. Contrary to the above statement, a loan of $72,350 was never approved, the offer being rejected by Mr. N. Derriksan.

586. The loan of $197,350, which was approved in 1976, was authorized at National Headquarters' level, not by the Region. The Loan Committee and the National Director of Economic Development of the day judged the documentation to be adequate. (Page 17)

Comment - Sparks

587. The information is factual. (Page 2)

Statement - Hobbs Report

588. Among securities for its loan, the Department took a second mortgage on the leasehold, a hypothecation of the shares of Toussowasket Enterprises Ltd., as well as a personal guarantee of owner Mr. N.C. Derricksan who, in 1975, had a reported personal net worth of one million dollars. (Page 6)

Comment - Evans

589. Other security was taken. See loan agreement for details.[1]

590. Mr. N.C. Derricksan's net worth was made up primarily of land assets which could not be easily translated into a liquid state. (Page 18)

Comment - Sparks

591. The information is factual. (Page 2)

Comment - Clarke

592. It should be noted that a considerable part of many Indian locatees net worth is based upon the current market value of land held by a C.P. Actual value will depend upon the ability to 'sell' the land, - limited by the Indian Act to another member of the same band, or to lease the land and generate an annual income.

Statement - Hobbs Report

593. "In 1977, the first I.E.D.F. loan repayment was due, but was not received. Unaudited net worth statements of Mr. N.C. Derricksan that year (1977) showed $2.1 Million, including annual on reserve income of $64,000." (Page 6)

Comment - Evans

594. This statement, taken by itself, could be misleading. The Stabilization review undertaken in 1977 on Toussowasket Enterprises Ltd. noted that:

1. The capital cost overruns for the project had placed the viability of the project in jeopardy.

2. There had been a sudden decline in the market for Trailer Court pads.

3. Neither Mrs. Noll Derricksan nor Mrs. Margaret Derrickson were prepared to invest more equity in the enterprise at that time.

4. The financial projections prepared by the Region indicated a long term viability for the project when completed. These analysis showed a period of 12 to 15 years during which the owners/investors would receive no return on their investment.

5. The recommendation of the B.C. Region which was accepted by National Headquarters(1) was not to invest any Stabilization Funds in the business unless the owners were prepared to increase their equity.

The agreed upon Departmental approach was to let the I.E.D.F. loan accumulate until such time as the F.B.D.B. loan was retired at which time it would be theoretically possible to commence retiring the I.E.D.F. Loan.(2) (Pages 19/20)

Comment - Sparks

595. While Mr. N.C. Derricksan had an estimated net worth in 1977 of $2.1 million dollars, the largest part of that net worth was made up of estimated values of land holdings in Indian Reserve Numbers 9 and 10, together with an art collection and a few not too liquid investments. Mr. Derricksan had very nominal cash resources at this time. (Page 2)

Statement - Hobbs Report

596. "Documents indicate that in 1978, the Department provided at least a $7,000. contribution/contract to the Band to assist Mr. N.C. Derricksan in his defence in a court action by Donaldson Engineering and Construction Ltd., a contractor of Toussowasket Enterprises Ltd. B.C. Supreme Court judgement against Toussowasket Enterprises Ltd., in favour of Donaldson Engineering and Construction Ltd., was awarded in April 1979." (Page 6)

Comment - Evans

597. The court action had the potential of having a direct effect upon the viability of the operation as well similar actions were being considered by W.I.B.D.C. against Donaldson.

598. Region wrote to the Head of Litigation Support at HQ requesting a legal opinion as to whether or not such a contribution would meet the policy requirements of the Department.(1) At the time of writing I have been unable to find Ms. Devine's response.

599. In discussion with Ms. Zaharko, Ms. Devines successor, it was noted that Ms. Devine did not leave a well-defined paper trail. (Page 21)

Comment - Sparks

600. The monies provided to the Band were used to attempt to negotiate the differences between N.C. Derricksan and Donaldson Engineering and Construction Ltd. The judgement was uncontested. (Page 3)

Statement - Hobbs Report

601. "Also, in 1978, a request for deletion of Toussowasket's I.E.D.F. loan was supported in principle by the B.C. Region. However, it was ultimately not submitted formally to Departmental Headquarters because Headquarters advised that it would not entertain a request for the deletion of the loan as it was personally guaranteed by Mr. N.C. Derricksan, who was reportedly a wealthy person with a substantial income." (Pages 6/7)

Comment - Evans

602. This statement is not in accordance with the facts. The Stabilization Submission dated 19/12/77 by the B.C. Region recommended:

a) rewrite of loan to include interest due;
b) obtain additional security if possible; and
c) accommodate projected arrears.

603. This proposal was accepted by Mr. R.H. Knox on January 6, 1978.(1) (Page 22)

Statement - Hobbs Report

604. "In November 1978, Toussowasket's solicitors (Warren, Ladner) suggested transferring the company's assets and liabilities, (except the I.E.D.F. loan) to another company, thus avoiding repayment of the I.E.D.F. loan. B.C. Regional officials refused this, however, on the grounds that since the debt deletion authority to accomplish this directly had not been granted, the Region could not approve the proposed indirect method of debt deletion." (Page 7)

Comment - Evans

605. No evidence was found on files to suggest that Toussowasket's legal advisors had counselled the company to avoid meeting its debt obligations. (Page 23)

Statement - Hobbs Report

606. "The F.B.D.B., from 1978 to 1980, was attempting to realize on its first mortgage but could not do so without the support of the B.C. Region, which was not forthcoming. In 1979, F.B.D.B. appointed a receiver manager to Toussowasket Enterprises Ltd." (Page 7)

Comment - Evans

607. Contrary to the above statement, negotiations with the F.B.D.B. during this period were centred on a request by the F.B.D.B. that the I.E.D.F. write off its loan. Region did not agree with this approach.

608. The discussions became more pointed in 1979/80 when faced with other potential losses on Indian Reserves.

609. The F.B.D.B. representatives stated that unless the Department was prepared to write off its loan or pay out the F.B.D.B. they would stop lending to enterprises located on Indian Reserves.

610. Contrary to Mr. Hobbs' statement, the problem encountered by the F.B.D.B. in realizing on its security was not a lack of cooperation on the part of the Region, but through carelessness or lack of understanding of the Indian Act, the F.B.D.B. had taken a hypothecation of the leasehold interest (locatee lease) which could not be assigned without the approval of the Band Council. Such approval was not forthcoming from the Band(1,2). (Page 24)

Statement - Hobbs Report

611. "On May 5, 1981, the B.C. Region entered into a $300,000 3-year economic development contribution arrangement with the Westbank Indian Band for the purpose of purchasing a 50% interest in the Toussowasket lease and a right of first refusal for the adjoining property. A contribution arrangement stipulated that the monies be used to retire Toussowasket's I.E.D.F. loan. Also, on May 5, 1981, the Westbank Indian Band transferred $50,000. to the Westbank Indian Band Development Company Ltd. (W.I.B.D.C.) (1) for Toussowasket Enterprises Ltd. On May 8, 1981 the W.I.B.D.C. brought Toussowasket's F.B.D.B. loan current with a payment of approximately $51,000 and the F.B.D.B., on May 9, 1981, released its receiver manager." (Pages 7/8)

Comment - Evans

612. The rationale for providing this contribution is not stated. The critical considerations were:

1. The enterprise was failing and there was little hope of recovery based on operating projections.

2. The principals were unwilling to invest more funds in the enterprise.

613. F.B.D.B. wanted to realize on its security but because of faulty documentation on its part was unable to do so. F.B.D.B. had asked I.E.D.F. to write off its loan in order to improve the operating position of the company. Threats to stop all loans to Indian enterprises on B.C. Reserves were made by F.B.D.B. officials.(1) The Band felt the uncertainty surrounding Toussowasket was creating a poor image for Reserve development. The Band indicated a willingness to invest in the enterprise, to take management control and to develop stages 2 and 3 of the Park in order to create a cash flow which would ensure viability.

614. The total financing package was $1.3 million of which the Department contributed $300,000.

615. The main benefits to be realized from the arrangement were:

a) viability of the enterprise;

b) increase in equity position of the company and retirement of all loans;

c) in exchange for a cash contribution of $1 million, the Band received land valued at $3.2 million;

d) F.B.D.B. prepared to continue lending to Indian developers; and

616. The alternative of putting the company into bankruptcy would have in all likelihood resulted in a political reaction by the Band which would have resulted in an economic impasse - the write-off of both I.E.D.F. and F.B.D.B. loans, a black eye for the Band and the possibility of a host of law suits. (Pages 25/26)

Comment - Sparks

617. The purpose of the contribution made in May 1981 was to enable the Westbank Indian Band to acquire a 50% interest in Toussowasket Enterprises Ltd. In order to meet the recommendations suggested by the Band's advisors, the investment was made through its wholly owned development company, Westbank Indian Band Development Company Ltd. (Page 3)

Statement - Hobbs Report

618. "Pursuant to the May 5, 1981 contribution arrangement, a four-party agreement dated May 20, 1981 to purchase an interest in the lease was entered into between

Mr. N.C. Derricksan, the Band, Toussowasket Enterprises Ltd. (vendor) and W.I.B.D.C. (purchaser). By this agreement, the W.I.B.D.C. "or the Band on its behalf" would assume responsibility for all monies due DIAND under a second mortgage of the lease. In addition, WIBDC would assume responsibility for 50% of Mr. N.C. Derricksan's personal guarantee to F.B.D.B. in consideration for a 50% interest in and to the lease, with the operation of the trailer park provided for in the lease to be determined jointly by the Band Council or its authorized representative and Mr. N.C. Derricksan. Although the $300,000 contribution arrangement of May 5, 1981 is with the Band, this "purchase of interest in lease agreement" of May 20, 1981 states that the WIBDC is the purchaser. However, the WIBDC was not a party to the contribution arrangement." (Page 8)

Comment - Sparks

619. The Westbank Indian Band Development Company Ltd. had statutory legal capacity which the Band was presumed not to have as a corporate entity. The contribution was made to the Band and the Band was the recipient as defined pursuant to the prevailing Treasury Board authorities and the Appropriations Acts. (Page 3)

Comment - Evans

620. Much is made in this and subsequent sections on the specifics of how the money was transferred from the Department to the Band - to the Band's Development Company and finally to Toussowasket Enterprises.

621. From the Department's point of view the essence of the agareement with the Band was that the funds be used to acquire a 50% interest in Toussowasket Enterprises and a right of first refusal to a leasehold interest in an additional 15 acres of adjoining property.

622. As the Band carried out this arrangement and made adjustments in dealings with Toussowasket, they kept the Department fully informed. The technicalities of how the Band and Toussowasket implemented the intent of the contribution arrangement were not of direct concern to the Department.

623. It was the belief, of Regional staff, based on personal knowledge and past experience, that the Band would live up to its obligations. As events now reveal, the Band did live up to its commitments.

Statement - Hobbs Report

624. In December 1981, Headquarters' request to B.C. Region for information concerning Toussowasket's I.E.D.F. loan arrears met with a partial response, as did Headquarters' questions relating to the $300,000 contribution to the Westbank Indian Band of which $100,000 was already disbursed. Due to apparent irregularities, in May 1982 Departmental Headquarters (Hobbs) instructed the B.C. Region (Walchli) not to release the remaining $200,000 contribution pending further review. Despite this direction, however, the B.C. Region (Walchli) authorized the immediate disbursement (April 1982) of the remaining $200,000 contribution to the Band. (Pages 9/10)

Comment - Evans

625. Regional files do not record any written instruction from Mr. Hobbs on this issue, however, Headquarter's files do reveal a memo dated March 30, 1982, instructing Mr. Walchli to cease all further disbursements.(1) Mr. F.J. Walchli(2) states that he spoke on the telephone to Mr. Hobbs on the matter. A lengthy discussion ensued and at the conclusion of the call Mr. Hobbs said he would not oppose the release of the funds provided concurrence was received from Assistant Deputy Minister, Goodwin. A follow-up call (Walchli to Goodwin) resulted in the ADM agreeing that the funds could be released.(3) (Page 30)

Comment - Sparks

626. The information relayed from the B.C. Region to the DIA Economic Development activity at Headquarters is identified as a partial response. This is a subjective, selective judgement which does not reconcile with the information available at Headquarters at that time. In April 1982, a revised deal had been negotiated with a new set of objectives whereby the Westbank Indian Band would acquire certain properties in I.R. No. 10 in return for the satisfaction of the debts of Toussowasket Enterprises Ltd. and the completion of the trailer park as originally envisaged. This became a new transaction, and is referred to in the financial agreement dated April 23, 1982. (Page 3)

Statement - Hobbs Report

627. "This disbursement was made for a revised purpose, using some very questionable business practices, namely:

a) provision of funds without the required legal documentation having been executed;

b) continued disbursement of funds when the purpose of the contribution had evidently been radically revised, without amending the contribution arrangement to reflect the revised purpose;

c) no up-to-date appraisal of land which formed a significant consideration of the deal; and

d) acceptance of a third-party agreement which is ambiguous in meaning and effect without reference to the Department of Justice. (Page 10)

Comment - Evans

628. The legal documentation that was required to begin dispensing the contribution was an executed Contribution Agreement. This requirement was met.

629. The basic purpose of the Contribution Arrangement did not change. The techniques used to reach this objective by the Band and Toussowasket were altered but these did not have a fundamental effect upon the Departmental Agreement with the Band.

630. A land appraisal was not a requirement under this arrangement. General knowledge of Band and Departmental Staff indicated that the exchange of cash for land gave the Band excellent value for its money. This was substantiated in a subsequent appraisal.

631. The Department had a direct interest and responsibility to ensure that the terms of the Contribution Agreement between the Band and the Department were fulfilled. The details of how these obligations were discharged were the responsibility of the Band.

632. Contrary to the statement that the Contribution Arrangement was not amended to reflect a revised purpose, a letter dated November 18, 1982 - F.J. Walchli to Chief Derricksan, states:

> "This is to confirm our approval of your request to amend the Purpose of the Contribution Arrangement dated May 5, 1981, in the amount of $300,000;

From: To purchase a 50% interest in the leasehold interest held by Toussowasket Enterprises Ltd. and a first refusal to a leasehold interest in an additional 15 acres adjoining the property;

To: To assist the Band in assuming control of, and developing the leasehold interest held by Toussowasket Enterprises Ltd. as outlined in Appendix "A" attached, upon completion of which, as outlined in the Appendix, the Band will transfer Lot 33-1-B I.R. No.9 to Mr. Noll C. Derricksan, free of all encumbrances. In exchange, the Band will obtain full title in and to Lot 180, RSBC Plan No. 513, I.R. No. 10, without encumbrances." (Pages 31/32)

Comment - Sparks

633. No paragraph in the Hobbs Report more adequately reflects the lack of business acumen than the comments made therein. The records show the documentation was being processed at the time the funds were made available which was done to reduce the daily increasing debt loan. The purpose of the contribution continued to be as stated in the original agreement, to acquire an interest in real property. With respect to the values involved, internal professional advice was given to both the Regional Director General and the Westbank Band Council. The acceptance of a third party agreement is a business decision and whether or not it was ambiguous is a subjective decision. (Page 4)

Comment - Clarke

634. The relevancy of a land valuation was only to those parties involved which was limited to the locatee, the Band, and a corporation.

Statement - Hobbs Report

635. The revised purpose was outlined in an agreement dated April 23, 1982, between the Westbank Indian Band and Mr. N.C. Derricksan wherein the Westbank Indian Band would complete the development of the land, paying Mr. N.C. Derricksan $2,500 per month until completed, at

which time Mr. N.C. Derricksan would receive free and clear the fully developed land plus an additional lot (33-1-B, I.R. No. 9) which at the time of the signing of the agreement, the Band did not legally possess. Lot 33-1-B was transferred to the Band by the locatee, Mr. Bert Wilson on May 12, 1982 in consideration for the sum of $24,000. In exchange for the aforementioned, Mr. N.C. Derricksan was to transfer Lot 180(1) (I.R. No. 10) to the Westbank Indian Band. Although no appraisal was done prior to the agreement, Lot 180 was estimated by the B.C. Region to be worth $3.2 million. Lot 180 was allotted by the Band Council to Mr. N.C. Derricksan when he was Chief of Westbank Indian Band (BCR No. 176 dated August 21, 1973).

Comment - Evans

636. Commentary is largely irrelevant. Agreement between the Band and the Department was fulfilled. (Page 33)

Comment - Sparks

637. While the documents referred to lot 180, it had in fact only been surveyed and reregistered a few days prior to the preparation of this agreement. There is no evidence that the Westbank Indian Band nor N.C. Derricksan were aware of the new lot numbers at the time of the preparation of the April 23 agreement. The further allegation in this paragraph of a conflict of interest is referred to in paragraph 9 above. (Page 6)

Statement - Hobbs Report

638. "The relinquishment of the Toussowasket lease was approved by the B.C. Region in spite of the knowledge of the existence of Toussowasket's unsecured creditors and a ruling of the B.C. Rentalsman to roll back rent increases applied by Toussowasket on Mt. Boucherie Mobile Home Park tenants. This ruling respecting lease rentals was upheld by the Supreme Court of B.C. in March 1982. Legal advice in this matter was not obtained by the Region until later (letter dated May 20, 1982, T. Marsh, Department of Justice)." (Page 12)

Comment - Evans

639. An astonishing revelation. Once debt obligations have been discharged, a creditor is under a legal and moral obligation to release security. Any action to hold security in an attempt to pressure a borrower to settle obligations to third parties would be illegal and unethical. (Page 35)

Comment - Sparks

640. The Rentalsman's interest was not an interest in land and was no concern of the Regional Director of Reserves and Trusts. There was no evidence of any unsecured creditors other than Donaldson Engineering and Construction Ltd. which had obtained a judgement, and Underwood, McClelland and Associates which had initiated legal proceedings against Toussowasket Enterprises Ltd. The solicitor for Donaldson Engineering and Construction Ltd. was instructed to register the judgement by his principal, but failed to do so. As of this date, Donaldson Engineering and Construction Ltd. still have recourse for the omission of their solicitor against the said solicitor. (Page 4)

Comment - Clarke

641. It is not considered the role of this Department to seek unsecured creditors of provincial companies who are lessees of the Crown.

642. In this case we were aware of the actions of Donaldson Engineering and Construction Ltd. and had advised them of the process required to register a claim by way of a court judgement. A check of the register immediately prior to termination of the lease showed that the only charges were mortgages which were both paid out.

643. The Rentalsman's jurisdiction extended to matters between the Boucherie and their subtenants and no jurisdiction existed between Canada and the Boucherie. The Region was satisfied that the sub-tenants were being considered by the Band Council through their requests to develop a short term lease (five year, renewable) with the Crown. The region supported these measures but the Department was only prepared to provide one year leases. The rental required was conistent with rentals on comparable mobile home parks.

Statement - Hobbs Report

644. "The documentation provided by the Region does not indicate the current status of Toussowasket Enterprises Ltd., but given that its lease was its only known asset, it is probable that the company is now worthless. The events which led to this appear to have been well planned, with the requisite Departmental approval apparently given promptly and routinely at each juncture."

Comment - Sparks

645. Since the Government's interest had been satisfied at the time of the requests by the Hobbs' researchers, the Government had no rightful purpose in snooping into the affairs of a private company. With the exception of the cancellation of the lease with knowledge of, but no record of, existing liabilities of creditors against Toussowasket Enterprises Ltd. all other approvals were administratively correct and could have been obtained had Toussowasket Enterprises sought a writ of mandamus from a court. (Page 4)

Comment - Clarke

646. The objective of the Director of Reserves and Trusts at that time was to ensure that equity and fairness was received by all parties. This required that the Band or a Band member received a fair and equitable rent for the land, and that occupiers of the land paid a reasonable rent for the services provided. Of major importance was the need to ensure that Boucherie continued in operation with the ability to cover its expenditures out of operating revenues. It should be noted that a 'mobile home park' is not mobile. It is a misnomer for style of residential subdivision improved with manufactured homes assembled off site and transported as permanent fixtures.

Statement - Hobbs Report

"Potential Conflict of Interest"

647. A number of land transactions have been identified in which the Chief and Council of the Westbank Indian Band approved the transfer of land from the Band to either themselves or a close relative without any apparent declaration of conflict. This issue is interrelated with the allotment of Band land to individuals, the possession of which enables subsequently the possessor to obtain considerable value from the Band in exchange for the allotted land, as for example in the Toussowasket situation on lot 180. (Page 13)

Comment - Evans

648. This question, as it relates to Westbank, was given a detailed review in 1970 by Mr. H. Thornton of the Department of Justice. To quote from Mr. Thornton's report of 13/11/70:

> "...several of the above twenty parcels of land were allocated to the Derricksons of the Westbank Band Council and that the Derrickson's have always been members of the Council. In spite of this, I am unable to find any impropriety in the allocations, because the regulations under the Indian Act regulating procedure at Band Council meetings do not prevent a Council member from acting, even where he has a direct interest in the subject matter."(1)

649. This legal opinion appears to have been ignored. (Page 38)

Comment - Clarke

650. Possession of Reserve land is the responsibility and concern of an Indian Band.

See: 1. Indian Act.
2. Musqueam Decision
3. Thornton Opinion (DOJ)

Comment - Sparks

651. Many of these land allotments arise from historic occupation of Indian Reserve No. 9 and No. 10 prior to the subdivision of the Okanagan Band and the Westbank Indian Band. The Westbank Indian Band is in fact a limited number of extended families that have resided on these two reserves since their original allotment. (Page 5)

Statement - Hobbs Report

652. There may also be a question of conflict of interest in respect to the interrelated nature of the roles of various individuals in business relationships. For example, Mr. R.M. Derrickson, who is Chief of the Westbank Indian Band, is also Director and shareholder of Westbank Indian Band Development Company Ltd. and several other private companies and is brother to Mr. N.C. Derricksan, who is also director and shareholder of Westbank Indian Band Development Company Ltd. as well as Toussowasket and West-Kel Holdings (party to sub-lease with Park Mobile Homes). The question of arms-length transactions, due to the nature of these interrelationships becomes an important one." (Pages 13/14)

Comment - Evans

653. The point of this statement is not clear. The facts of the matter are:

1. The Band is small.

2. The Derrickson family is active in Band politics, economic development and community affairs.

3. for sound business reasons members of the Derrickson family have created companies to manage and carry out differing business interests.

4. It is not possible in such circumstances to have everything at "arms length". (Page 39)

Comment - Sparks

654. Please refer to my letter of October 11, 1978 on file 982-36-3-9, copy attached as Appendix "A-3". (Page 5)

Statement - Hobbs Report

"Status of Toussowasket/Trailer Parks

655. What is the status of Toussowasket and what are the interrelationships between McDougall Creek Trailer Park, Mt. Boucherie Trailer Park, Mr. N.C. Derricksan, the Westbank Indian Band and the WIBDC? (Page 16)

Comment - Evans

656. No response. This is a rhetorical question which, if important, should have been answered by the "Team". (Page 40)

Comment - Sparks

657. This is a rhetorical question. (Page 5)

Statement - Hobbs Report

"Inappropriate Use of Economic Development Contributions

658. The intent of the May 5, 1981 agreement with the Band was to effect the repayment of Toussowasket's I.E.D.F. loan. This is an unauthorized use of contributions, and all regions were formally advised of this in 1979." (Page 14)

Comment - Evans

659. Mr. Hobbs' statement is in direct variance to the opinions of the B.C. Director of Finance and the ADM Finance. I quote from a letter from the latter - "There is no doubt that the financial signing authorities as they existed in the Financial Management Manual, Volume 1, Part B, in May of 1981, did provide you with the authority."(1,2) (Page 41)

Comment - Sparks

660. This is a mis-statement of fact. The May 5, 1981 agreement was for the purpose of enabling the Westbank Indian Band to acquire an interest in an existing business venture and enhance that venture to create revenue for the Band. (Page 5)

Statement - Hobbs Report

661. "The first $100,000 contribution was disbursed based on an ambiguous four-party agreement, and the remaining $200,000 was released contrary to Departmental Headquarters direction, legal documents were missing, no land appraisal was done and the related agreement was ambiguous. In addition, the purpose of the contribution had changed, but the contribution arrangement was not amended accordingly, in spite of other permissive amendments related to the payment schedule having been made." (Pages 14/15)

Comment - Evans

662. See comments Section 20.

a) The Contribution was released on the basis of a two-party Agreement between the Department and the Westbank Indian Band.

b) Contrary to Mr. Hobbs' statement, Mr. F.J. Walchli advises that he received ADMs (Goodwin) approval to release the Contribution. See Observation on statement number 20.

c) The contribution agreement was amended.(1) (Page 42)

Comment - Sparks

663. A record of the documentary evidence provided and available to the authors (Hobbs) of this Report shows that the purposes were not ambiguous and the intentions

of the parties were very clear. The formalization of these intentions did not in fact take place in part because of the grinding progress made by the Departmental bureaucracy in fulfilling its duties. (Page 5)

Statement - Hobbs Report

664. It must be determined if the B.C. Region has acted prudently in exercising the Minister's authorities by approving the relinquishment of the Toussowasket lease, given the following circumstances:

a) legal advise was not obtained prior to accepting the relinquishment;

b) documentation to justify the action was not evident, there was no consideration apparent in the transaction, no thought seems to have been given to the position of the mobile home park tenants who were affected by this headlease vis-a-vis their legal relationship with Toussowasket/the Department;

c) the B.C. Region did not seem to consider other well known encumbrances (albeit unregistered), specifically Donaldson Engineering and Construction Ltd., an unsecured creditor of Toussowasket, which held a B.C. Supreme Court judgement against Toussowasket, and Underwood, McLellan and Associates, also an unsecured creditor of Toussowasket. (Pages 15/16)

Comment - Evans

665. Unsecured creditors claims cannot be used as a factor in determining leasing decisions. If Court judgements are not registered against leases the Department has no way of implementing such decisions. Mr. Clark states that he advised Mr. Donaldson of the importance of registering the Court decision in the Indian Land Registry if he proposed to pursue his claim. He also advised Mr. Donaldson of the procedures he should follow.(1) Mr. Donaldson did not follow Mr. Clark's advice. (Page 43)

Comment - Clarke

666. 1. No legal advice is sought when all parties with an interest are seeking support to improve a situation, and precedents demonstrate a standard, formal procedure.

2. Documentation is available including the Land Register which showed the land to be free and clear of any encumbrances.

3. The required legal forms were completed.

4. See response to 24 and 25 which provides information that took into account all interests.

5. A most speculative comment, but the Region had made those with 'unregistered' encumbrances aware of the process necessary to register them. (Page 8)

Comment - Sparks

667. The Westbank Indian Band had prepared a form of permit and as it was presuming that it would receive authority to manage its lands pursuant to Section 60 of the Indian Act momentarily, (permission had been promised since fall of 1980 on almost a week-by-week basis) these permits would have given effect to solving this problem. When the promised authority was not forthcoming, D.I.A. and the Westbank Indian Band staff completed the necessary permit requirements to address this particular issue. (Page 5)

Statement - Hobbs Report

668. "This action by B.C. Region directly eradicated any possibility of the unsecured creditors of Toussowasket forcing the collection of their debts, since the only revenue-generating asset of Toussowasket was its lease. The B.C. Region could be seen as instrumental in rendering unenforceable the B.C. Supreme Court judgment which was awarded to Donaldson Engineering and Construction Ltd." (Page 16)

Comment - Evans

669. This is laregly repetitive - See Section 32.

- Mr. Clark states that prior to accepting the relinquishment of the Toussowasket lease he spoke to the B.C. Rentalsmans' representative in the interim. No objection to the relinquishment was raised.(1)

- A legal opinion by Mr. Becket of the Department of Justice states that the action of relinquishment of the lease raises no legal question.(2) (Page 44)

Comment - Clarke

670. Toussowasket was placed in receivership because of its inability to cover its debts. The lease as it existed prior to relinquishment was not an asset. In fact, the approach taken by the B.C. Region was sound business and endeavored to protect as many as possible by ensuring the continuation and expansion of the subdivision.

Comment - Sparks

671. As mentioned previously, Donaldson Engineering and Construction Ltd.'s lawyer was instructed to register the judgement in the Indian Land Registry and failed to do so. Donaldson Engineering and Construction Ltd. should seek redress against its solicitor. (Page 5)

Statement - Hobbs Report

672. "The relinquishment of the lease also affected the jurisdiction of the B.C. Rentalsman, whose order for Toussowasket to roll back the rent increases was upheld by the B.C. Supreme Court just the month before (this judgment used as precedent, the 1978 B.C. Court of Appeal decision on Park Mobile Homes). The Department of Justice, (T. Marsh) is of the opinion that the B.C. Region could be seen as conspiring with its tenant (Toussowasket), by accepting the relinquishment, to circumvent the B.C. Rentalsman's jurisdiction." (Page 16)

Comment - Evans

673. This observation is based on a letter - T. Marsh to Peter Clark dated May 20, 1982.(1) Contrary to the statement by the Hobbs "Team", Mr. Marsh did not state that the B.C. Region could be seen as "conspiring" with its tenant. The word used by Mr. Marsh was "combined". I am advised there is a vast difference in legal terms between the two words.

674. There is no evidence that any illegal act was committed and in the view of James Beckett (another Justice lawyer) the action raised no legal question.(2)

675. From a business point of view, the action undertaken by Toussowasket was key to establishing a rent structure comparable to other Trailer Courts in the area and laying the basis for a cash flow which could establish viability for the operation.

676. As noted in Observation(s) 33, the Rentalsman expressed no concern to the Director of Reserves and Trusts over the proposed relinquishment. (Pages 45/46)

Comment - Clarke

677. 1. In the letter of Mr. T.B. Marsh, the word used is 'combining'.

678. The jurisdiction of B.C. in the regulation, development and management of Federal Lands is considered by the Indian Bands to be "unconstitutional". The Peace Arch case provided the opposite view. It might be stated that the Department is open to question in allowing situations to occur that provide for another level of jurisdiction. No attempt was made to circumvent any jurisdiction - only to remove doubt. (Page 10)

Statement - Hobbs Report

Inadequacy of Legal Agreements

679. "The validity and effectiveness of the two agreements upon which the contribution disbursements were based is very questionable. For example, the four-party agreement of May 20, 1981 was missing critical information such as lease number and certificate of possession number. The 2-party agreement of April 23, 1982 purports to agree to transfer possession of Reserve land which, according to Section 24 of the Indian Act would not be effective without the approval of the Minister. The required approval does not appear to have been obtained. In addition, one of the lots of land, to be transferred by the Band to Mr. N.C. Derricksan, belonged to Mr. Bert Wilson and was not transferred from him to the Band until May 12, 1982. How could the Band legally agree to transfer land which, at the date of the signing of the agreement, did not belong to it? Why were these essential documents not legally executed prior to the disbursement of funds by the B.C. Region? (Page 17)

Comment - Evans

680. As noted in preceding sections, the Contribution Agreement was fulfilled. Internal arrangements within the Band are not Departmental business - unless the conditions of the Agreement were not fulfilled.

681. In memo dated November 16, 1982, Mr. J.C. Rennie, A/Director, Economic Development, carried out a post disbursement on-site inspection. His letter states "All

conditions of the Contribution Arrangement as amended have now been met with the exception of the final audit which will be completed as at March 31, 1983."(1) (Page 47)

Comment - Clarke

682. Whilst not a party to this agreement, it is not unusual in business practices involving several parties to make an agreement which requires subsequent arrangements to be made before the final agreement is completed. This appears to be the case based upon the necessary involvement of many parties and the need for considerable time to complete fairly routine documents. (Page 11)

Comment - Sparks

683. The four-party agreement of May 20, 1981 contained sufficient legal description to preclude vagueness as to its subject matter. The Band was aware that it could conclude its agreement with Mr. Bert Wilson and meet its commitments as of the May 20, 1981 agreement. The question of whether these were essential documents is a moot one. The parties were aware of what they had agreed to, their solicitors and staff were preparing the necessary documentation, and none of the parties has tried to have the courts set aside the agreement. (Page 5)

Statement - Hobbs Report

Westbank Indian Band Development Company Ltd. (W.I.B.D.C.)

684. Formed in 1974 to undertake residential commercial developments on Indian Reserve No. 10, all available documentation refers to the WIBDC as a Band owned entity, although the shares are held currently by Mr. R.M. Derrickson, Mr. N.C. Derricksan and Mr. Brian Eli. Though it has been indicated by the B.C. Region that these shares were held "in trust" for the Band, no document (i.e. declaration of trust) was available to substantiate this. (Pages 17/18)

Comment - Evans

685. Contrary to statement made by Hobbs that there is no evidence of a Trust arrangement, agreements do exist, are on file and are available. Mr. Hobbs own files indicate evidence of such agreements. (1,2,3,4)
Chief R. Derrickson has promised to make available current trust arrangement if so required.(5) (Page 48)

Comment - Sparks

686. This is a mis-statement of information. Copies of the trust agreement were in the hands of D.I.A. staff in the Region and at Headquarters. (Page 6)

Statement - Hobbs Report

687. While indications exist that some additional Band members receive monies periodically from the W.I.B.D.C. there is no indication that these payments could be seen to constitute fulfillment of a trust relationship. (Page 19)

Comment - Evans

688. It is the Band's practice to make payments to Band members once per year, such funds are taken from a variety of sources including earnings from W.I.B.D.C. A general Band meeting decides the amounts to be paid.

689. The General Band meeting also sets criteria for eligibility.

690. An individual has the right to appeal to the General Band meeting if they feel they have not been dealt with fairly. Complainants are also advised that they have access to the Courts if redress is sought.[1] (Page 51)

Comment - Sparks

691. Many Band members and others received monies from time to time as payment for services or other valuable consideration in the normal course of business of Westbank Indian Band Development Company Ltd. (Page 6)

Statement - Hobbs Report

692. If the shares are not in trust for the Band, then all benefits accrue to the shareholders themselves and not the members of the Band at large. There is fundamental significance in the manner of ownership of the W.I.B.D.C. given the major role it plays in Band Development, the interrelated financial transactions between the Band and W.I.B.D.C. and the interrelated roles of the principals of the company and the Chief and Council of the Band. (Page 19)

Comment - Evans

693. A hypothetical supposition. W.I.B.D.C. is held in Trust for the Band. See Section 36. (Page 52)

Comment - Sparks

694. This is a hypothetical and argumentative question and is not based on fact. (Page 6)

Statement - Hobbs Report

695. "In general, documentation provided by the Region regarding the Westbank Indian Band Development Company Ltd. is spotty and does not allow for definitive conclusions, e.g., very little post-1978 information is available." (Page 20)

Comment - Evans

696. The stabilization plan advanced by the Region for this development was used Nationally as a good example of documenting need for stabilization. Over 11 volumes of files are available.

697. Once the Company was stabilized and its borrowings guaranteed by I.E.D.F., the loan was monitored and supervised by the Royal Bank as is normal in instances of guaranteed loans. The Department received progress reports on debt retirement but beyond that the Department had no "raison d'etre" to maintain detailed files.

698. Once the debt was discharged, dealings between the Corporation and the Department were minimal. (Page 57)

Statement - Hobbs Report

699. Are the shares of the W.I.B.D.C. held in trust for the Band? (Page 20)

Comment Evans

700. A Trust Agreement exists with copies held in the Band Office and in the office of the Band Solicitor. (Page 59)

Statement - Hobbs Report

"Financial Statement Display and Information

701. The 1981/82 draft audited statements of the WIBDC, completed by Lett, Tricket and Co. Chartered Accountants(1), show a deficit of $140,000 and lease payables and advances from shareholders of $1.2 million. However, the 1981/82 draft consolidated financial statements of the Westbank Indian Band, completed by

Lett, Trickey and Co. Chartered Accountants, do not show any receivables from the W.I.B.D.C. The Bands surplus may be understated by over $1 million or W.I.B.D.C. may be in a considerable surplus rather than deficit position. In the latter case, this could have considerable corporate tax implications. (Page 21)

Comment - Evans

702. No comment on substance. The observations are hypothetical and based on draft financial statements. If Mr. Hobbs' "Team" felt that the firm of Lett, Trickey and Co., Chartered Accountants, was misrepresenting the Band's or W.I.B.D.C.'s financial position, they should have said so. I am in no position to comment upon the professional judgment of a respected firm of chartered accountants. (Page 60)

Comment - Sparks

703. The final statements prepared by Lett, Trickey and Co., chartered accountants show the financial relationships between the Westbank Indian Band and the Westbank Indian Band Development Company Ltd. reconciled. (Page 6)

Statement - Hobbs Report

Subleases by Mr. R.M. Derrickson

704. In June 1980, Mr. R.M. Derrickson sub-leased 11 lots from the W.I.B.D.C. for $211,000 (average $19,000/lot). Given the inter-related nature of the principals in this transaction, it should be confirmed whether the transaction was completed at "market value". (Page 21)

Comment - Evans

705. The Department could be questioned as to whether or not this arrangement is any of our business. However, file records do show:

1. Average price of lots in the development was $18,000.(1)

2. A listing of available lots on the Sookinchute development showed a range of lot prices $16,000 to $39,900.(2)

706. Chief R. Derrickson states that the lots in question were purchased by a private developer who subsequently encountered financial difficulties. The developer asked Chief Derrickson to participate as a partner in the development. As a matter of principle, Chief Derrickson declined the request, but did lend money to the development. He took the lots in question as security for his loan. Chief Derrickson made a full disclosure to the Board of Directors of WIBDC, who voiced no concern over the arrangement. Chief Derrickson states that he lost a good deal of money in the venture.(3) (Page 61)

Comment - Clarke

707. The assessed actual values of these lots as at January 1980, averaged $17,500. The assessed actual values of these lots at January 1981, averaged $24,000 after improvements valued in excess of $35,000 had been made.

708. It appears that the average price of $19,000 was market value.

Statement - Hobbs Report

$185,000 I.E.D.F. Stabilization Contribution

709. Available documentation suggests that this proposal was recommended by the B.C. Region, opposed considerably at Departmental Headquarters but ultimately submited to and approved by Treasury Board. A detailed examination would be necessary to ascertain the validity of reasons, cited in internal Headquarters' memos (Dickson to Fournier, 19/01/78, and R.D. Brown to Minister, 03/02/78) for recommending non-approval and would also reveal the subsequent decision process. (Page 22)

Comment - Evans

710. This is indeed an extraordinary summary statement. If the stabilization submission went forward to the Treasury Board it was because the Headquarters staff supported it. Internal Headquarters differences are irrelevant. An internal memorandum, Knox-Brown, seeks guidance on this issue.(1)

711. It is interesting to note Section 43 of Hobbs' review which reports that the "company now in healthy cash and equity positions." In short, the contribution met its objective. (Page 63)

Statement - Hobbs Report

B.C. Regional Role

712. Given the magnitude of financial support provided, what information did the B.C. Region have to confirm the reputed "Band-owned" status of the W.I.B.D.C., and what explanation exists for the B.C. Regional role in the transactions. (Page 22)

Comment - Evans

713. See Section 36 re: Band owned status of WIBDC. (Page 64)

Comment - Sparks

714. This is a rhetorical question and argumentative. It reflects the inept research of the 10,000+ pieces of information on this issue in the hands of the authors. (Page 6)

Statement - Hobbs Report

Arms-length Transactions

715. Do the identified transactions fulfill accepted arms-length considerations and to what extent are the interest of Band members adequately safe-guarded? (Page 23)

Comment - Evans

716. See comments Section 36.

717. Rhetorical question. (Page 65)

Comment - Sparks

718. See paragraph 28 above and note lack of D.I.A. Headquarters response in the form of specific direction or better yet revised regulations or statute amendments. (Page 6)

Statement - Hobbs Report

R.M. Derrickson - Band Payments

719. In the 1981-82 fiscal year Mr. R.M. Derrickson received from the Band a total of at least $269,000 from the following sources:

Salary	$39,000
Sign Rentals	10,000
Lease Rentals	187,000
Other	33,000
	$269,000 (Page 23)

Comment - Evans

720. The source of this information is unknown and cannot be verified.

721. The Band as a matter of policy collects all lease revenues for locatees. The receipts for sign rentals and lease revenues would have been paid to Mr. Derrickson because he was the beneficial owner of the lands in question. (Page 66)

Comment - Sparks

722. Lease rentals were not from Band but were Indian monies flowed through the Band as Managers pursuant to Section 69 of the Indian Act. See comments in covering letter. (Page 6)

Statement - Hobbs Report

Land Lease Transactions

723. The current and potential economic resource base of the Westbank Indian Reserves is highly influenced by land. Since the early '70's, there has been a considerable number of land transactions ranging through lease agreements, assignments and surrenders. In reviewing the chronological history of certain properties, Departmentally approved transactions have occurred wherein the value of leased land has inexplicably declined within a relatively short period of time. (Page 23)

Comment - Clarke

724. The evidence through land transfers, land sales, leasehold rentals and land valuations shows a substantial increase in value over the past 15 years. (Page 13)

Comment - Sparks

725. Please refer to covering letter. A volatile market in the Okanagan Valley has resulted in very rapid changes in opinions of value. Also, because of the unorganized

territory and absence of soft infrastructure, potential use which was legally unencumbered has an influence on opinions of value. (Page 7)

Statement - Hobbs Report

726. On December 31, 1979, seven months later, the lease was assigned to George Leon Nuytten for the balance of the lease period at a cost of $1.00. On February 13, 1981, fourteen months later the lease was further assigned from G. Nuytten to Deron Developments Inc., of which Mr. R.M. Derrickson is owner, for the balance of the original lease period at a cost of $1.00. On February 13, 1982 one year later, Deron Development Inc. surrendered the lease to the Crown. (Page 24)

Comment - Sparks

727. The use of nominal consideration is a common practice in the preparation of an assignment document. Usually the terms are expressed as "One dollar and other valuable consideration". (Page 7)

Statement - Hobbs Report

728. In the absence of more detailed and complementary information, it is not clear as to what was the planned use of the original lease, and hence, whether the subsequent assignments of the lease resulted from aborted plans or were in fact part of an overall strategy. The interests of the locatee, who was the owner and officer of two companies involved in the transactions, are not readily evident.

1. What caused the fair market value of this property to drop, for example, by 70% in a six-month period?

2. Did these transactions have any effect on tax liabilities? (Pages 24/25)

Comment - Clarke

729. This transaction is not unusual in terms of business development and the private sector strategies associated with maximizing profit and minimizing income or corporate tax.

730. The fair market value did not drop. The assessment role and property tax shows an increase in value since 1978 by approximately 25%. (Page 14)

Comment - Sparks

731. Revenue Canada has the repsonsibility for determining tax liabilities. (Page 7)

Statement - Hobbs Report

Parcel F.F.-6 - Indian Reserve No. 10

732. On February 1, 1980, a lease agreement was signed between the Crown and Ronald M. Derrickson Enterprises for the whole of Parcel F.F.-6 -- Indian Reserve No. 10 for a period of 98 years at a rental cost of $55,000. On March 25, 1980, less than two years later, the lease was assigned to Commonwealth Realty Inc. for the balance of the lease period at a cost of $1.00. (Page 25)

Comment - Sparks

733. These questions, in view of the time, money and access to thousands of documents, show the lack of competence in managing this enquiry and the lack of professional skills in understanding real estate development practices and common legal terminology. (Page 7)

Statement - Hobbs Report

734. Similar observations pertain as those in example (a) above:

1. What was the initial plan for the use of the land?

2. Why was the lease assigned so rapidly, with such extreme value deterioration?

3. Did the original lessee expend $55,000 for what was essentially two months' use of the land? (Page 25)

Comment - Sparks

735. This observation is a further example of the lack of professional and technical competence of the author's research team related to legal terminology, real estate development practices and a simple understanding of all the material which set out the objectives of both N.C. Derricksan and the Westbank Indian Band. (Page 7)

Comment - Clarke

736. The 98 year lease was fully prepaid for the market value of $55,000.00 for a residential, single lot use with improvements in place.

737. The subsequent assignment had no bearing on the actual market value but a contractual consideration of $1.00 was required by law to effect the contract.

738. The original lessee probably recovered the $55,000.00 (plus a profit) from the assignee.

Statement - Hobbs Report

Employment Creation

739. File documentation showed very little visible Indian employment impact from expenditures, since most developments were undertaken with off-reserve labour. A report prepared by Mr. John Evans, B.C. Director of Economic Development, based on conversations with Mr. R.M. Derrickson, Chief of the Westbank Indian Band, indicated that there were 31 Band members (of total 190) employed on the Westbank Reserves, though this report did not indicate if these jobs were seasonable or part-time; also noted were 200 non-Indian people employed on Reserve primarily in construction and service. (Page 26)

Comment - Evans

740. Hobbs' paper misquotes figures stated in Evans' review. On Reserve employment of Indian people was noted as 46 not 31 as quoted in the Hobbs Report. Contrary to Hobbs statement that these figures were based on a discussion with the Chief, Evans' paper credits several other sources.

741. In addition Evans' paper notes that in 1980 lease revenues to the individual Indians and the Band were $1,296,000. This constitutes an important benefit to the Band and individual Indians. (Page 74)

Comment - Sparks

742. Employment creation is only one objective of Economic Development. Wealth Generation is an equally valid objective which is mandated by the Government in the appropriations. The creation of wealth may, as a spinoff, create employment. (Page 7)

Statement - Hobbs Report

Ineffective Loan Collection Action

743. The review of several regional loan files respecting Derrickson family members and their companies, indicated few loan collection attempts, and where such attempts

have been made, they have been ineffective. For example, at the time of the May 1981 $300,000 contribution arrangement, Toussowasket's $197,350 loan was over 50 payments in arrears and had a principal and interest balance of about $300,000. Despite this serious arrears situation, however, there were no letters on Regional files to indicate that any attempt was made to collect this loan. Similarly, the security which was taken (2nd mortgage on lease and personal guarantee of Mr. N.C. Derricksan) was not exercised to satisfy the delinquent loan. (Pages 26/27)

Comment - Evans

744. The arrears incurred by the Toussowasket loan had been recognized in the stabilization review undertaken of this enterprise. The proposal to let the arrears accrue was approved at the National Headquarter level (R. Knox).(1)

745. Consistent with this approach was the decision approved by Mr. Knox not to foreclose on the enterprise because of the loan arrears. In short, the Department was prepared to let interest and principal arrears accrue for over 10 years.(2)

746. An unfair statement not supported by the facts.

747. A review of loans to borrowers with the family name "Derrickson" indicates that "Loans made to Derrickson family members from the I.E.D.F. have proven to be more successful than the over-all average made by the Fund."(3) (Page 73)

Comment - Sparks

748. The absence of a cash flow negated any meaningful punitive action towards collection. Business judgement dictated the better strategy would be to attempt to make the venture viable and work out the arrears. Hindsight has proved this to be substantially the proper course of action. (Page 7)

Statement - Hobbs Report

Inappropriate use of Economic Development Contributions

749. The B.C. Region has provided Economic Development monies for very dubious purposes which are difficult to relate to Indian Economic Development; for example, the $300,000 contribution to ultimately repay an I.E.D.F. loan and the

use of economic development monies to pay legal fees to assist an Indian entrepreneur in legal actions undertaken by creditors. (Page 27)

Comment - Evans

750. The rationale to provide the contributions is discussed in Sections 13 and 17. (Page 76)

Comment - Sparks

751. This is a complete mis-statement of fact. (Page 7)

Statement - Hobbs Report

Mortgage of Leaseholds

752. The case of Toussowasket demonstrates that leasehold mortgages on Reserve can be difficult on which to realize in cases of default, without the support and/or approval of the Department and Band. The effect of this will be to discourage potential investors and encourage unacceptable debtor behaviour. This recurring problem was raised by the Department of Justice to the B.C. Region in November 1979, when they requested the B.C. Region to deal with this on-going problem. (Pages 27/28)

Comment - Evans

753. Realization on leasehold mortgages on Indian Reserve land requires the support of the Department and the Band. If either party objects to realization, the action is stalemated. This is why commercial development on Indian land is difficult.

754. A change in the system of law governing land holdings on B.C. Indian Reserves would require a change in the Indian Act.

755. In the case of the F.B.D.B. loan, no really serious consideration was given by the Band to foreclosing on the account and reassigning the lease. The proposition that was made by the Bank to the Department was that the Department write-off its I.E.D.F. loan thus leaving the business with a smaller debt load. Indian Affairs did not agree to this proposal. (Page 77)

Comment - Clarke

756. The subject of mortgage security on leasehold interest has been, since 1979, the topic of considerable discussion. With assistance from H.Q. Reserves and

Trusts, and the Department of Justice, several meetings with the F.B.D.B. were held in an attempt to provide a clearer policy.

757. The major problem relates to the ownership and possession of Indian lands as prescribed by the Indian Act. (Page 16)

Comment - Sparks

758. This has been a problem identified by the D.I.A. staff in the B.C. Region to Headquarters since 1970 and has been the subject of repeated recommendations for legislative change to the Indian Act which have been either opposed or deferred. (Page 7)

Statement - Hobbs Report

Impact on Social Services

759. Despite the apparent growth and economic development taking place at Westbank, social services contributions have increased annually, the increase from 1980-1981 to 1981-1982 being 26.6%. Though Regional documents indicated that for these years there was no comparative data on social assistance recipients, this increase may have been occasioned by payments to non-Band members pursuant to an informal agreement(1) with the Province of B.C. (Page 28)

Comment - Evans

760. Figures supplied by Finance indicate that the annual percentage increase from 1980-81 to 1981-82 is accurate. The agreement with the Province of B.C. provides that the Department will make social assistance payments for non-Band members living on-Reserve in B.C., in exchange for the waiving by the Province of the one-year waiting period prescribed by ss. 3 and 5 of the B.C. Residence and Responsibility Act R.S.B.C. 1979, c. 364. The cost savings to the Region by virtue of the waiver far exceed the costs of providing social assistance to the relatively few non-Indians living on-Reserve in need thereof. Moreover, the agreement vastly simplifies the administration of the program, resulting in significant savings in that area. (Page 78)

Statement - Hobbs Report

Capital Management

761. In 1979, DIAND sought Treasury Board authority in the amount of $755,000 to complete three phases of the development of infrastructure for a subdivision for Band members on I.R. No. 9. Treasury Board authority was granted for the first two phases in the amount of $555,000 but the Department was instructed to return to Treasury Board prior to phase III. (Pages 28/29)

Comment - Evans

762. By T.B. Minute 766133, $555,000 was approved for Phases I and II of the above project. Phase III of that project was subsequently abandoned by the Westbank Band.(1) (Page 79)

Statement - Hobbs Report

763. Phases I and II were completed and the B.C. Region, in 1982-83, expended an additional $255,000 for a road to the subdivision. It appears that the B.C. Region has funded the complete subdivision infrastructure without securing the requisite Treasury Board approval. (Page 29)

Comment - Sparks

764. The funds expended in 1982-83 were for a different project identified in the capital plan. (Page 8)

Comment - Evans

765. The additional money referred to above was not spent on subdivision infrastructure, nor was it spent on any other works contemplated by the Treasury Board submission referred to above.

766. In 1979 the Provincial Ministry of Highways had undertaken to construct a road adjacent to the subdivision, Phases I and II only. The M.O.H. subsequently decided against construction of the road, and the subdivision, by then completed, was left virtually isolated.

767. In order to provide the access to the subdivision which the M.O.H. decision had eliminated (and to fulfill the Department's responsibility to provide access to emergency vehicles), a contribution agreement was entered

into under which DIAND provided $250,000 (not $255,000) of the $425,000 cost of the access road. The remainder was provided by the Band. The contribution agreement was within Regional signing authority.(1) (Page 80)

Statement - Hobbs Report

Social Assistance

768. Documentation shows that at least in 1974 both Departmental officials and the RCMP were operating on the basis of an apparent Departmental policy not to pursue legal action in respect of social assistance overpayments. (Page 29)

Comment - Evans

769. I was unable to find formal documentation supporting these comments. "Team" members working notes do however provide some insight.(1) They indicate that in a letter to L. Wight, then Director General B.C. Region, from a Mr. Klassen, RCMP, the following statement was made:

> "The police were informed that it is not the policy of this Department to take legal action against a recipient who has been overpaid through the social assistance program."

770. Some 11 years have passed since the letter was written and many of the staff who might have been able to comment on the issue have retired, died or left the Department.

771. The matter was also discussed with the Director of Finance and Administration. He feels that, to the best of his recollection, the above statement is an accurate reflection of Departmental policy in 1974 (Mr. Szalay joined the Department in 1977). He stated that there was a general feeling at the time that there was not much that could be done about collecting any social assistance overpayments, since the recipients were, by definition without resources sufficient to enable them to make any repayments. (Page 81/82)

Statement - Hobbs Report

772. In 1978-79, the Auditor General indicated that this informal exchange of letters did not provide the Department with sufficient authority to make certain child care payments. The Department has not yet

formalized a legal agreement with the Government of B.C. in this regard, although payments continue to be made by the B.C. Region both for child care and social assistance. (Page 30)

Comment - Evans

773. Annex 27 and 28 provide considerable insight into the problem. Contrary to Hobbs contention that this was a Regional gaffe, the material illustrates quite clearly the Regional and National H.Q. were co-operating very closely in reaching a solution.(1,2) (Page 84)

Comment - Sparks

774. While administratively it may be ideal for the federal government and the provincial government to formalize a legal agreement, however, the issues are complex and have constitutional implications. As a consequence, the management of the department was faced with either providing the Indians of British Columbia with the same level of service as was authorized by the Treasury Board, or alternatively, withdraw the service and make a disadvantaged group even more disadvantaged. (Page 8)

Statement - Hobbs Report

Cross-Activity Funding

775. Instances have been noted in the post-1977 period, of funds being allocated by B.C. Region from a specific main activity for activities related to a different main activity. Total funds apparently involved are approximately $100,000. Specific instances involved use of capital monies for economic development, use of education funds for economic development and use of housing monies for other capital infrastructure. (Page 30)

Comment - Evans

776. This statement does not make it clear whether it is cross-activity funding by the Department or by the Band which is being criticized.

777. Cross-activity funding by the Region is a normal budgetary control mechanism. Any transfers of funds between programs would have been authorized by appropriate senior officials in Ottawa.

778. As to cross-activity funding by Bands, it is always possible that contributions given for one purpose might be used for another. Any instances of this would, however, have shown up in the Departmental audit and would have been dealt with at that time.(1) (Page 85)

Statement - Hobbs Report

779. These funding transfers are not totally unusual given the accepted practice by Band Councils, but an issue remains of whether the Band continued to receive an equivalent degree of satisfaction and benefit from the expenditures. (Page 31)

Comment - Evans

780. This paragraph contradicts paragraph 72 by referring to cross-activity funding implicitly disapproved of there as "accepted practice by Band Councils". The issue raised above is academic at best, since there is no practical method of determining comparative degrees of satisfaction and benefit.(1) (Page 86)

Statement - Hobbs Report

781. There was an increase of about $2 million from 1981 to 1982 in funds held in trust for Band members, according to the 1981-82 draft consolidated financial statements of the Band. There was no explanation for this increase but available documentation seemed to indicate that it resulted from a transaction with the B.C. Department of Highways. The statements did not indicate specifically who the beneficiaries were.

Comment - Evans

782. Chief Derrickson confirms that the funds in question were for sale of land to the B.C. Highways. Beneficiaries of these funds would be ascertained by normal procedures: the Band would benefit from the sale of Band lands and locatees would be paid for their lands.

Comment - Sparks

783. These negotiations had not been completed at the time of these statements. Certain monies were paid in advance by the Province of British Columbia but until negotiations had been completed, the allocation and disposition of these monies could not be determined precisely. (Page 8)

Statement - Hobbs Report

784. Of more dubious validity, an agreement effective April 1, 1977 between B.C. Region (F.J. Walchli) and the Westbank Indian Band authorized the Band to assume the duties (some 56 listed) for the administration of lands, estates and memberships. A clause of this agreement indicated that the Minister must maintain his responsibility in this area. B.C. Region agreed to provide monies to the Band for this purpose. (Page 32)

Comment - Evans

785. See Peter Clarke's comments on lands.

786. There may well be some legal shortfall in the 1977 Agreement with Westbank Band as indeed there may be with the 1974 T.B. authority which gave program management authority to Bands for a wide variety of services. Definitive answers to those questions, if required, should be provided by legal counsel.

787. What is required is some understanding of the context in which the 1977 Agreement was written. In 1975, the two central interior District Offices were closed. A letter from Regional Director Wight (see Annex 43) was written to Bands outlining the Departmental response to the closures. The 1977 Agreement was an attempt to bring some orders to the management of Department trust functions carried out by Bands. (Page 90)

Comment - Clarke

788. It is clear that this Agreement was based upon Treasury Board Authority provided under Minute No. 72573 dated April 1, 1974. (Page 17)

Comment - Sparks

789. There is a suggestion that the 1977 Agreement was of dubious validity. The Agreement was authorized under Treasury Board Minute 725973. However, there was an omission of duty on the part of the Department in not advising the Band that as of April 1, 1980, pursuant to Treasury Baord Minute 763729, the April 1, 1977 Agreement became invalid. There was a duty on the Region/District staff to negotiate a new agreement for funding in accordance with T.B. Minute 725973 as amended by T.B. 763729. (Page 8)

Statement - Hobbs Report

790. Available documentation indicated many instances of 98-year leases of land on Westbank Reserves. Further investigation is required to determine if these long-term leases are for the benefit of the Band or Band members. (Page 32)

Comment - Evans

791. All land leases over 21 years must be approved at the National Headquarters level. The question of long term leases is a matter of policy which has been under review for a lengthy period of time. It is a question which must be addressed at the national level. (Page 91)

Comment - Clarke

792. The major long term lease at Westbank is on unsurrendered land and the benefits flow through the Bands Development Company to all members. A few (6) long term leases have been granted on locatee lands and the benefit clearly goes to the locatee.

Note:

793. In the opinion of the authors of this facilitative review, the conclusions and observations of Mr. John Evans (as set out in his "Analysis of the Hobbs Report") embodies a suscinct and pertinent synopsis of that Report. Mr. Evans' comments are, in our opinion, worthy of careful consideration and reflection. Mr. Evans' statement is set out verbatim hereunder.

Conclusion and Observations - Evans

794. Having reviewed Mr. Hobbs' report in some detail and having had the opportunity to scan the research material that was available to the Hobbs' "Team", I have reached a number of conclusions.

795. In commenting on the content of Mr. Hobbs' report it is important to keep in mind that the focus of his paper is on a rapidly developing Indian Band, its Chief and Council, a leading family of the Band and senior Departmental officials. In my view, the methodology followed in the preparation of the report did not meet even the most basic standards of professional and ethical conduct. Major shortcomings included:

> While the researchers did assemble and organize an immense amount of material, over 15,000 documents, there is no evidence that the material was analyzed in any objective manner. Issues which had the potential of casting the Band, the Chief, the Westbank Council or Regional Public Servants in a derogatory light were developed at length, while exculpatory material was largely ignored. The lack of substantive factual material was filled with negative and speculative hyperbole.

796. Mr. Hobbs repeatedly notes that the Region did not provide the "Team" with the information that they needed to carry out their task. Yet that same "Team" decided that it would not interview Regional staff, Band officials, Indian entrepreneurs or, indeed, anyone who had detailed knowledge of the dealings in question. To rely on Departmental files as the sole source of information was most unwise and led predictably to large and important gaps in the information base. Terms of Reference were developed in draft, but not followed.

797. Very little factual material was used. Generalizations, innuendo and rhetorical questions served in the place of deductive reasoning. Practically no footnotes or references to source materials were used. Where such basic research techniques were followed, the source were frequently misquoted or used out of context.

798. Mr. Hobbs severely chastized the Region for making poor decisions on key issues, yet in a substantial number of cases the decisions were made at the National Headquarters level. Approval of 98 year leases, authorization of stabilization agreements and dealing with the B.C. Government on child care are examples of such anomalies.

799. A number of examples were found where the "Team" had assembled a substantial body of information which indicated the existence of certain agreements or understandings, e.g. that Trust Agreements existed with the Board of Directors of WIBDC. The information available would have led an honest researcher to conclude that there was an excellent chance that such an agreement existed. Yet, in the instance quoted, Mr. Hobbs goes on for several paragraphs suggesting that no Trust Agreement existed and suggesting that Company officials might be benefiting improperly from their positions as WIBDC Directors.

800. In summary, one must conclude that Mr. Hobbs discharged his responsibilities for preparing this report with a lack of objectivity, a total disregard for the morality of the scientific method and with a complete absence of any standard of common decency. As a consequence, his work cannot be considered creditable. Unethical, unprofessional and unconscionable aptly describes Mr. Hobbs' review. It is an embarrassment that such a report is the product of the Public Service of Canada.

801. Unfortunately, the destructive influence of the report did not stop with its classification as "secret" and its placement in a locked filing cabinet. Mr. Hobbs recommended an RCMP investigation on the Westbank Band. One was carried out. Many remember the investigation, few remember that the Band was exonerated. Staff were advised, and I was one of them, that the reason certain supportive actions could not be taken in respect to the Westbank Band was because of the findings of Mr. Hobbs' "secret" report. Few had read it, but many knew that it contained "damning evidence". Staff throughout the Department linked, perhaps incorrectly, personnel moves of senior staff to the findings of the Hobbs and Lawson, Lundell reports. Careers have been damaged. Development initiatives at the Band level were slowed or stalled. This mismanaged process extracted an extraordinarily high cost in both human and financial terms.

802. While one may dismiss Mr Hobbs' Report on the grounds of incompetence, it would be quite wrong to conclude that all of the issues raised are inconsequential. Westbank and other Indian Bands in the Province face some severe problems. The difference that I would suggest in addressing these issues would be to discard the highly personalized and persecutive approach taken by Mr. Hobbs and to address them as policy matters, common to many developing Bands, which require the joint input of the Department and the Indian people themselves.

803. An example of issues which played a significant role in "the Westbank Band Affair" and which requires careful policy consideration, includes:

1. Conflict of Interest Guidelines

   Many of the Bands are small and their pool of leadership talent is limited. As a result, Indian leadership often find themselves playing several roles and performing functions that in the non-Indian society would be considered as conflict of interest.

Guidelines which would enable Bands to maximize the use of their pool of management talent yet avoid direct conflict of interest situations are needed.

2. Arms-Length Business Relationships

As noted in the preceding section, Indian leaders often play a multiplicity of roles in their Communities. It is not reasonable to apply the standards of the non-Indian Community concerning arms-length business relationships to Reserve situations. Again, guidelines are required.

3. Economic Priority Setting

The limited amount of funding for economic development purposes suggests that a system of priorizing the use of these scarce resources is important. More work is required in this field.

804. Finally, I am pleased that a process has been initiated to review both the Hobbs and Lawson, Lundell Reports, to give them a critical but fair examination and to attempt to put this unholy nightmare to rest.

PART IV

REPORT CONCERNING THE PROBLEMS BETWEEN THE MOBILE HOME PARK LESSEES AND THE WESTBANK INDIAN BAND

Background

805. Allegations have been made by the lessees located at the Westbank Indian Reserve, as well as by the law firm of Lawson, Lundell that the Department, through its actions and inactions, has contributed to a situation concerning the lessees which conceivably may result in certain lessees being forced into bankruptcy. As a result the relationship between the lessees and the Westbank Indian Band, specifically the Chief of the Band, Chief Derrickson, has deteriorated rapidly.

806. To assist in the facilitative process the Department retained a solicitor to advise and assist in the identification and implementation of a plan to resolve the outstanding difficulties. The objective of the contractor was to determine whether or not the Department, through its actions or inactions, contributed to the deteriorated state of affairs that purportedly exists at Westbank.

807. The contractors' terms of reference were set as follows:

1. the contractor shall do whatever is necessary to determine the true facts of the situation at Westbank;

2. after the contractor has determined the true facts, he will determine whether or not the Department committed any acts that it ought not to have committed, or failed to take any actions which it ought to have taken and what actions, if any, it can take now to rectify the situation;

3. the method of effectively achieving the contractor's goal shall be determined jointly by the contractor and the Departmental representative, Mr. F.J. Singleton; and

4. the contractor shall report his findings and recommendations directly and only to Mr. F.J. Singleton, Director, Lands Directorate, Indian and Northern Affairs Canada.

808. The contractors, Mr. Bruce Preston and Mr. J. Paul Reecke, met individually and at considerable length the six park owners who asked to meet with them.

Acres Holdings Ltd.
Jack Alexander and Barbara Alexander
The Billabong Mobile Home & Tourist Park (1974) Ltd.

Golden Acres Limited
Park Mobile Home Sales Ltd.
Westgate Developments Ltd.

809. The contractors' report and recommendations are set out hereunder.

Contractors Report and Recommendation

810. We told Mr. L. Crosby, Chairman of the Park Owners Association, we are prepared to meet any of the remaining park owners who may decide they want to meet us in the next week or so.

811. We also met on several occasions with Chief Ron Derrickson of the Westbank Band, together with his legal counsel Mr. Graham Allen, and on other occasions with Mr. Allen separately. From DIA we had a number of meetings each with Mr. Fred Walchli, Mr. David Sparks and Mr. Peter Clarke. We also had a number of telephone conversations with all of the above mentioned persons and with some other members of D.I.A. staff, including Mr. John Evans.

Question of Urgency

812. Some of the mobile home park owners are faced with expiration of existing financing and with further renewal dates under their leases. We have been advised by some owners that they do not know how they will meet the financial obligations that they will face on the expiration of their existing financing. Financial institutions and private lenders are reluctant to extend or renew financing in view of the existing uncertainties. Bankruptcy and loss of existing equity may well be the consequence of continuation of the existing situation. It is our view that a protracted period of review and movement toward a solution would complicate further the existing situation and would make any solution more difficult to attain.

Mobile Home Parks on the Westbank Reserve

813. In the course of this project we reviewed 13 leases of lands indicated on Tsinstikeptum Indian Reserve No. 9 near Westbank, British Columbia. Functionally these comprise nine operating mobile home parks. The entities or individuals operating these mobile home parks are:

Acres Holdings Ltd.
Jack Alexander and Barbara Alexander
The Billabong Mobile Home & Tourist Park (1974) Ltd.

Golden Acres Limited
H.I. Enterprises Ltd.
Park Mobile Home Sales Ltd.
Shady Beach Camp Ltd.
231117 B.C. Ltd.
Westgate Developments Ltd.

814. Golden Acres Limited and Westgate Developments Ltd. each operate their mobile home parks on two leases.

815. Two of the 13 leases have been cancelled and mobile home parks are not being operated on those lands.

816. Six of the functioning mobile home parks belong to an association known as Westbank Mobile Home Park Operators Association. The spokesman for that association is Mr. Leonard Crosby, the owner of Golden Acres Limited. In the course of our review we spoke to each of the operators of the 6 mobile home parks. All of the mobile home parks operate on leases of locatee lands with the exception of Park Mobile Home Sales Ltd. which leases surrendered lands from a company owned by a Band member, Mr. Noll Derricksan.

The Six Association Mobile Home Parks

Acres Holdings Ltd.

817. Acres Holdings Ltd. leases 24.31 acres from the Crown. The Estate of Ellen Tomat is locatee. The lease is dated September 1, 1979 and runs for 25 years from that date.

818. This mobile home park consists of 75 mobile home pads, 16 of which are designed for double-wide and 59 for singles. At present there are 65 mobile homes in the park. In addition to the mobile homes, this park contains campground facilities, a laundromat, a small store and an office. The campground has space for 103 campsites. The operator of this mobile home park purchased it as a going concern in July of 1980. The mobile home park is located on lakefront property along the eastern border of IR No. 9.

Jack Alexander and Barbara Alexander

819. The Alexanders operate their mobile home park on 21.5 acres leased from the Crown. Mr. Ron Derrickson, the Chief of the Westbank Band of Indians, is locatee. The lease is dated May 1, 1981 and runs for a period of 40 years from that date. The mobile home park consists of

126 mobile home pads, 52 of which are designed for double-wide mobile homes and 74 for single-wide mobile homes. At present there are 107 mobile homes in the park. In addition to the 126 mobile home pads, there are 2 mobile homes that are used as an office and the Alexander's home.

820. The Alexanders first leased the land in 1976 for 25 years. They developed the park and renegotiated the lease at the time of the rental review provided for in the first lease in 1981. The lease was extended from 25 years to 40 years at the time of the first rental review. The Alexander's park is located in northeastern portion of IR No. 9 and does not have beach frontage some of the pads have a view of Okanagan Lake.

The Billabong Mobile Home & Tourist Park (1980) Ltd.

821. This company leases 13 acres from the Crown. The Estate of Ellen Tomat is locatee. The date of lease is September 1, 1979 and runs for a period of 25 years from that date. This mobile home park consists of 77 mobile home pads, 67 of which are currently occupied by mobile homes. In addition to the mobile home pads, the mobile home park contains 65 campsites and 1 mobile home pad occupied by the owners.

822. The operator of the park, Mr. Don Lauriault, purchased this lease on July 1, 1980. At the time of purchase the park was developed and fully occupied. This mobile home park is on the eastern border of IR No. 9. The mobile home park is located on lakefront property.

Golden Acres Limited

823. This mobile home park is located on property governed by two leases. One of the leases covers a 15.54 acre parcel leased from the Crown. The locatee is Theordore Derrickson. The date of the lease is September 1, 1980 and runs for a period of 41 years from that date. The other portion of the mobile home park is operated on lands leased from Mr. Ronald Derrickson. This lease covers a 7.51 acre parcel and runs for 45 years and 7 months from the date of the lease, February 1, 1976.

824. This mobile home park consists of 87 mobile home rental sites, all of which are designed for double-wide mobile homes. In addition, a portion of the lands have been converted into residential housing. This housing consists of two duplexes and a permanent residence.

825. This property was developed by the operator, Mr. Leonard Crosby, after leasing an initial 3.5 acres in 1969. He consolidated this parcel with another to create the 7.51 acres leased in 1976. A further 15.54 was leased in 1980. The mobile home park is located immediately behind and across Boucherie Road from the lakefront mobile home parks and has an attractive view of Okanagan Lake.

Park Mobile Home Sales Ltd.

826. This mobile home park is located on 53.16 acres on surrendered lands leased from West-Kel Holdings Ltd., a company owned by Mr. Noll Derricksan which holds the Head Lease. The Head Lease is dated June 30, 1970 and the Sub-Lease to Park Mobile Home Sales Ltd. is dated October 12, 1972. The Head Lease is for a period of 50 years from July 1, 1971 and the Sub-lease for a period of 48 years and eight months less one day commencing November 1, 1972.

827. This mobile home park consists of 270 mobile home pads. There are presently 247 mobile homes in the park. In addition to the mobile home pads there is a storage building, store, office and swimming pool in an approximately 4,000 square foot building.

828. This park is located beside Highway 97 and does not have a view of Okanagan Lake. The operators, Mr. and Mrs. Bruce York, took over the park in 1977 when it had 171 developed mobile home pads. They expanded the mobile home park in 1981 and the first mobile home unit was moved onto the expanded section of the mobile home park on July 1, 1981. Park Mobile Homes Sales Ltd. has now sold its interest. The property is now leased to Ross Management Ltd. by the Crown.

Westgate Mobile Home Park Ltd.

829. This mobile home park is operated on 20.3 acres under two separate leases. One lease covers 10.3 acres of which Mr. Ron Derrickson is the lessee. This lease is dated August 1, 1981 and runs for 40 years from that date. The other parcel of land is governed by a lease of lands of which the Estate of Ellen Tomat is lessee and this lease runs from June 15, 1981 for a period of 40 years.

830. This mobile home park consists of 137 mobile home pads occupied at present by 128 mobile homes.

831. Mr. Ted Zelmer leased this mobile home park and began development in 1976 when he entered into his first lease. He subsequently leased 2-1/2 acres in 1976 and a

further 7-1/2 acres in 1980. When the original lease with Mr. Ron Derrickson came up for renewal in 1981, the two Tomat leases were combined and the current rents were agreed to. This mobile home park is not located on lakefront property.

Rental Disputes and Potential Disputes

Acres Holdings Ltd.

832. The rent under this lease is subject to review to set the rent for the five-year period commencing September 1, 1984. This rent has not been fixed at the present time.

The Billabong Mobile Home & Tourist Park (1974) Ltd.

833. The rent under this lease is subject to review to set the rent for the five-year period commencing September 1, 1984. This rent also has not been fixed.

Golden Acres Limited

834. There is a dispute which is presently the subject of a Federal Court action concerning the rent under the lease of 7.5 acres of which Ron Derrickson is the locatee. The amount of the rent for the five-year period commencing September 1, 1981 is under dispute pursuant to the terms of that lease.

The Relationship Between the Park Onwers Association and the Westbank Band

835. A common theme emerged throughout our discussions with the mobile home park owners. When they entered into the leases and committed themselves to mobile home parks on Westbank Indian Reserve lands, while in some cases they appreciated that the Band was, to some extent, participating in the administration of the leases, they thought that the Department would continue to be responsible for and ensure that the administration was in accordance with Crown lease administration policy. The park owners told us that they were confident that because the leases were Crown leases they would be administered in a manner consistent with the Crown's normal policies and procedures in dealing with small business men.

836. It is significant that several of these entrepreneurs who became lessees were under-financed and were attracted to the Westbank Reserve by the plentiful supply of cheap land available with annual lease payments. In this way

the lessees were able to avoid capital investment in land. They were also attracted by what was perceived to be a relative lack of governmental controls on land development on Indian land. In British Columbia Indian Reserve land had become known as a haven for developers with limited capital who wished to avoid the increasing capital cost of land purchase and who wished to escape the increasing costs and stringency of municipal controls over development.

837. The period in which most of these trailer parks were developed was an economically expansionary period in the mobile home park industry. The mobile home park industry was particularly expansionary in the central Okanagan in the latter part of the 1970's and up until 1981. The mobile home park owners, by and large, significantly increased their business investment during this period. On the basis of what they told us, they did so in the expectation that the management of the lands on which they were expanding their operations would be characterized by an even-handed course of dealing which they expected when dealing with the Crown.

838. It became evident to them in 1980 and 1981 that the Westbank Band of Indians had assumed greater control of the management of lands in the Reserve than had been previously been supposed by the owners. The existence of the 1977 Agreement and the extent of the de facto delegation of powers over the management and control of the lands on the Reserves was not known to the trailer park owners at that point.

839. The Chief of the Westbank Band, Chief Ron Derrickson, is an astute and highly capable individual who has a firm grip on the economic realities of the commercial situation in which the Band finds itself. The Band lands are located next to the expanding commercial centre of the Okanagan Valley. Chief Derrickson has and is, in our view, pursuing policies with a view to maximizing the commercial benefit to the members of the Band of the Reserve lands. The Band has developed far-reaching plans for the development of their own lands and has taken steps to put in place, through the framework of by-laws emerging from a development plan, an administrative structure to maximize the benefit to the Band of the valuable lands which it occupies. The Westbank Band has exercised, in full measure, its powers to administer lands arising from the grants of power under the 1977 Agreement. This was subsequently replaced by a grant of Section 53 and now Section 60 powers. The Band is also

aggressively exercising the power to regulate construction, development and the expansion of an infrastructure of services through policies which they base on their powers under sections 81 and 83 of the Indian Act.

840. In the normal commercial situation extraction of greater revenues from tenants would be moderated by the adverse effect, upon the revenues of the landlord, of insolvency of the tenants. In the situation which exists in Westbank the probable consequence of insolvency or bankruptcy is to return the lands, with their considerable capital improvements, to the locatees. There is little in this situation to moderate the natural desire of the Band to seek even greater revenues from the tenants.

841. All of the mobile home park owners that we spoke to expressed concern over their ability to meet the level of rents and other financial levies which the Band is seeking. The park owners feel that the level of rents sougnt by the Band in recent years is above fair market rents under the leases. It is their position as well that some fees levied on the basis of by-laws have been arbitrary and of a magnitude which threatened the financial viability of their parks.

842. The prolonged history of the conflict between the mobile home park owners and the Band and its Chief has already been the subject of testimony before the Standing Committee on Indian Afairs and Northern Development and the Special Committee on Indian Self-Government. It has led to extensive mediation by the Member of Parliament for Okanagan Similkameen, Mr. Fred King, and further attempted mediation by Mr. Gerv Fretz, M.P., Parliamentary Secretary to the Minister of Indian Affairs and Northern Development.

843. An incident in which a serious assault on Chief Derrickson led to charges against three persons associated with the ownership of the mobile home parks has exacerbated an already commercially unstable situation. None of the present lessees affected by our proposed solution were among these three.

844. The remedy provided within the framework of the leases which govern the mobile home parks is a determination under the authority of Subsection (3) of Section 17 of the Federal Court Act, which provides:

"(3) The Trial Division has exclusive original jurisdiction to hear and determine the following matters:

(a) the amount to be paid where the Crown and any person have agreed in writing that the Crown or that person shall pay an amount to be determined by

(i) the Federal Court
(ii) the Trial Division, or
(iii) the Exchequer Court of Canada;

(b) any question of law, fact, or mixed law and fact that the Crown and any person have agreed in writing shall be determined by:

(i) the Federal Court
(ii) the Trial Division, or
(iii) the Exchequer Court of Canada: and

(c) proceedings to determine disputes where the Crown is or may be under an obligation, in respect of which there are or may be conflicting claims."

845. Periodic reference of disputes to the Courts and of rental disputes to Federal Court and Federal Court of Appeal is not a practical or possible solution for small business. From the point of view of the mobile home park owners, this remedy is beyond their reach economically. The Band can, and has in the past, vigorously monitored or pursued court actions in which their interests were involved.

846. It is our conclusion that the multitude of conflicts are real ones. We are convinced that they have substantially interfered with the ability of the Band and its Chief to carry forward their plans and achieve their goals. We are convinced that they have created an environment in which the mobile home park owners find it nearly impossible to carry on their commercial ventures.

The Role of the Department of Indian Affairs and Northern Development

847. The complaints of the mobile home park owners have been repeatedly brought to the attention of the Department over the long course of this conflict. Considerable

correspondence exists which documents this. Because of the extent to which the Department handed over power to manage and control lands on the Reserve to the Band the Department had removed itself from a position in which it could deal effectively with the problem.

848. The provisions of the "D" series of ciculars which are incorporated by reference in the 1977 Agreement do not provide an effective framework for an orderly transition of powers of administration of lands to the Band. It would appear that what resulted from the Department's actions during the period 1977 through 1985 was an ineffectively controlled transfer of powers under Section 60 of the Indian Act to the Band without the necessary Order-in-Council authority. In particular, DIA technically retained the Section 60 powers under the 1977 Agreement, but in practice did not fully exercise them.

849. This was made worse by the loss of Departmental records resulting from the occupation of the offices in Vernon and Kamloops in 1975. It was further adversely affected by the large staff reductions that accompanied the devolution of powers to the Band. Protection of the interests of third parties during the course of transition was not effectively accomplished by the Department. This could perhaps have been accomplished by an effective program of advising third parties of the extent and nature of the changes in management which directly affected their commercial interests and by building in a process to ensure that their interests were not adversely affected by arbitrary or commercially unforseeable change.

850. It is our conclusion that the Department has allowed to develop, and has created in part, this situation through failing to fulfil adequately its responsibilities in three areas;

1. The Department has, through a policy of aggressively handing over the management and control of lands on the Reserve to the Band, transferred to the Band in the late 1970's the powers which are dealt with in Section 60 of the Indian Act. While technically the Department correctly retained these responsibilities and powers in the 1977 Agreement, in practice it was normal to permit the decisions to be made by the Band. This was done without the necessary Order-in-Council. The basis in law upon which the Band exercised these powers was therefore suspect. The exercise of these powers directly affected the owners of the mobile home parks.

2. All of the leases governing the existing mobile home parks with the exception of the Park Mobile Home Sales Ltd. lease have covenants providing that "...if the Lessee pays rent hereby reserved and observes and performs the covenants herein contained, it will peaceably hold the land without any unlawful interruption by Her Majesty." The activity of the Band in the course of its control and management of lands under leases between the Crown and the mobile home park owners has interfered with that covenant to provide quiet enjoyment. The involvement of the Department in permitting the exercise of by-law powers on questionable statutory footing has, as well, interfered with that quiet enjoyment.

3. The mobile home park owners feel, with perhaps some justification, that the Crown assumed a moral obligation to them when they entered into their leases with the Crown to avoid creating a situation which significantly derogated from the value of the leases.

851. The position of the five association mobile home park owners, other than Park Mobile Home Sales Ltd., is much the same in all material respects. Park Mobile Home Sales Ltd. differs because of three factors;

1. Its lease is with a company owned by a Band member which holds the Head Lease on the lands rather than with the Crown

2. The lease is a lease of conditionally surrendered lands.

3. The Park Mobile Home Sales Ltd. lease does not have an express covenant for quiet enjoyment and must rely on the covenant implied by law.

852. To the extent therefore that the harm done to the lessees flows from the lease of lands being a Crown lease, Park Mobile Home Sales Ltd. is outside the scope of the above comments. It may be however, because of the status of surrendered lands, that the effect of the by-law regulation countenanced by the Department has been greater in the case of Park Mobile Home Sales Ltd.

Mobile Home Park Tenants

853. Aside from the direct effect on the mobile home park owners, these developments have led to a situation where the mobile home park industry on Band lands has received

extensive unfavourable publicity in the Okanagan area. There is a net movement of mobile home tenants off the parks. This, in itself, has had a considerable effect on the economic viability of the mobile home parks. This process has affected the tenants in the mobile home parks as well. Moving a mobile home is costly. Because of this the mobile home tenants are not free to move at will in response to a deteriorating environment. Many of them are both emotionally and economically attached to their location in the mobile home parks and, because of this, can be subjected in the short run, to a level of rents above the prevailing market level in the area.

854. The upward pressure on rents under the leases has, we understand, led to a level of rents in some or all of the mobile home parks which are not maintainable in the long run. Due to the economic recession, market value of the parks and the level of rents that can be obtained from individual homeowners has decreased. The Park owners however, as lessees of the Crown on locatee lands, face increasing rents, which, combined with increasing taxes and operating costs including interest on borrowed money, takes a greater and greater proportion of their total income from the Parks. As a result they are being pushed toward bankruptcy. As well, we saw some evidence that the unwillingness or inability to continue investment in the mobile home parks by the mobile home park owners will lead to a situation where the quality of the services in the parks will decline. Because most of the services such as electricity, water, sewage and roads are individually constructed and maintained, continued investment is required to ensure that they are maintained at an acceptable level. The economic pressure experienced by the mobile home park owners militates against maintenance of services at an acceptable standard.

855. In addition, the servicing infrastructure on the Reserve lands is totally inadequate to meet the requirements of the rapidly increased population, the vast majority of which is non-Indian. This is especially so in the case of water supply which is deficient in both quantity and quality, resulting in danger to health and safety. In turn this creates a potential liability situation for the Band and the Crown.

Recommended Solution

856. We would expect that if the mobile home parks were to be owned and managed by the Band that they would be well managed. We were impressed by the management abilities

of the Band and its Council. We were told that the management of the mobile home parks presently in the hands of Band members was of a high standard. It would be our expectation that if the pressures generated by the currently unstable situation were removed from the mobile home parks that it would be in the best interests of the Band and the mobile home park tenants. We have no reason to believe that the Band would not achieve this. The history of the conflict between the mobile park owners and the Band has created a situation which has led to a public perception that conditions in mobile home parks on the Reserve are below the standard of mobile home parks off the Reserve. It would be in the Band's interest to reverse that situation as quickly as possible.

857. In our view, the most practical resolution of the conflict which presently exists between the mobile home park owners and the Band could be achieved by transfer of ownership of some or all of the mobile home parks to band ownership. Both Chief Derrickson and the mobile park owners have expressed an interest in discussing this.

858. We would see the process operating as follows:

Initial Approach

859. The Owners of some or all of the parks operating on Reserve lands would be approached to explore their interest in selling their mobile home parks to the Band at fair market value. The fair market value would be determined through a process of appraisal, negotiation and arbitration. We understand that the six mobile home park owners that we spoke to would all be interested in exploring such a sale. There are three mobile home parks whose operators we have not discussed this with. But it may be because of the absence of evident conflict between these lessees and the Band or because these properties came into their present owner's hands at a time when the extent of the Band's control of their lands was known that these properties remain outside the scope of this proposal. However, we would recommend that the owners of the three other parks, H.I. Enterprises Ltd., Shady Beach Camp Ltd. and 231117 B.C. Ltd. be contacted to explore their desire to be included in this process. The Park Mobile Home Sales Ltd. property has been sold. Presumably the purchaser of that property is aware of and accepts the commercial risks inherent in the purchase. This will presumably put Park Mobile Home Sales Ltd., the largest of the parks, outside the scope of this proposal.

Retaining of Appraisers by Both Parties

860. If tentative agreement on a buy-out process could be achieved between the mobile home park owners and the Band then each would be asked to retain an appraiser to appraise the mobile home parks on the basis of their fair market value. The mobile home park owners would be required to provide their audited financial statements to both appraisers. Factual data that has been developed by Mr. Gaetan Roy would be provided to both appraisers and the appraisers chosen by the parties would be instructed to discuss their appraisal approach with one another beforehand and to agree to sharing basic sources of information to minimize the costs of the appraisal process. We would suggest that in these exceptional circumstances the costs of the appraisals be borne by the Department.

Gaetan Roy Guideline Letters of Opinion

861. During the course of our review we have asked Mr. Gaetan Roy to prepare letters of opinion of approximate market value for our assistance and to give some indication to both the Band and the mobile home park owners of the general area in which the appraisal values may fall. These are necessarily incomplete and are intended to be general indicators only. For example, these letters of opinion do not take into account levels of future expenditures required, changes in pad rental levels, advantages of permanent structures or values of structures and equipment of a moveable nature. These letters of opinion are to be released to the Band and the park owners but we do not see them as necessarily being relied upon in the process which will establish fair market value.

Process of Determination of Fair Market Value

862. Once the appraisal results were obtained, if the appraisals differed by less than 10% of the valuation placed on any individual mobile home park, then the appraisal results would be averaged to determine the fair market value for the purposes of the sale. If the appraisal results differed by more than 10%, the parties would have the opportunity for a specified but short period to negotiate a fair market value. Failing this the matter would be arbitrated by a sole arbitrator agreed to by both parties beforehand. We think that it is important that this arbitrator be agreed upon by the parties as early as possible. There should be a set

period within which the arbitration would have to take place and, in order to make this practical, the choosing of an arbitrator should be one of the first tasks undertaken.

The Park Owner's Decision

863. After determination of a fair market value for the parks the park owners would make an election to sell or not to sell at the fair market value established.

Exploration of Financing

864. A member of the Department, in consultation with the bank or agency chosen to provide the financing, would discuss with the Band an acceptable financing proposal. During the course of our review we were advised by Senior DIA officers that the financing might be put together through a combination of the Indian Economic Development Fund and commercial lenders.

Decision of Band

865. If suitable financing arrangements could be made and the Band elects to go ahead, the purchase and sale of the mobile home parks could then proceed.

866. Mobile home park owners who decided that they would prefer to continue with the operation of their mobile home parks with full knowledge of the present circumstances surrounding the grant of powers to the Band and after having had an opportunity to dispose of their mobile home park at fair market value would be in a situation where they had made a business decision to carry on the operation of their mobile home parks with full knowledge of the process under which their leases would be administered.

Recommendation #1

867. That the Department agree in principle to the "recommended solution" set forth by the contractors and, further, that the necessary procedures be effected immediately to acquire the requisite authorities and funds to successfully implement the "recommended solution".

PART V

CONCLUSIONS AND RECOMMENDATIONS

Forward

868. There is a fundamental and extremely important point regarding "attitude" which needs to be fully appreciated by readers who are attempting to "make sense" of the turmoil and discontent that has swirled around the Tsinstikeptum Indian Reserves during the past decade. The point is that this is NOT a situation (as some apparently would prefer to believe and have everyone else believe) where a bad Indian Chief, a bad Band Council and a bad Indian Band are plotting and scheming to take advantage of a particular legal situation to the economic detriment of a group of unsuspecting, innocent and defenceless non-Indians.

869. It is not intended to be suggested that the situation at Westbank is "squeaky clean". Rather, it is suggested that to better appreciate the overall context of the flow of events of the past decade it is most helpful to bear in mind that the lessee-owners of the mobile home park business ventures are entrepreneurs who attempted to gain a business advanatage by acquiring cheap land through lease rather than purchase and thereby avoid the up-front outlay of a large capital expense. This was achieved through the leasing of surrendered Indian Reserve lands which had the added attractiveness of being free of the restrictiveness of municipal rules and regulations. For a while, it appears, it was a very good business approach. However, during the past decade, the Indian Band has been led by a Chief who has shown himself to possess a highly developed and finely honed sense of business acumen. Under his leadership the Band has steadily generated increased wealth to the point where it is today one of the wealthier Indian Bands in Canada. The Chief's zeal for hard nosed business deals and the maximization of returns on investments has led to a state of virtual and total alienation with respect to the relationship between the Band and most of its mobile home park lessees. It was essentially the constant and unceasing pursuit of a greater share of the profits of the mobile home park lessees which ultimately led to the severely deteriorated situation of today and not, as some would advocate, a question of a deliberate plan to drive anyone into bankruptcy.

The Overriding Problem - The Jurisdictional Lacuna

870. Of all the volumes of material that has been written concerning the Westbank Band during the past decade, the one predominant feature which permeates all issues is

that the pith and substance of the problem is a direct confrontation between an antiquated and irrelevant statute -- The Indian Act -- and the advancement of the bona fide business interests of a highly developed Indian Band. In essence, the constantly recurring problem of the "jurisdictional lacuna" which the Department has been struggling with and "studying" for well over two decades. Particularly since the "Peace Arch" decision of the British Columbia Court of Appeal in 1970, the Department has been waivering in a constant state of uncertainty as to whether or not this decision could be interpreted and applied as permitting Indian Bands with authority to pass by-laws under Sections 81 and 83 of The Indian Act to tax non-Indian lessees on surrendered Indian lands and to pass other by-laws for the orderly development and control of such lands.

871. In 1975 the Alliance of Squamish, Sechelt and Musqueam Bands made representations to the Minister regarding the existence of what they termed "a complete regulatory vacuum". The Department of Justice, after an exchange of various opinions, eventually acceded to the position of the Alliance on this matter. This is set out in a letter to the Alliance dated September 24, 1975 and signed by Paul M. Ollivier, Q.C., Associate Deputy Minister of Justice.

872. In a subsequent letter (undated) the then incumbent Minister of Indian Affairs, Mr. Judd Buchanan, acknowledges the position of the Department of Justice and states:

> "... I am very concerned, as you are, about this regulatory vacuum. Officers of that Department (Justice) are responsible for advising Federal Departments on all matters of law and, in this case, they have informed me of a legal problem which prevents my Department from pursuing a course of action consistent with our policy of promoting local government. In view of this, I intend to ask the National Indian Brotherhood to support my request to Parliament for permissive legislation, which will allow Bands to assume as much responsibility as possible, consistent with good administrative practices, for the management and control of Reserve lands, and lands surrendered for leasing ..."

873. The new "permissive legislation" referred to by the Minister never materialized and Indian Bands were left to cope with the situation as best they could. The interim advice from the Department was that all future leases of surrendered lands include a covenant whereby the lessee would voluntarily attorn, through the medium of contract law, to the applicability of Band by-laws.

874. By letter dated February 10, 1977, the then incumbent Minister of Indian Affairs, Mr. Warren Allmand, states:

> "... Although my predecessor, Mr. Buchanan, felt at one time the simplest way of overcoming the so-called "regulatory vacuum" was to amend the Indian Act, there have been a number of developments since as well as a great deal of research done on the topic ..."

875. We do not know at present what the "... number of developments ..." that Mr. Allmand speaks of refer to. Nor were we able to locate the "... great deal of research done on the topic ..." Notwithstanding, for these reasons Mr. Allmand settled on a proposed route to fill the "regulatory vacuum" by passing regulations under Section 73(3) of the Indian Act to permit the regulation of activities on surrendered Indian lands by Indian Bands.

876. It is obvious that Mr. Allmand had been advised of the inherent weakness and possible illegality of this approach for he states:

> "... While I am aware there is a possiblity the regulations may not stand the full test of a Court of Law if they are challenged, I am nevertheless more inclined to adopting that route rather than opting for the more complex and lengthy process of amending the present legislation ..."

877. Again, as with the case of the proposed new permissive legislation, this proposed solution also never materialized and the Indian Bands were left to continue to struggle with the uncertainties and inadequacies of the only available option -- the lessees' covenant.

878. Ten years later the Department has "progressed" to the point where, on August 21, 1985, Corporate Planning produced the second Draft Discussion Paper entitled "Jurisdiction on Surrendered Land". This 33 page document contains the astounding conclusion (page 19):

> "Some of the most serious obstacles to Indian economic development have nothing to do with shortage of capital or resources or distances from markets. They relate instead to the unusual and ill-defined legal status of Indians and their land ..."

879. So we come full circle yet again. Can anyone seriously question why Indian Bands are extremely agitated and frustrated over this matter. Both the problem and the solution have been clearly and unequivocally identified for well over a decade. Why do we need to study it yet again? Nine years ago Mr. Allmand said there had been "... a great deal of research done on the topic ..." The statute has not been amended during that time; so what new factors now necessitate and justify this present "discussion paper"? The simple answer is none. Accordingly, we are of the opinion that it is time for the Department to put an end to this "stonewalling"; accept fully its responsibility in and for this matter; and commence immediately, with the very highest of priorities, the necessary legislative reform to finally and irrevocably determine this matter so that a major stumbling block in the path of Indian economic development and self-reliance can be permanently removed.

Recommendation #2

880. That the Department take immediate action to sponsor the necessary legislation to determine the status of Indian lands surrendered for lease in such a manner as to put the jurisdiction of these lands clearly outside that of the provinces and municipalities and clearly inside that of the Indian Bands.

Re: Lawson, Lundell Report Generally

881. From the advantage of applied hindsight, it is clear that the Lawson, Lundell inquiry was an ill-conceived and ill-timed response to a serious and steadily growing problem area. Mainly because of the way it was conducted, rather than contributing to the resolution of the problems it allegedly investigated, it further fuelled the fires of discontent and added considerably more malaise to an already potentially explosive situation. Notwithstanding, we are of the firm conviction that there was no *mala fides* on their part. The difficulties were generated by the vagueness,

uncertainty and wide ranging scope of their Terms of Reference. For this the Department must bear full responsibility.

882. In addition to poorly defined Terms of Reference, the Lawson, Lundell team appear to have conducted an inquiry, formulated conclusions and enumerated recommendations based upon an investigative style and procedure which, at best, can be characterized as incomplete and wanting. There is considerable evidence that, whether intentionally or unintentionally, there was very little contact with the Chief and Band Council as well as pertinent British Columbia Region personnel. On the other hand it appears that there was significant contact with mobile home park lessees. In view of this apparent fact, many of their conclusions and recommendations must be assumed to be biased and, accordingly, must be viewed with scepticism.

883. Notwithstanding the flaws that underline the Lawson, Lundell Report; we are of the opinion that it was compiled with the utmost of good faith and does, in fact, set forth many recommendations and raise many questions which, aside from their individual validity or invalidity, ought to be of significant interest to the Indian Programme and worthy of appropriate follow-up action to determine their merit.

884. The fundamental difficulty with the Lawson, Lundell inquiry is that it appears to have been conducted and concluded in the absence of certain very essential and crucial information. No where in the Lawson, Lundell Report, directly or indirectly, is there any reference whatsoever to Treasury Board Minute 725973 dated April 1, 1974. Yet, particularly in response to that section of the Report that deals with the 1977 Agreement, both the Band and Departmental representatives refer to that Treasury Board Minute as the direct source of authority for the 1977 Agreement and the guidelines for the subsequent interpretation and application of that Agreement.

885. It is clearly obvious from the Report that Lawson, Lundell were not aware of the existence of Treasury Board Minute 725793. This is particularly obvious when they question the authority of B.C. Region to enter into such a relationship as that set out in the 1977 Agreement.

886. We are of the opinion that had Lawson, Lundell been apprised of the existence of the Treasury Board Minute the whole tenor of their report with respect to the 1977

Agreement and the delegation authority of B.C. Region would have taken on a new perspective and been revised accordingly. Undoubtedly such an awareness would at least have permitted them to justify the "fact of existence" of the 1977 Agreement if not its "form of existence".

Recommendation #3

887. That the Lawson, Lundell Report be recognized as a document conceived *per incuriam* and that its conclusions and recommendations be considered in the light of that fact.

Re: By-Law Authority

888. Although substantively by no means conclusive, the majority of the general comments provided by Lawson, Lundell with respect to by-laws are well founded if viewed in a generic sense encompassing the general principles of municipal government. But this in itself also portrays the underlying difficulty with the Report.

889. The essential flaw is that in discussing the problems evident to them with respect to passing, interpreting and applying by-laws Lawson, Lundell kept the discussion within the purview of the general municipal setting and failed to bring it into the specific and unique setting within which Indian Band governments find themselves. As such, although they discussed many problems associated with many by-laws they did not, on any occasion, go on to relate these problems to the "Indian setting". Had they taken this further step it is quite conceivable that the Report might have been of significant impact in assisting the Department to identify and resolve this most troublesome area.

890. In discussing by-laws Lawson, Lundell appear to have missed the quintessential point that the Department and the Indian Band Councils have only Sections 81 and 83 of the Indian Act to guide them. There is no equivalent of the various provincial "Municipal Acts" to define the parameters of jurisdiction for Indian Band Councils or to provide appropriate remedies for those aggrieved by particular by-laws. Within the words of Sections 81 and 83 the Indian Band must identify the parameters of its authority, and within those parameters attempt to set out a code of by-laws which will ensure the orderly, controlled and most effective use of its land based economic resources.

891. Naturally, within the confines of such severe restrictions and sketchy criteria there can be very little, if any, certainty. If the very basis of authority of the by-law is itself unclear then, of necessity, the substantive content of the by-law will also be unclear. Certainty in the law is directly contingent upon simple, clear, concise, well structured and well drafted legislation. This is as applicable to by-laws as it is to statutes themselves. Clearly, the Indian Act, through Sections 81 and 83, do not provide the proper basis upon which by-laws can be drafted with the precision and certainty necessary to ensure their intended applicability.

892. Again, the Department must accept full responsibility for the present state of affairs. How can the Department seriously talk about "self-reliance", "self-government", "non-paternalistic regimes", "economic self-sufficiency" and the like when it continues year in and year out to tolerate the severe restrictions forced upon Indian Band Councils as a direct result of the vagueness of Sections 81 and 83 of the Act and the uncertainty of their applicability to lands surrendered for lease?

Recommendation #4

893. The by-law making powers of Indian Bands be redefined and set out in such a manner that they are ascertainable, definitive and certain for all concerned.

Recommendation #5

894. That the utility of Section 82 of the Act be reconsidered as an appropriate and proper policing method for by-laws with a view to redefining the duties and role of the Minister in light of the present day state of development of Indian Band governments and, in particular, that serious consideration be given to a more active role for Departmental legal services.

Recommendation #6

895. That the legal difference between "zoning" and "community planning" be clearly identified and that, if necessary, approrpriate legislation follow as soon as possible to ensure that Indian Band Councils have the requisite authority to legislate with respect to both areas of municipal control.

Recommendation #7

896. That the appropriateness of the penalizing powers given to Bands under Section 81(r) of the Act be re-evaluated with a view to broadening the spectrum of applicable penalties.

Recommendation #8

897. That the Department carefully consider a form of mandatory notification to all affected non-Indian parties of new by-laws in effect on Reserve lands, be they effective pursuant to the authoritative procedures set out in Section 82 or Section 83 of the Act.

Recommendation #9

898. With respect to the Westbank Band of Indians, the Department require that:

i) all existing by-laws be reviewed with a view to ensuring that they are "within the four corners" of the Act and regulations and, where they are not so found, that they be appropriately amended to bring them within the said "four corners";

ii) a training programme for Band personnel be devised which will permit them to learn, from a legal perspective, the fundamentals of by-law interpretation and application;

iii) a complete review of all discretionary powers delegated to Band officials by Band Council be undertaken with a view to determining their validity;

iv) a review of the criteria set out in various by-laws that allows for the issuance of permits and licences with a view to determining the degree of certainty of the applicable criteria.

Re: Administration of By-Laws

899. The difficulties with respect to the administration of by-laws, identified by Lawson, Lundell, are a natural outgrowth of as well as symptomatic of the historical psychological relationship of the Federal Government and the various Indian Bands. Prior to the mid-1960s there was a clearly distinct "paternalistic" relationship between the Government and the several Indian Bands.

From the mid-1960s onward it was increasingly evident there was a clear attitudinal change on the part of the Indian peoples. They clearly wished to take control of and responsibility for their own destiny and, above all, to escape assimilation into the broader Canadian mosaic -- which was the espoused aim of the paternalistic approach so evident in the Indian Act. In the words of a well known cigarette commercial they had "come a long way". Increasingly, Indian Band Councils have advanced to the stage of development where they are actively seeking more and more direct responsibility for their lives and futures. The very significant increase in the number of Bands that have, or have applied for, Sections 53, 60, 69 and 83 delegations of authority constitutes clear evidence of how the Indians feel about their "advanced stage of development".

900. The difficulty is that the vast majority of Indian Bands have been "overtaken by events", in the sense that they have taken quantum leaps forward in recent decades, in terms of acquiring control of their own destinies, but they do not have the benefit of a "historical base" upon which to build. That is, they do not have as, for example, the English do, a long and sequential history of orderly development of society leading gradually and naturally from one step to the next as from the "Industry Revolution" to the "High Tech Revolution". Indian Bands, it appears, are now in the process of establishing this historical foundation. But they must establish it within the context of the more advanced Canadian society at large. The result is that, by way of analogy, they are secondary school students suddenly forced to cope with and master a university curriculum.

901. The result of the Indian situation is that, when delegations of authority are finally attained, the Band often suffers from poor administration. In turn the Department, as well as non-Indian lessees of Band lands, usually find themselves constantly forced to deal with this situation of poor administration. We fail to properly appreciate that the Band administrators are at a severe disadvantage. They must struggle, at least initially, to try to achieve the level of administration that we seen to assume is present and certainly expect of them almost as a matter of course.

902. The Department should recognize that Indians (as equally capable as they assuredly are) do not possess the long history of development, especially in terms of government administration, as do the Departmental "bureaucrats".

The Department should seize the initiative and take effective measures to contribute toward the development of a tradition of "good administration" amongst Indian Bands.

Recommendation #10

903. That the Department develop and make available, to both Band Councillors and all Band employees engaged in Band administration, academic courses in "government administration". These courses should be specifically designed to ensure that the Indian student fully understands, on a general level as well as from their own particular perspective, how government administration is achieved and how they interface with this government bureaucracy on a day-to-day working level.

Re: Supervision and Monitoring of Subordinate Legislation

904. It is trite law that it is the responsibility of the legislator to ensure that, where subordinate legislation is authorized, such legislation is fully within the scope authorized by the delegation and that attempts to extend the scope by the delegatee are denied. Such is the case with Sections 81 and 83 by-laws. We have previously covered some of the more fundamental difficulties with these Sections. Notwithstanding these problems, the vigilance of the Minister with respect to his duties in this regard must still be maintained.

905. The Department must establish and maintain a procedure to ensure that there is appropriate monitoring and follow-up of Band activities to ensure Band adherence to the law as well as applicable Departmental policies and procedures. Part of this procedure would, of course, include the training programmes referred to above, but the process must go farther than that.

906. One of the evident difficulties with the present situation of non-Indian lessees on Indian lands is that they have absolutely no say in the formulation or composition of the Band Council (i.e. no vote) and the Band by-laws. Accordingly, they have no effective form of redress against Chiefs, Councillors, by-laws or other rules and regulations that they may find particularly obnoxious or otherwise objectionable. With respect to the Band Council, they are non-entities -- they have no rights and, consequently, no remedies. With respect to by-laws and other rules and regulations, they are usually

confronted with a fait accompli and left with the choice of either accepting the situation as is and falling into line, or engaging in the expensive process of a legal challenge through the judicial system.

907. There are, of course, serious long range implications in this state of affairs for Indian Bands who wish to entice non-Indian economic interests onto their lands in the future. Perhaps, as recommended earlier, some version of the Provincial "Municipal Acts" will resolve the future difficulties in this area.

Recommendation #11

908. That the Department consider amendments to the Indian Act to ensure that the Department has clear and ultimate control of those exercising subordinate powers to ensure that abuses of the exercise of power are prevented or overruled and that the basic democratic rights of non-Indians lessees on Indian lands are properly and fully protected.

Re: Crown as Landlord

909. Although the federal Crown is not affected by provincial "Landlord and Tenant Acts", it is subject to any applicable federal legislation, the common law principles of landlord and tenant relations as well as the law of contract.

910. It is evident from the multitudinous complaints of lessees on the Tsinstikeptum Reserves that the Crown may well be in violation of its covenant with respect to "quiet enjoyment". One of the common themes that runs through the lessees complaints is that they thought they had contracted with the Crown and that they would have to deal only with the Crown. They were not aware of the provisions of delegation provided for in the Indian Act and were "surprised" when they suddenly, without prior Departmental notice, received notice from the Band that they would be dealing with the Band in certain future activities.

911. Although legal services are the proper party to pronounce upon the legal aspects of the Crown's duty to the lessees in these circumstances, we are of the opinion that there is a clear moral obligation, in the interests of fair play, on the part of the Crown to at least notify the lessees when a particular delegation of authority occurs. Lawson, Lundell advocate going farther and would have the Crown "consult" with the lessees regarding the

implications for them of delegations of authority. We foresee many difficulties with the concept of "consultation" unless, of course, Lawson, Lundell are referring to consultation ex post facto, in which case we are of the opinion that it would not only be a reasonable action on the part of the Department, but one which would significantly shore up a badly battered Departmental image.

Recommendation #12

912. That the Department develop a policy to ensure that affected non-Indian parties are advised when a delegation of powers occurs pursuant to the Indian Act and that the ramifications of this delegation are brought to their attention.

Re: 1977 Agreement

913. By Order-in-Council P.C. 1985-1836 dated June 6, 1985 Her Excellency, the Governor General in Council, delegated certain rights of control and management over their Reserves to the Westbank Band of Indian pursuant to Section 60(1) of the Indian Act. The rights are enumerated in the Schedule and Appendix to the Schedule that are affixed to the Order. By Band Council Resolution ? dated ?, 1985 the Westbank Indian Band relinquished any and all rights that it may possess pertaining to lands pursuant to the 1977 Agreement insofar as these rights have been superceded by the delegation pursuant to Section 60 of the Act.

914. Subject to subsequent legal services or judicial interpretation, we are of the opinion that the Section 60 delegation completely supercedes all land matters with respect to the 1977 Agreement. Insofar as the Lawson, Lundell Report was concerned with the 1977 Agreement, we are of the opinion that the Section 60 delegation is now the prevailing authority and any concerns which the mobile home park lessees may have had regarding the 1977 Agreement are now rendered moot.

915. However, from a Departmental perspective, there are still outstanding aspects of the 1977 Agreement which affect the relationship between the Department and the Band; particularly with respect to Band involvement in the estates of deceased Indians.

916. There is also the problem that the Band's renunciation of its alleged rights under the 1977 Agreement are directly contingent upon those alleged rights being set out in the

Section 60 delegation. In our opinion, the wording of the Band Council Resolution is couched in terms that may be interpreted as preserving the Band's alleged rights under the 1977 Agreement should the Governor-in-Council at some future date withdraw any or all of the Band's powers pursuant to Section 60(2) of the Act.

917. In other words, should the Governor-in-Council withdraw any of the Band's land related powers at any time in the future, it is conceivable, perhaps probable, that the Department will again be confronted with the matter of the 1977 Agreement as set out in the Lawson, Lundell Report.

Recommendation #13

918. That the Department consider the uncertainty of its position and the propriety of seeking a final determination of the status of the 1977 Agreement.

Re: Lawson, Lundell Recommendations

919. As stated earlier, in spite of its many drawbacks and shortcomings, the Lawson, Lundell report also contains many recommendations of a general nature which are worthy of serious consideration by the Department.

Recommendation #14

920. That the Department seriously evaluate the utility of the following recommendations contained in the Lawson, Lundell Report. That the Department:

i) originate a policy directive that clearly sets out the duties and responsibilities of Departmental officers with respect to the formal handling of complaints received from non-Indian lessees of Indian lands;

ii) consider the applicability and feasibility of the use of a "Standard Form Commerical Lease";

iii) consider the appropriateness of demanding that all lessees and proposed lessees have the benefit of independent legal advice before formal agreements with the Crown are executed or otherwise dealt with;

iv) reconsider the patent unfairness of the present standard lease clause with respect to the disposition of insurance proceeds with a view to rewriting the clause to be more in line with the true intent of Her Majesty and fairer to the affected lessee;

v) initiate a policy directive to clearly set out the procedures to be followed with respect to an application by a locatee for the leasing of his lands;

vi) initiate a policy directive to set out rules and procedures to ensure the timely and proper consent of affected locatees to rent reviews and assignment/amendment of leases;

vii) re-evaluate its present policy with respect to the length of terms of leases;

viii) investigate the validity of the observations offered with respect to certain specific leases;

ix) investigate the allegations of the assessment of "processing and administration fees" and, if found to be substantiated, initiate effective measures to ensure the cessation of this activity; and

x) review the basis of authority of the delegations of powers pursuant to Section 58(3) of the Act with a view to determining the validity or invalidity of the Lawson, Lundell position that they may be invalid.

Re: Conflict of Interest

921. Conflict of interest is a subject area that receives considerable attention in both the Lawson, Lundell and the Hobbs Reports. The agruments, both pro and con, are not new. The subject seems to be appearing with increasing regularity in the day-to-day routine of Departmental administration and will undoubtedly become the focal point of considerably more attention in the future if the present situation is allowed to continue to exist.

922. As has been shown, the case law on the subject is by no means unanimous. The matter has been addressed by at least two superior courts: the Supreme Court of British

Columbia and the Federal Court of Canada, Trial Division. The differing attitudes of these two courts is indeed significant and can probably be taken as a firm indication that the matter will most assuredly be the subject of review by a court of appeal in the not too distant future.

923. Regardless of what the courts may ultimately say about conflict of interest regarding members of Band Councils and the Band's business affairs, it appears that should the matter come before an Appeal Court with the Department's present policy as the prevailing guidelines, the Department will most probably be "found wanting" and find itself in the position of having lost the initiative to the courts and being forced to take its direction from a judgement of the court. There is also the risk that the judgement might be as obscure and elusive as the recent Guerin decision with respect to clearly identifying the substance and extent of the Ministers duties and responsibilities.

Recommendation #15

924. That the Department seize the initiative and afford a high priority to the matter of the review of present regulations and the development of a comprehensive set of conflict of interest rules and guidelines for Indian Band Councils.

Re: Hobbs Report - Generally

925. The Hobbs Report is, in essence, nothing more than a classic and vicious example of the procedural execution of a "witch hunt". The selective accumulation and interpretation of documents, the use of numerous rhetorical questions, the use of innuendo and half-truths and the use of unsubstantiated "facts" appear to be all masterfully co-ordinated to produce a devastating result for reasons that are nowhere apparent to the reader. The security classification of the document should of itself have raised suspicions when the final report was submitted.

926. The fact that the document was received and then, until very recently, locked up in a filing cabinet makes it extremely difficult to determine whether or not any Departmental personnel suffered adverse career repercussions as a result of its content. In any event, Mr. Walchli, the then Director General of British Columbia Region, is of the opinion that his career has

suffered as a direct result of this Report. In view of Mr. Walchli's senior position in the Department we are, of course, not in a position to determine the validity or otherwise of his opinion. However, it is our opinion that if Mr. Walchli's career progression was adversely affected in any significant way as a result of the Hobbs Report, then the possibility exists that an injustice may have been done to him.

Recommendation #16

927. That the Department investigate whether or not the careers of any Departmental personnel were adversely affected as a result of the Hobbs Report and, if so, whether or not an injustice has been committed which the Department may wish to rectify.

Major Issues Raised By Hobbs' Report

928. In spite of the fact that Mr. Hobbs' inquiry was initiated from the standpoint of certain preconceived opinions and conclusions and conducted in an atmosphere of hostility and discord, there are several major issues addressed in it which are of importance to the Department. These issues are:

a) the propriety of the Department's role in the "Toussowasket Affair";

b) the legal basis of the Department's treatment of the claim of Donaldson Engineering and Construction Limited;

c) the role of the Registrar of Indian lands and the Indian Lands Registry in the "Toussowasket Affair";

d) the propriety of the contribution of public funds to the Westbank Indian Band to assist Mr. Noll Derricksan to defend the action against Donaldson Construction;

e) the ownership and control of the Westbank Indian Band Development Company;

f) the conflict of interest situation of Departmental personnel; and

g) the role of the Department of Justice in the affairs of the Department.

Re: Department's Role in Toussowasket Affair

929. Much is made by Hobbs of the role of the Department and the use of public funds in the rescue of Toussawasket Enterprises Limited from the brink of bankruptcy and its subsequent conversion into a successful and viable business operation.

930. In our opinion, there is no merit whatsoever to the contention that the whole affair was the result of a conscientous act of skulduggery on the part of certain Band and Departmental personnel.

931. Certainly, at this point in time, there is no doubt that the four-party agreement which allowed the Band to buy controlling interest in the company, and to eventually exchange that interest for the release to the Band of Mr. Noll Derricksan's interest in a valuable piece of Reserve property, was a good business investment on the part of the Band that produced beneficial results.

932. With respect to the issue of the ousting of the jurisdiction of the B.C. Rentalsman, in the face of a B.C. Supreme Court decision establishing that jurisdiction, we cannot agree with the position taken in the Hobbs Report. We see no error, both as a matter of law and as a matter of policy, in the actions taken by the Department that resulted in the eventual acceptance of the surrender of the Toussowasket lease. In our opinion, the situation here is tantamount to that where a corporation is fortunate enough to find a "loophole" in the Income Tax Act. Just as tax avoidance is legal, so the avoidance here was also legal. With the exception of the treatment of the claim of Donaldson Engineering, dealt with separately below, we can find no fault with the actions of Departmental personnel in moving to save the business venture. In fact, we believe that it is quite possible that the Department may have had a positive duty to so act. Under the circumstances, the action was in the best interests of the Band as a whole and hence the Department's actions may well have been no more than the fulfillment of its fiduciary duty to the Band.

933. With respect to the issue of authority to enter into certain financial arrangements, there can be no doubt that the requisite authorities were in place and where authorities were required the proper authorities were provided.

934. In our opinion Mr. Hobbs' misguided perception of his mandate is most evident in that part of his Report wherein he attacks the basis of a T.B. authority with respect to a $185,000 I.E.D.F. Stabilization Contribution to the WIBDC. He goes so far as to suggest that "... a detailed examination would be necessary to ascertain the validity of reasons cited in internal Headquarters memoranda (Dickson to Fournier, 19/01/78, and R.D. Brown to Minister, 03/02/78) ..." We find this suggestion nothing short of incredible. At that time, Mr. Fournier was the ADM and Mr. Brown the DM. Obviously the very fact that Treasury Board had authorized the contribution clearly indicated that the Minister had recommended it to the Board. To suggest going behind the reasons for decisions of the ADM and the DM we think was most improper and clearly outside the terms of reference for Hobbs' Report. Such a suggestion is, we think, clear evidence of Mr. Hobbs' overzealous and misguided dedication to some ill-conceived mission.

935. In our opinion, Mr. Hobbs was clearly not attuned to the intertwining and sensitive political, business, administrative and economic forces that were at play when the crucial decisions were being made. Certainly, depending upon the perspective from which one views the sequence of events, there were actions taken and decisions made which might have been questioned by some. But the reality nevertheless was that actions were required and decisions were necessary at various stages. However, the fact that one disagrees with the actions taken or the decisions made is not sufficient grounds to suggest, through rhetoric and innuendo, that *mala fides* existed on the part of the parties involved. There was a legal opinion from the Department of Justice stating that the relinquishment of the lease raised no legal question. That being the case, we do not understand the tenacity and ferociousness of Mr. Hobbs' approach. We think it most unfair and inappropriate.

Recommendation #17

936. That, insofar as the Hobbs Report deals with the matter of the surrender of the lease of Tussowasket Enterprises Limited, it be considered as a tainted report and, as such, to be treated as a document without credibility.

Re: Donaldson Engineering and Construction Company Limited

937. It is with respect to the treatment of the outstanding claim of Donaldson Engineering that B.C. Region Departmental personnel are found to be totally wanting.

At the time of the surrender of the lease Donaldson Engineering were judgement creditors by judgement issuing out of the B.C. Supreme Court. There is a preponderance of evidence that all the key Departmental personnel involved in the surrender of the lease were well aware of the existence of the Court Order. There is significant evidence that they were aware of the claim long before a Court Order was issued.

938. To hide now behind the flimsy camouflage that the judgement was "unregistered", and hence of no concern to them, is unacceptable. Even if legally correct (which is in itself doubtful) such an ethical attitude is not what one would expect from Her Majesty's agents, and clearly not one that Her Majesty would endorse or condone. By their actions in this matter, Departmental personnel, in essence, may have put Her Majesty in the position of undermining the effectiveness and authority of Her Majesty's courts. Aside from the theoritical constitutional complications this might produce, it also produces the possibility that Her Majesty might well have been put into the position of being in contempt of her own courts.

939. The matter is rendered still more questionable by the fact that, in spite of the availability of legal assistance, both from within Departmental legal services as well as from Regional Justice, no one deemed it appropriate to seek legal advice regarding the status of this, albeit unregistered, Court Order.

940. Aside from the questionable ethics and procedures used by Departmental personnel there is the more serious question of the legality of the treatment of the Donaldson claim.

941. Toussowasket Enterprises Ltd. was a provincially incorporated company pursuant to the laws of the Province of British Columbia. As such, it was fully obligated to abide by those laws and, in particular, the Fraudulent Conveyances Act, R.S.B.C., Chapter 142. Legal opinion has indicated that this statute is applicable to the Donaldson situation. It is said that the net effect of its application would be to render the effect of the surrender of the lease null and void as against Donaldson. This bieng the case, it may still be open to Donaldson to pursue the enforcement of his Court Order.

942. In any event, in our opinion, the claim of Donaldson Contruction Ltd. was handled in a most shoddy manner by Departmental personnel. In view of the fact that the

claim is in the form of a Court Order; that the court action was neither defended at trial nor subsequently appealed; that the matter of the registration of the Court Order in the Indian Lands Registry (covered separately below) is somewhat nebulous; that the possibility exists that the acceptance of the surrender of the lease may well be null and void as against Donaldson; and the fact that the outcome of events may well have put Her Majesty in a most embarrassing position with respect to Her Majesty's courts, we are of the opinion that the honourable, right and prudent course of action at this juncture would be for the Crown to satisfy the Donaldson claim by way of an ex gratia payment for the full amount of the judgement plus accrued interest.

Recommendation #18

943. That the Minister recommend to Treasury Board an ex gratia payment to Donaldson Engineering and Construction Company Ltd. for the full amount of the outstanding Court Order plus accrued interest.

Re: Role of Registrar of Indian Lands and the Indian Lands Registry

944. By letter dated ? the Registrar of Indian Lands notified Donaldson Engineering and Construction Ltd. that it would not accept the Company's Court Order for registration in the Indian Lands Registry. The rationale for this decision was based upon the prior decision of Mr. Justice Primrose of the Federal Court of Canada (Trial Division) respecting the case of Palm Dairies Limited and Her Majesty the Queen in Right of Canada, et al wherein he states:

> "... The Crown's argument is that Section 55 of the Indian Act does not encompass any builders' lien and this is a compelling argument. A builders' lien is a document which may be filed in the Land Titles Office pursuant to the provisions of the Builders' Lien Act but can the Registrar under the Indian Act somehow be directed to register a lien in the Federal Registry when there is no specific authority for any such registration. The answer must be in the negative ..."

945. As a result of the reliance of the Registrar of Indian Lands upon the judgement in Palm Dairies, Donaldson Engineering and Construction Ltd. was denied the

registration of its Court Order. Since the lands it held under lease were the only asset of Toussowasket Enterprises Ltd.; and since these lands were Indian (Crown) lands and hence not registered in the provincial land titles systems, Donaldson Engineering and Construction was effectively barred from enforcing its Court Order.

946. This situation raises once again the question of the role and function of the Indian Lands Registry and the Office of the Registrar of Indian Lands within the overall context of the Indian Act in particular and the Department's land tenure policies in general.

947. The difficulty is that although the Indian Lands Registry, as presently constituted, has been functioning for over a decade, there still does not exist any clearly defined definition that sets forth the principles and policies upon which the Registry is based and within which the Registrar operates.

948. There appears to have been considerable agreement within and without the Department for many years that Sections 21 and 55 of the Indian Act are of little, if any, assistance in clarifying, let alone resolving, the problems encountered. The essential difficulty is that although the Act mandatorily decrees that two registers shall be kept, it does not say how they are to be kept, where they are to be kept, in what form, in what circumstances and, most importantly, by whom.

949. In spite of these fundamental difficulties, the present Indian Lands Registry has grown to the point where today it has a Registrar, a Deputy Registrar and a staff of ? people. It is in the process of being converted to an automated data base at a cost of several millions of dollars. Yet one is unable to register a Court Order.

950. Another long standing complaint is that the Indian Lands Registry is just another bureaucractic arm of the Department that, as with the others, takes its legal advice from the Department of Justice and its policy direction from the Department of Indian Affairs. As a result the integrity and basis of Registrar's decisions and the Registry's records are constantly being assailed.

951. There is also the concurrent problem that the Department appears to hold the Indian Lands Registry out as a registry office analogous to the provincial land registry offices. Yet there is no independent statutory base to

the concept of the Indian Lands Registry and no independence of the office of Registrar of Indian Lands. In addition, the present Registry gives all the appearances of being a Land Titles Office, yet there is no assurance fund or guarantee to protect the interests of those who rely upon its records.

952. Then, of course, there is the Donaldson Engineering and Construction Ltd. type of situation. Would any company perform work and invest capital expenditures in projects, as Donaldson Construction did, if they knew that they would have no protection whatsoever for their interest, that even the order of a Supreme Court of a province would be totally ineffective to assist them in claiming their legal rights? Obviously not, and this is a fundamental flaw that will become more difficult for Indian Bands in the future as they become more economically active and independent.

953. The immediate basic problem, it appears, is that there are no rules to guide the Departmental personnel who are engaged in the day-to-day decision-making process. There are no rules because the system of land tenure upon which rules would be based is itself nebulous. The system of land tenure is nebulous because there are no firm rules to guide the Registrar. It is a classic "Catch 22" situation and the result is a lands registry system run on an ad-hoc basis which appears to be subject to the prevailing winds of legal opinion and the force of personality of the incumbent Registrar.

954. As long as the system of land tenure remains uncertain and obscure and as long as a comprehensive set of rules and guidelines are not forthcoming, the Department can expect to remain in a very vulnerable position. It has to be borne in mind that, even though powers may be validly delegated (to Departmental personnel or Bands) the ultimate responsibility, and hence liability, remains with the Crown.

Recommendation #19

955. That the Department produce a comprehensive set of policy guidelines to guide personnel who are engaged in activities, such as the acceptance of the surrender of a lease, to ensure that procedures are present to protect the bona fide interests of all parties in accordance with law and the moral and ethical standards that Her subjects have come to expect from Her Majesty's agents.

Recommendation #20

956. That the Department undertake, on a high priority basis, the definition of the role and function of the Indian Lands Registry, and the office of Registrar of Indian Lands, within the overall context of long term government policies and aims with respect to Indian lands.

Recommendation #21

957. That, within the context of Recommendation #19, the Department consider the feasibility and utility of creating an Indian Lands Registry independent of the Department, controlled by its own statutory base and capable of interfacing with provincial land registry and land title systems.

Re: Contribution to Westbank Indian Band for Toussowasket Enterprises Ltd.

958. It appears that, based upon the content of a letter dated March 14, 1978 from Warren, Ladner solicitors for Toussowasket Enterprises, the Department entered into a Contribution Agreement with the Westbank Indian Band in the amount of $7,000 to cover certain legal costs incurred by Toussowasket Enterprises Ltd.

959. A memo to file dated April 11, 1978 indicates that a $7,000 contribution was made to the Band to pay the costs of Mr. Noll Derricksan "... in pursuing an action against the project managers, consulting engineers and contractor who participated in the design and construction of a mobile home park." The memo goes on to explain the reasons for the grant as follows:

> "The reasoning for this assistance is to provide a delay action in the life of the trailer park such that sufficient time will be available for new legislation to come into force that will greatly increase the marketability of mobile homes, i.e. B.C. Registry and CMHC funding. The Toussowasket park is well within the guidelines of this new legislation. This delay and the resultant expected increase in demand for space (resulting from the new legislation) would provide the cash flow necessary for the orderly solution of the development problems and continue and augment the development climate on the Westbank Reserve."

960. This raises the question of the validity and propriety of such a contribution. As far as can be ascertained Treasury Board Directives do not provide for Contribution Agreements under the circumstances that existed between Donaldson Engineering and Construction Ltd. and Toussowasket Enterprises Ltd. Also, under the circumstances, one has to wonder why, if Departmental personnel felt that the Contribution Agreement was legitimate, it was not entered into directly between the Department and Toussowasket Enterprises or even the Department and Noll Derricksan instead of the Department and the Westbank Indian Band. Again, there is no indication that legal or other advice was sought. Yet, by letter dated April 1, 1982 the B.C. Region staff, in similar circumstances, saw fit to inquire of the Director of Legal Liaison and Support whether certain legal fees incurred by Toussowasket Enterprises Ltd. "... fits with the policy of this Department in providing legal support to Bands undertaking litigation ..."

961. It appears as if there may exist a misuse of public funds with respect to the alleged $7,000 Contribution Agreement with the Band to offset certain legal costs of Toussowasket Enterprises Ltd. However, there is also the possibility that the reasoning provided in the memo to file of April 11, 1978 constituted sufficient justification for the action taken.

Recommendation #22

962. That the Department inquire further into the matter of this Contribution Agreement with a view to ensuring that present guidelines and controls are sufficient to assure full compliance with the applicable law and Treasury Board Directives.

Re: Ownership and Control of the Westbank Indian Band Development Company Limited

963. The Hobbs Report makes much of the matter of ownership and control of the Westbank Indian Band Development Company Limited (WIBDC) and the interrelationship of its shareholders and directors with other Band officials.

964. As we understand it, the WIBDC was incorporated to conduct all of the Band's business affairs on behalf of the Westbank Indian Band. It is a Band-owned company whose shares are held "in trust" for the Band by the Band members who may hold the shares from time to time.

965. We have been presented with copies of Declarations of Trust executed on April 25, 1983 by Chief R. M. Derrickson and Councillor Brian Eli. According to the Lawson, Lundell Report these two people held four of five common shares in the WIBDC as at April 20, 1983. Upon inquiry, we had little difficulty in obtaining copies of the Trust Declarations. We are of the opinion that the Hobbs' Team could have met with the same success, if only they had made the effort. Instead, they opted to leave the impression that, because they had not seen the documents, the sinister conclusion that they indicate was warranted.

966. As we understand it, considerable Band as well as public funds are funelled through the WIBDC. Does the Minister have any duties with respect to the funds funelled through these companies? If so, to whom is the duty owed and what is the nature and extent of that duty? Is the present relationship, if any, between the Department and the WIBDC sufficient to meet the Minister's responsibilities, if indeed he has any?

967. The above questions, of course, raise complicated questions of law regarding interpretation of the Indian Act, amongst other statutes, as well as interpretation and application of the general law of trusts. Needless to say, they will require extensive review and in-depth legal analysis by Departmental Legal Services.

Recommendation #23

968. That the Department refer the matter of the Minister's duties and responsibilities, if any, with respect to Band-owned corporations to Departmental Legal Services for legal opinion.

Re: Professional Conflict of Interest - Departmental Personnel

969. Although not specifically addressed in either the Lawson, Lundell or the Hobbs Report, the matter of conflict of interest of Departmental personnel permeates each and every situation that arises. The essence of the problem is that Departmental personnel are constantly either torn between or confused by their duties and responsibilities to the Crown on the one hand and to the Indian Bands on the other hand. Many of the negative accusations often thrown at Departmental personnel are traceable to the difficult position with which the employee is placed. Even our own legal advisers, Departmental Legal Services,

insist that their role is to protect the interests of the Crown or, as more often put, to minimize the exposure of the Crown to liability.

970. In addition, there is the difficulty faced by the Departmental employees when involved in matters concerning the Band and the lessees of Band land. Just recently the Director of Lands was threatened with a law suit for breach of fiduciary duty by the Band's solicitor when he proposed a plan of action to resolve certain difficulties between the Band and its lessees which the Band's solicitor considered not to be in the best interests of the Band.

971. The difficulty is that, although the Supreme Court of Canada identified a fiduciary duty of the Minister in the Guerin case, the definition, scope and parameters of the duty were ill-defined. The result is that, pending further judicial refinement of the substantive content of the duty, the Departmental employee is left to flounder in the quagmire of uncertainty.

972. As well there is the added complaint that the Legal Services' lawyers constantly act in a "negative" capacity, almost always saying what cannot be done and rarely offering "positive" input as to how a particular objective can be achieved. It appears to be a general observation, at least on the part of most senior officials, that the role of Legal Services would be much more beneficial and appreciated if they were to take a much more positive approach in assisting the client Department to achieve its aims and objectives. Having said that, we are of course sensitive to the fact that, if Legal Services are to play an active role in achieving the client's aims and objectives, then "timing" becomes an important element in the overall strategy. The later Legal Services are brought into the situation, the less opportunity exists for them to be utilized in a positive role. Faced with a fait accompli, the greater the probability that they are forced into the role of negative advocacy. In this regard then, a heavy onus rests upon Departmental personnel with regard to the timely and proper use of Departmental Legal Services.

Recommendation #24

973. That the Department inquire into the position of its employees with a view to ascertaining whether or not there exists a valid requirement for the Department to retain independent legal counsel to advise employees of

their rights and duties in respect to Indian Bands when engaged in formal activities (particularly economic related activities) that affect the Band.

Recommendation #25

974. That the Department should actively seek to redefine its solicitor-client relationship with the Department of Justice with a view to seeking a more positive role for Departmental Legal Services in the achievement of the Department's aims and objectives.

General Conclusions

975. Again, we reiterate our former remarks that both the Lawson, Lundell and the Hobbs Reports were ill-conceived, ill-defined and ill-timed ventures, whose end products offered no new revelations or far reaching recommendations but which caused considerably more friction than that which already existed between the Department, the Band and the lessees.

976. In our opinion, the overwhelming majority of problems and issues raised in both Reports relate to matters totally internal to the Department. Many of them are difficulties that are directly attributable to the inadequacies of the Indian Act. Others are the result of inadequate or no policy direction in certain areas. Still others are the result of poor exercise of judgement on the part of Departmental personnel.

977. In both Reports there are really only two matters which are external to the Department: the matter of the situation of the Westbank lessees and the matter of the outstanding Court Order of Donaldson Engineering and Construction Ltd. Both these matters, we feel, have been adequately addressed in this Report with proposed courses of action that will resolve these difficulties.

978. With respect to the matters internal to the Department, we have offered many recommendations which, in our opinion, if diligently followed up by the appropriate authority/body, will eventually resolve all outstanding problems to the benefit of both the Department and the Indian constituency that it serves.

979. We are also of the opinion that the presently proposed plans for the restructuring of the Department will provide the necessary streamlining of command and control which will contribute significantly to the dissipation of

many of the past difficulties attributable to these factors. It is our understanding that the restructured Departmental organization will provide for increased "hands-on" activity at the ADM level. This we view as a positive sign which we feel will provide increased direction and support as well as supervision to senior officials at the Regional level.

Recommendation #26

980. That the Minister not call for a public inquiry into the affairs of the Westbank Indian Band at this time.