

moneys may only be spent for the benefit of the Indians or bands for whom the funds are held. For expenditures of capital, a band council resolution is required, although the band as a whole need not consent. In all cases, however, the Minister (or, more accurately, the Cabinet) has the power to exercise discretion in the use of funds. Subject to the terms of the Act and any relevant treaties or surrenders, he may determine whether a purpose is for the "use and benefit" of the band.

Administering federally funded programs and managing trust funds are two very different roles, requiring different exercises of judgement. In recent years, the two functions have become confused, and uncertainty as to the Department's role and objectives has arisen.

Legal problems may also arise. One specific concern has been per capita distribution to band members. The departmental Management Improvement Project (Trust Fund Management) noted:

With regard to the expenditure process, current activities concerning the expenditure of capital moneys are incompatible with the direction of the *Indian Act*. At this time, that Act does not permit the management of these funds in any manner by anyone other than the Crown. In 1981, total capital expenditures were about \$200 million, while over \$20 million of this was for per capita distributions to band members. Where the latter concerned distributions to minors, which could have amounted to \$10 million or more for 1981 alone, the Crown is vulnerable to prosecution for breach of trust, as these moneys traditionally have been improperly paid to the parents.

The authors concluded that the Department is becoming more and more vulnerable to successful legal prosecution by bands and individual Indians on grounds of breach of trust.*

The policy of devolution to bands may also leave the Department open to suit for breach of its statutory duties. Policies conflict with statutory standards, and the laws themselves—the *Indian Act* and the *Financial Administration Act*—conflict.

For these reasons—conflicting standards and the incompatible roles of trustee and program administrator—change is needed. In any event, the Department is ill-equipped to function as a bank. The researchers thus concluded that the Department's trust fund management role should be separated from its program delivery functions. The Committee is of the view that the trust fund management role should be phased out as First Nations are recognized as self-governing. Holding the Minister responsible for managing Indian band moneys, as if Indian people were incapable of doing so themselves, is the antithesis of self-government.

The earlier discussion of the origin and purpose of the trust accounts should indicate, however, that a simple pay-out of moneys to First Nation people or governments would be inappropriate, at least in the case of the capital accounts. These accounts were accumulated for the First Nations to provide a financial base for the future, and there are still future generations to consider.

53. The Committee recommends that the revenue trust funds be transferred from the Department of Indian Affairs and Northern Development direct to each First Nation for administration by its government. Capital trust funds, however, should be transferred to a

* DIAND, *MIP 2.3* (August 1, 1982), *Executive Summary*.