

OMBUDSMAN OF BRITISH COLUMBIA

Special Report No. 1

to

The Legislative Assembly of British Columbia

THE GARIBALDI CASE



April 22, 1981

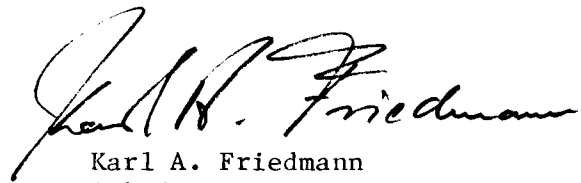
The Honourable Harvey W. Schroeder
Speaker of the Legislative Assembly
Province of British Columbia
Parliament Buildings
Victoria, B. C.

Mr. Speaker:

I have the honour to submit herewith a report to the Legislative Assembly, pursuant to section 30(2) of the Ombudsman Act, R.S.B.C. 1979, chapter 306.

The report concerns complaints I received from owners of property in the area affected by Order in Council 1185/80, the investigations of these complaints by my office, and the recommendations I made to the Ministry of Environment following these investigations. I have attached in the appendices to this report my correspondence with the Ministry of Environment and other related documents.

All of which is respectfully submitted.


Karl A. Friedmann
Ombudsman

OMBUDSMAN OF BRITISH COLUMBIA

SPECIAL REPORT #1

TO

THE LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA

AN INVESTIGATION BY THE OMBUDSMAN

INTO COMPLAINTS

RECEIVED FROM OWNERS OF PROPERTY

IN THE GARIBALDI AREA

APRIL 22, 1981

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I. INTRODUCTION

Section 30(2) of the Ombudsman Act provides that the Ombudsman may make a special report to the Legislative Assembly where he considers that to be in the public interest or in the interest of a person or authority. The present report constitutes the first time I have had occasion or need to resort to such a measure.

I have received a large number of urgent complaints from the residents and other property owners of the Garibaldi area and these complaints raise serious issues of justice and fairness in the administration of a government program designed to mitigate the consequences of a potential natural disaster.

By the end of November, 1980, I had received most of these complaints and assigned priority to their investigation because of a deadline imposed by government on the property owners to sell their properties to the Ministry of Environment. My preliminary findings were transmitted to the Ministry of Environment on December 19, 1980 and after considering the Ministry's response of January 26, 1981, I modified and finalized my report and recommendations to the Ministry. I forwarded these to the Ministry by letter dated February 2, 1981.

The Ministry's response of February 16, 1981 was, in my opinion, neither adequate nor appropriate and I proceeded to make a report to the Lieutenant Governor in Council on February 24, 1981 in accordance with section 24 of the Ombudsman Act. I have now waited eight weeks and have received only a general indication (on April 14th, 1981) that the Executive Council has my report under consideration. Time is running out: many of the complainants are under a government imposed deadline to sell their properties to the Ministry of Environment by June 30, 1981 or suffer serious derogation of their property rights after that date.

This report is intended to explain the issues to the Legislative Assembly, to render account of my actions in these matters, and to call on the Legislative Assembly's assistance in seeing that justice is done.

II. THE COMPLAINTS

The village of Garibaldi is a small collection of residences and recreational cottages located almost equidistant between the municipalities of Whistler and Squamish, and is approximately eighty kilometres north of Vancouver. It lies in the narrow Cheakamus valley. Immediately to the north of the village is the Daisy Lake Reservoir and Dam, which was constructed by the B. C. Electric Company in the early 1950's. About four kilometres east of Garibaldi is the Barrier, an imposing cliff and talus slope some 450 metres high, which forms part of the western boundary of Garibaldi Provincial Park. Rubble Creek runs from the Barrier and intersects the Cheakamus River immediately north of Garibaldi and just south of the Daisy Lake Dam. A map of the area is attached in Appendix A.

The Barrier has long been known to be the source of a potential landslide. On May 29, 1980, the Lieutenant Governor in Council of British Columbia took steps to reduce the anticipated effects of such a potential landslide by approving Order in Council 1185/80 (ordered and approved on May 29, 1980, copy attached in Appendix B, and hereinafter referred to as the OIC). The OIC designated the area as a civil defense zone, appropriated a sum of seven million

dollars to permit the Minister of Environment to acquire properties in the area, and effectively prohibited any further dealing in, development, or improvement of land in the designated area.

The Government intended these measures for the good of the residents of Garibaldi. I have not questioned before, nor will I question now, the basic bona fides of the Government in generating this program. I assume that the only purpose of the acquisition program was to mitigate the consequences of a potential future natural disaster and I accept that it was conceived and intended to avoid loss of life and property. Clearly, once a serious danger has been identified, the Government is wise to act in the interest of safety and to move people before it is too late. A certain amount of hardship and distress that inevitably accompanies such a program can be justified in the name of avoiding the the greater future risk. The people of Garibaldi recognised that and initially tried to cope with the Ministry of Environment's acquisition program. However, as more rules and decisions were made by officials and as more procedures and conditions became known, the citizens of Garibaldi became increasingly apprehensive and after trying in vain to change these rules, conditions, and procedures they complained to the Ombudsman.

Between the months of August and December, 1980, I received representations from sixty-one groups and individuals who own more than fifty of the properties in the area designated as a civil defense zone by the OIC. These persons expressed a wide range of grievances, but their most pressing concerns related to the Ministry of Environment's acquisition program and the lack of assurances about a relocation site. The major complaints, as paraphrased by my staff, are set out below.

1. The OIC was not justified and ought not to have been approved and/or that there were improper motives behind the approval of the OIC (twelve complainants).
2. I received no direct notice of the effects of the OIC on my property and/or was not adequately informed about the Ministry of Environment's acquisition program and/or was not given a copy of the written appraisal of my property done for the Ministry and/or was not adequately informed about the terms of the Ministry's salvage and disposal program (thirty-three complaints).
3. The criteria upon which compensation for improved properties is being determined are unfair (twenty-eight complaints).
4. Unfair pressure has been exerted upon owners of improved properties in order to compel them to sell their properties to the Ministry of Environment (sixteen complaints).
5. No compensation is being paid for unimproved properties (fourteen complaints).
6. The Ministry of Environment has refused to vary or add additional terms to the agreements of sale (nine complaints).
7. My property has not been excluded from the designated area (five complainants).

8. The Ministry of Environment has not committed itself to providing a relocation site and/or has not provided adequate information about the relocation program (twenty-eight complaints).
9. B. C. Hydro and other government authorities have been allowed to maintain and/or improve their facilities in the OIC designated area (nineteen complaints).
10. The amount of compensation offered and/or paid for my improved property does not fairly represent its value (thirteen complaints).
11. The Ministry will not pay compensation for other costs and/or inconveniences directly caused by the provisions of the OIC (seventeen complaints).

Most of the complaints focus on the Ministry of Environment's acquisition program. There are many individual stories of hardship and confusion behind this program and its implementation. I did not look specifically at these individual cases, but for the purposes of illustration I have summarized some of the effects of the OIC, and the Ministry of Environment's administration of the OIC, in three individual cases below:

An owner of a serviced residential lot had decided, early in May, 1980, to sell the lot. He was purchasing a house in Vancouver and required additional funds to finance that transaction. He listed the lot for \$46,000 and within a few days had received an offer. An interim agreement, at a price of \$43,500 was signed on May 23, 1980 and the date for completion of the sale was June 12. On May 29, 1980, the OIC was approved and prevented the property from being conveyed. In order to complete the purchase of the Vancouver house, the individual was required to obtain a second mortgage with an interest rate of 16 per cent, and he has paid in excess of \$5,000 in interest since that time. He still owns the lot in Garibaldi, but he cannot sell it and he cannot build on it.

An elderly couple has owned a parcel of land in Garibaldi for many years. When the highway to Whistler was constructed, a portion of this property was expropriated for that purpose. In the latter part of the 1960s, B. C. Hydro expropriated a strip through their land for use as a transmission line. In 1978, the Ministry of Transportation and Highways required another portion of their property for the reconstruction of the Rubble Creek bridge. They were more than a little upset to discover, in 1980, that the Ministry of Environment now wanted all of the remainder of their land.

Another family had lived in the area for thirty-five years. The father of the family works in Whistler. Two of their children attend elementary school. Because of the impending deadline of December 31, 1980 by which to sell their property to the Ministry of Environment, they felt under extreme pressure to move before school started. They could not afford to move to Whistler because of the very high land prices, and eventually found a residence in Squamish. This makes commuting very difficult for the father who still works in Whistler. They are angry; both because they do not believe they received fair compensation for their Garibaldi property, and because they were not informed by the Ministry that the deadline for selling out would be extended to June 30, 1981.

The economic, social and emotional stress suffered by the Garibaldi property owners cannot be adequately described in a report such as this. I can only convey my impression and my conclusion that a lot of anxiety, frustration, and disturbance could and should have been avoided had the program been better planned and more fairly administered.

Before discussing the complaints and my findings, it is first necessary to set out in some detail the history of this matter as it emerged from my investigation.

III. THE FACTS

A. Government Becomes Concerned about the Barrier

In August of 1972, a company called Cleveland Holdings Limited applied to the Department of Highways for permission to develop Phase II of a subdivision just south of the Garibaldi village centre; earlier that year Phase I of the subdivision had been approved. The Department of Highways refused to approve Phase II of the development on the ground that it would be against the public interest. This decision was appealed to the Supreme Court of British Columbia, and the matter was heard by Mr. Justice Berger in March of 1973.

One of the Department's reasons for denying approval of Phase II was the danger of a catastrophic slide from the Barrier inundating the Garibaldi area of the Cheakamus valley. Evidence that such a slide occurred in 1855 was advanced and eminent geologists were called to

testify on the possibility of such a slide recurring. Mr. Justice Berger concluded that the possibility of a slide occurring in the future did exist. He said:

On a human time scale, there is a risk here. It is a risk that can be understood. It is a substantial risk. It may not be an immediate risk, yet it is there. Who is to say that the life of the subdivision would be merely one generation? Who is to say that any community established there would not last. The presumption must be that there is every likelihood that the structures built there will be replaced by new structures and that those will, in turn, be replaced. The life of the community may be one of hundreds of years. . . . I am not saying that any community built at Phase II is going to last for a long time. I don't know. But the life of the community will likely be at least a generation. The evidence shows there is a risk - a risk that reasonable men can not exlude - that a disaster will occur within the life of the community. The Approving Officer adopted a policy of safety first. I think he was right to do so.

Cleveland Holdings' appeal was dismissed, and approval of the subdivision was denied.

In 1974, the Government announced that a study would be made of the Barrier in order to determine the degree of risk posed by the Barrier and to determine what action should be taken; a public meeting was held at Garibaldi in December of that year to receive public input, and in April of 1975 the Garibaldi Advisory Panel was

appointed and commissioned to conduct such a study. The terms of reference of the Panel were as follows:

- (a) Ascertain whether a hazard of a landslide exists in the Valley of Rubble Creek [which runs from the Barrier to Garibaldi village] and, if so, the degree or frequency of risk that may exist;
- (b) Determine the possible mechanism of a second catastrophic slide similar to that which occurred in 1855 in Rubble Creek, its extent, and impact on the present and future land use of Garibaldi Park, Rubble Creek Valley, and the Cheakamus River Valley; and
- (c) Recommend measures and costs to prevent or minimize risk to human life and property arising from a slide in Rubble Creek Valley.

The final report of the Garibaldi Advisory Panel was published by the Department of Highways in July of 1978. The Panel concluded that "the risks of landslides are considerably greater in this particular valley than in most other valleys in the mountainous regions of British Columbia. The extent to which this greater degree of risk of landslides may be compensated for in terms of overall consequences is discussed in Section 8.4." I take this to mean that, while the Panel was unable to quantify the risk, adoption of the measures outlined in Section 8.4 of the Report would, in the opinion of the Panel, reduce the risk to a level similar to that found in other valleys in B.C.

Section 8.4 outlines three measures by which the risk of a slide could be "essentially eliminated." An official with the Ministry of Transportation and Highways advised my office that the elimination of the risk was, in his opinion, neither feasible nor financially justifiable. This was also the Panel's conclusion.

The Panel suggested three methods for "reducing the risk to human life and property." After analyzing each of these methods, the Panel summarized its conclusions in section 8.4.13:

To summarize, the Panel sees no acceptable means of preventing a repeat of a rock avalanche because the source area is so large as to make treatment of the Barrier impractical and the principal triggering mechanisms -- earthquakes, internal water pressures and extreme floods or snowmelts -- are either extremely costly to control or beyond reasonable means of control. The only practical means of minimizing risk to human life and property from another rock avalanche is to avoid or minimize development and use of the source and runout areas. However, in the view of the Panel, it is neither practical nor reasonable to completely abandon the area to all development.

On the basis of these conclusions, the Panel recommended:

- a) concentrated development, in terms of both people and property, should be severely limited in specified areas;
- b) investigation of the value of attaching a precautionary statement to titles of those lands affected;
- c) a cost-benefit analysis of the construction of a training dyke to divert debris flow away from presently occupied areas; and,
- d) a minimal ongoing surveillance program of the stability conditions at the Barrier.

It is my understanding that, immediately prior to the approval of the OIC, there were no other reports available to the Government other than a preliminary estimate by B. C. Hydro of a tidal wave created by the effect of such a landslide on Daisy Lake Reservoir, with a height of between 15 and 43 meters.

Between 1976 and 1980, the Director of the Squamish-Lillooet Regional District for Garibaldi actively sought to obtain from the Government the findings and report of the Panel. He was continually put off by the various persons in government whom he contacted, and a history of his attempts was provided to me by one of the property owners in a document entitled "An Exercise in Frustration." In response to a complaint made by him to the Ministry of Deregulation about the delay in releasing the Report, the Honourable Alex Fraser, Minister of Transportation, Communications and Highways, wrote on February 26, 1979:

The Report has indeed been completed for several months. However, it raises questions for which we need at least some preliminary answers before it can be made public. Further work is currently under way toward this end but I cannot say how long it will take.

In April, 1980, the Director of the Regional District for Garibaldi complained to me about the continuing delay; it had then been almost two years since the Department of Highways had received the Report. Strong feelings of animosity had developed in the area as the

Department of Highways continued to upgrade the highway through the area, while property owners were prevented from developing private lands. At one point some of the residents blocked the Premier's train (on the B. C. Rail line through Garibaldi) in order to express their dissatisfaction.

During my investigation, I was advised by the Assistant Deputy Minister of Transportation and Highways, Administration, on May 23, 1980, that "this matter is presently before a Committee of Cabinet . . . It is expected that some statement may be made shortly."

Other documents subsequently revealed that the Ministry of Transportation and Highways had asked B. C. Hydro to lower the level of the water in the Daisy Lake Reservoir by two meters, and this was done on May 21, 1980. Of interest is that on July 25, 1980, B. C. Hydro wrote to the Deputy Minister of Environment and asked that "as the 2-metre lowering has minimal effect on reducing the wave height, we request your approval to restore the reservoir to the full operating level starting on August 1, 1980." I understand that this request was denied.

A copy of the Report of the Garibaldi Advisory Panel was finally provided to the Director of the Regional District for Garibaldi on May 30, 1980.

B. Government Takes Action: the Order in Council

On May 29, 1980, the Lieutenant Governor in Council ordered and approved Order-in-Council 1185/80. The full text and schedule to the OIC are attached in Appendix B; I have briefly summarized the provisions below.

Section 2 of the OIC designates an area, described in the schedule, as a civil defense zone.

Section 3 authorizes "the Minister of Environment . . . to acquire such property within such parts of the designated area as he considers necessary to eliminate or reduce the danger of continued occupation of it. . . ." It is perhaps relevant to note at this point that the OIC did not require that such acquisitions be completed by a particular point in time.

Section 4 prohibits any dealing in land, and any development, improvement, contruction, excavation, alteration, or renovation of land, without the consent of the Minister of Environment and the Minister of Municipal Affairs.

A statement was issued to the press on the day the OIC was approved. The day following, at the request of the Director of the

Regional District for Garibaldi, the Honourable Allan Williams, who is the Member of the Legislative Assembly for the area, met with the Director and one of the residents. The Honourable Mr. Williams agreed to participate in a public meeting at Garibaldi on June 7, 1980.

C. What's Happening? The Owners Search for Information

On June 1, 1980, the Garibaldi Ratepayers Association convened a public meeting to discuss the OIC and its effects on the area. A committee was formed to investigate the situation and report back.

On June 7, 1980, at the request of the Garibaldi Ratepayers' Association, the Honourable Allan Williams attended a public meeting in Garibaldi. By this time the Ministry of Environment had retained the Canadian Independent Adjusters Conference (CIAC) to negotiate the acquisition of properties in the designated area on behalf of the Ministry. The Deputy Minister of Environment had also delegated responsibility for administering the acquisition program to the Director of the Provincial Emergency Program. The Chief Assessor of CIAC was in attendance at the meeting with the Honourable Mr.

Williams, and reported to the Director of the Provincial Emergency Program, as follows:

The Honourable Attorney General, Allan Williams, spoke and indicated to the group assembled that he wanted to assure them about what the Government intends to do about the possible lack of stabilization. He indicated that in addition to offering to purchase property from owners who voluntarily decided to sell that the Government was embarking on further examination of the entire situation and that he has carefully monitored the technical data that has been developed from the beginning and that the obvious conclusion was that the Barrier is not stable but it poses various problems with respect to rock flow coming down to the community and the report recommended no new development but did not recommend evacuation of the area. . . . The Chairman then asked for questions from the audience.

- Q. Does this ban in the Order in Council prohibit all development - Crown and private?
- A. Yes, all work in the designated area must stop.
- Q. Why did it take 18 months?
- A. There was no immediate danger - there was no attempt to hide the report but we were waiting for the wave action data.
- Q. Do we have your assurance the Government will continue to look at stabilization?
- A. Government does not want you to move out. There is a possibility of relocation somewhere else. Government hasn't found a safe and satisfactory alternative to Garibaldi, but in response to your question, the answer is 'yes'.
- Q. If purchase is cheaper than fixing the Barrier, will the Government forget about stabilization?
- A. Can't answer that question. The impact on B. C. Hydro, B. C. Rail and the community down the valley has to be taken into account.

At the request of the Garibaldi Ratepayers' Association, the Deputy Minister of Environment met with the Ad Hoc Committee of the Association on June 28, 1980. Information received at this meeting was distributed by the Ad Hoc Committee during the first week in July to members of the Garibaldi Ratepayers' Association. In a letter dated August 14, 1980, the Deputy Minister confirmed that 'the draft minutes of the June 28, 1980 meeting which you supplied satisfactorily represent the discussion of that date.' Enclosed with the letter of August 14, 1980, was a document entitled "Responses to Garibaldi Questions", and that document was distributed to members of the Association in the latter part of August. According to minutes of the June 28, 1980, meeting taken by the Ad Hoc Committee, the Deputy Minister provided the following information, which is summarized below:

1. The Ministry of Environment and the Ministry of Transportation and Highways believe there is no practical solution to stabilizing the Barrier and there are no further studies being done for this purpose.
2. The boundaries of the area designated by the OIC were originally drawn wide as it is easier to release an area from the zone rather than attempt to include it after the OIC was approved. The Ministry is now finalizing the boundaries to be included in a revised OIC and are using the 400 meter elevation level.
3. The Ministry of Lands, Parks, and Housing and B.C. Hydro are looking at the possibility of Crown land in the area that could be used for relocation. The Deputy Minister stated that they should attempt to get a fair settlement for the people here and then give people the opportunity of first option on a new Crown subdivision. He noted that there was no option included in the OIC for relocation. He said that all the Ministry was prepared to do at this time is to buy

the land and improvements being offered for sale by the owners. Relocation can be arranged at a future date.

4. With respect to the future use of the Garibaldi area, Mr. Marr indicated that he did not know at the moment what may or may not be allowed. He suggested that campsites and trails might be permitted.

5. The Deputy Minister said that the OIC clearly stated that developed land will be compensated but not unoccupied land. Serviced lots which have no buildings on them would not be compensated. He pointed out that the matter of compensation for unimproved lands is to be reconsidered. He said that businesses could be purchased by the Ministry and that people holding a legal lease on land would be compensated to some degree.

6. The Deputy Minister noted that the OIC curtails the use of land in the area because of the provisions of section 4. The Government must act in order to protect the people who live in the area. What the Government has decided to do seems fair and reasonable to everyone in government. It has never paid compensation prior to a disaster. In this case, a precedent is being set.

7. The date for evaluating fair market value is May 28, 1980. September 30 is the deadline for requesting appraisals. The Government hopes to consummate the deals as quickly as possible. The Chief Assessor stated that December 31, 1980 is the date set for completion of all sales. The Deputy Minister said that it was up to the owner whether or not to sell his property to the Government. However, after January 1, 1981, he is on his own. After that an owner will retain legal title to the property but will be unable to sell it to anyone else. Also, such an owner will be unable to perform any work on the land without the express permission of the Ministers (as provided by section 4 of the OIC - see Appendix B).

8. The Chief Assessor said that an independent appraisal firm would be appraising each property individually. The Property Negotiator for CIAC would then negotiate with each individual owner. The appraisals will not be given to the owners. This is a standard procedure. The Deputy Minister suggested that if no agreement could be reached the dispute could be resolved by a third party. There would have to be a written agreement between the parties that they would abide by the decision of the third party.

9. The Deputy Minister indicated that the Ministry would not agree to purchase property and then lease it back to the vendor for an indefinite period. However he did indicate that he would consider the possibility of purchasing properties and then leasing back to the vendors until such time as a relocation subdivision was developed. He stated that it could be a term of the agreements of sale that the vendor purchase the buildings from the Government. If no such term was included the Government would auction the improvements for salvage.

10. The Government does not intend to remove or modify section 4 of the OIC at a later date. Although the OIC is open ended, it is not open ended with respect to valuation and purchase. December 31, 1980, is the cut off date. His Ministry would not agree to permit people to stay and allow them to sell their properties on the open market, even if the owners agreed to accept an endorsement on their titles warning prospective purchasers of the dangers referred to in the Report of the Garibaldi Advisory Panel.

I have set out in some detail the information which was provided to the Garibaldi Ratepayers' Association at the time they were being invited to sell their properties to the Ministry of Environment. Written notice of the OIC was never sent to all individuals affected until March 25, 1981, almost ten months after the OIC was approved (I must accept responsibility for the last two months of this delay; in my letter of February 2, 1981 to the Deputy Minister I stated:

I appreciate your willingness to send the information outlined in points (a)[terms of the OIC] and (b)[terms of the acquisition program] on page 15 of my letter of December 19. I do believe a useful purpose would still be served by providing the owners with this information, but would ask that it be sent out only after some agreement has been reached between us with respect to the above recommendations.)

Individuals who were members of the Garibaldi Ratepayers'

Association received copies of the minutes of these meetings; others

were left to depend primarily on hearsay. The Director of the Provincial Emergency Program, by his own admission, placed a great deal of reliance on the Garibaldi Ratepayers' Association and the local grapevine as means for distributing information to the owners. Unfortunately, many of the owners were not members of the Association and, because they did not live in the area, were not party to the local grapevine. These people were left substantially in the dark.

Those who did attend these meetings or who received copies of the minutes of these meetings were left with both conflicting information and unanswered questions. One example of the former is that the Honourable Allan Williams had stated that further studies would be conducted with respect to the possibility of stabilizing the Barrier and thus eliminating the risk. The Deputy Minister of Environment said that no such studies were being conducted and that it had been determined that no practical method of stabilizing the Barrier existed. One of the owners wrote to the Honourable Mr. Williams on July 9, 1980 and stated:

We are now in a position where [the Deputy Minister of Environment], a civil servant, not an elected member, sees fit to speak in contradiction to you. Would you please clarify this situation for us and substantiate your position in regard to stabilization of the Barrier?

The Honourable Mr. Williams replied on July 22, 1980, and stated:

I will discuss with [the Deputy Minister of Environment] his statements at the recent meeting, but wish to point out to you that it is not my recollection that I indicated there would be further studies with respect to the stabilizing of the Barrier. I explained that there would be further studies undertaken to examine the consequences of wave action should the Barrier come down.

D. Implementing the OIC: Enter the Ministry of Environment

On June 2, 1980, a meeting was held in the office of the Deputy Minister of Environment with officials of the Ministry of Environment, the Chief Assessor of the Canadian Independent Adjusters Conference, and CIAC's property negotiator who would negotiate the acquisition of the Garibaldi properties. On June 3, 1980, the Chief Assessor wrote to the Director of the Provincial Emergency Program and set out his understanding of the instructions received. Some of the main elements of these instructions, as well as parts of the supplemental instructions sent to the Chief Assessor by the Director of the Provincial Emergency Program, are set out below:

"Our representative, . . . , began working in the area on the morning of June 2, 1980. His instructions were to visit the Garibaldi area, make our presence known and distribute Request for Appraisal Forms to those permanently residing in the district. Reports indicate that he was well received and he is continuing to maintain good public relations."

"VALUATION DAY - To maintain a uniformity of property appraisals, it was resolved that a valuation date closely paralleling the date of the Order in Council would be beneficial. After considerable discussion it was mutually agreed that May 28, 1980 would be appropriate."

"EXTENT OF APPRAISAL - Those parcels of land containing improvements situated within the designated area are the only ones considered for acquisition. . . . Appraisals and offers to purchase land and improvements thereon will be negotiated on the basis of 'fair market value'. This was further defined as being that which an individual might expect as a reasonable offer from a willing buyer if the property was placed on the open market."

"RE-LOCATION COSTS - There will be no allowance or compensation to the vendor for moving costs or any related expenses. Similarly, claims for inconvenience or other special or general damages are to be rejected." The Director of the Provincial Emergency Program replied "The questions you raise in para. 2 related to fair market value that I believe will be established very quickly as a result of your studies at Garibaldi and places adjacent thereto. It follows that no expenses will be allowed for relocation, bearing in mind that the sale of the property is totally at the discretion of the owner and there is nothing compelling him to accept Government's benevolent offer."

"DEADLINES - Offers to sell shall be received until September 30, 1980 and all land ownership transfers shall be completed by December 31, 1980."

"SPECIALISTS - To assist personnel directly associated with our organization, arrangements have been completed to use other specialists. Appraisals of improved land at a fair market value will be conducted by [an independent real estate appraisal firm]. . . . Their preliminary involvement will provide a total review of the market situation in the Garibaldi area. . . . Many property owners who have called have expressed the view that development of Whistler, B.C. has indirectly affected the potential fair market value of their holdings at Garibaldi. They believe that individual values have accelerated appreciably and are looking for comparative values. Some enquiring are fearful that appraisals will not take this into consideration and are concerned that proceeds from sales will provide insufficient funds to re-locate elsewhere."

"PUBLIC NOTICE - A public notice regarding the aquisition and letter to the registered owners of improved land was drafted in accordance with instructions given at the meeting. Direction was given to place notices in the local newspapers as well as the Vancouver Sun and Province.

After further consideration we were instructed by [the Director of the Provincial Emergency Program] on June 5, 1980 to reverse this decision. The reason being that such notices at this time may have a detrimental effect regarding the storm damage occurring throughout southwestern British Columbia on or about December 10, 1979."

"SPECIAL REPORT - The Garibaldi Advisory Panel 80 page report tabled in the Legislature on May 29, 1980 is required. As discussed a number of individuals have expressed interest in the contents. It was resolved that a copy be placed in the Squamish Library for examination by those concerned." The Director of the Provincial Emergency Program responded "This is to advise you that at present no copies of the report are available. Should there be persons dedicated to obtaining access to the documents, please advise and further efforts will be made to obtain the report." (The Director had been instructed by the Deputy Minister to "Advise no copies available at this time")

"SPECIAL INSTRUCTIONS - It is to be noted that the Honourable Minister of Environment, Stephen Rogers, has indicated the decision to sell is entirely up to the property owners. Government will not force residents to sell to the Province but if they are apprehensive then Government will buy them out. It is further noted that [the Assistant Deputy Minister of Environment, Environmental Services] has requested every effort be made by our organization to amicably reach agreement and employ gentle, compassionate indulgence towards property owners, being extremely sensitive of their position. It is further noted that it is not the intention of Government to invoke expropriation procedures."

"PUBLIC RELATIONS - It is understood that Government will take the initiative in this regard with the undersigned and members of our organization maintaining a low profile." The Director replied "It is expected that wherever possible, you and/or your assessors will be 'front and centre' in dealing with matters as they relate to the ongoing negotiations with the public. Should, of course, things come to your attention that do, or might, have far-reaching effects, etc., from the Government's point of view, they should be immediately directed to this office."

Shortly after receiving these instructions, the Chief Assessor sought a legal opinion about certain aspects of the acquisition program. In a section entitled "Acquisition of Property within the Designated Area," his solicitor advised:

I am aware from our discussions that your firm acting for and on behalf of the Minister of the Environment has been negotiating with property owners within the designated area on the basis that the Crown is prepared to negotiate the acquisition of their property based on its fair market value as at May 28th, 1980. I further understand that prices of comparable recreational properties in the same general area appear to have increased significantly since May 28th, 1980. It is important that you recognize that there is absolutely no mention in the Order in Council about your authority being limited to making offers based on the fair market value as at May 28th, 1980 and to represent that this is the case would in my respectful opinion give any property owner the right to rescind a transaction that had been entered into on that premise and may expose you and your firm to a claim for damages. It is my opinion that you are in a position of having to pay fair market value for the subject properties as at the date you negotiate an agreement with the owner.

This legal opinion was forwarded to the Ministry of Environment, and another solicitor was asked to comment on it. Respecting the opinion expressed above, the second solicitor wrote on September 8, 1980:

The order does not require the Minister of Environment to acquire any property. It gives him power to acquire property which he considers necessary to eliminate or reduce the danger flowing from continued occupation. Legally the question of fair market value does not arise. The Minister can offer the price he wishes to pay and it is up to the owner whether he wishes to accept that offer. . . . The question of price is purely a matter of policy and in my view there is no place for specification of price or how one arrives at price in the order.

The policy of basing the price offered by the Ministry for properties according to the fair market value on May 28, 1980, was not changed.

E. The Dilemma of the Owners

When it came right down to it owners of improved properties were faced with a choice. They could sell their property to the Ministry and receive compensation based on the fair market value of the property on May 28, 1980. They would sell knowing that there were no guarantees about a relocation site. If they got to the point where the Ministry's standard agreement of sale was put before them they discovered that no monies were payable until the Ministry had obtained vacant possession and there was no possibility of leasing back the property from the Ministry until a relocation site was found. Following the sale the buildings on the property were put up for auction and the owner could match the highest bid. However, under the agreement of sale, the terms of purchase by the owner were to be the same as those that the highest bidder must meet; one of those was that the buildings must be moved within twenty-one days. Several people who sold their properties told me later that they would have repurchased the buildings had they been allowed to leave them on the site until a relocation subdivision was developed.

Owners of improved properties were told they had another choice. They could refuse to sell their properties to the Ministry and remain in the area. However, if they chose to stay they would never be able to sell their properties to anyone in the future nor to lease their properties. They could not even transfer their properties to their heirs under a will. Further the terms of the OIC prohibited any improvement, construction, excavation, renovation, or alteration of property without the consent of the Ministers of Environment and Municipal Affairs.

Given that the option to stay involved such undesirable consequences, it is perhaps surprising that by September 9, 1980, only fourteen of the eighty-four improved properties had been sold to the Ministry (as of the end of March, 1981, thirty-eight of the eighty-four improved properties had been sold to the Ministry). Owners of seventy-seven improved properties had requested that CIAC have their properties appraised, and owners of the other seven had been sent double registered letters with an appraisal application form enclosed.

Also as of September 9, 1980, eighteen owners of unimproved properties had also applied to have their properties appraised. These applications were rejected; the Ministry had not offered to buy these properties even though the sale, development, or improvement of such properties was also prohibited under the provisions of section 4 of the OIC.

Unfortunately as time passed, the pressure on the residents and other owners of improved properties to sell their properties to the Ministry increased. The community was beginning to crumble as individuals sold out and their houses were either hauled away or destroyed. While the Ministry had promised to ensure that services would be maintained for those who remained, there were some over which the Ministry had no control and, for example, the school bus was discontinued. More tangibly, owners knew that the longer they delayed in selling their properties, the more they stood lose financially. The Ministry would only offer a price based on the value of the property on May 28, 1980 and prices of replacement properties in the area were appreciating rapidly. Yet the decision had to be made, and according to the timetable laid down by the Ministry, it had to be made before December 30, 1980.

F. Seeking Answers from Government

Throughout the summer and fall of 1980 numerous letters were written by the owners to their elected representatives and to various public officials. One such letter, to the Honourable Allan Williams, dated

June 7, 1980, pointed out what the author viewed as certain inconsistencies in the Government's action:

If the Government is truly concerned with the danger to people occupying the area surrounding Garibaldi, it must, for the sake of consistency, be equally concerned with the danger to the masses of humanity passing through the area. Sheer simple logic would dictate that:

1. The Squamish-Whistler highway must be closed immediately as at least five miles of it are exposed to catastrophe.
2. The B.C. Railway must be closed through this area while an alternate route is built. Rail crews are in peril.
3. The logging industry must find an alternate route, perhaps Harrison Lake, for transporting the harvest from the Interior.
4. B.C. Hydro must re-locate its transmission lines, which could be severed at anytime, for fear of a devastating blackout in Vancouver.
5. Daisy Lake must not be just lowered, but emptied in anticipation of being swamped by the Barrier. Prudence would suggest dismantling the dam itself with the resultant available fill being sold to Whistler developers, if any should survive the cataclysm.
6. Under Section 16 of the Act, additional funds to perhaps 50 million dollars, should be set aside to assist refugees from the Whistler area wishing relocation and resettlement due to the removal of access and loss of property value.

To sum up, Mr. Minister, you and your colleagues have created a Bureaucratic Monster far exceeding, in its potential for disaster, any 'sloughing off' of our beloved Barrier. Apply your 7 million dollars sensibly in researching Barrier retention projects - sensing devices, tunneling, guniting, shaping, buttressing or dyking.

Let our Village live. Repeal your Order. If you destroy our future we shall feel honour-bound to return the favour.

Another complainant wrote to the Premier, the Honourable W. R.

Bennett, on October 14, 1980 as follows:

I must say at this time that I am writing this with a negative attitude as no doubt this will be passed on to one of your bureaucrats who will reply with some type of side-stepping answer and nothing positive. For what it is worth at this time, I wish to state that for the past 24 years I have worked harder than the majority of Canadians in order that I could provide something a little better for my family. . . .

I also would like to state at this time, it is not my desire to sell out or move from Garibaldi, however, it appears that the pressures put forth leave us with no other cause should we want to protect our interest and invested funds. My major complaints pertaining to this subject are:

1. You have not had the decency to even inform us direct in writing about the subject OIC which would appear to be a business-like manner. We had to actually find this out by word of mouth.
2. You refused to reply positively to many written requests by individuals and various questions put forth through the G. R. D. as to what the government intends to do with our property once it is vacated should this come about.
3. If we elect to stay, which is our sincere desire, we should have the right to pass title to our heirs. Again, no definite response has come forth.
4. Further, if we desire to sell under the democratic process, we should be at liberty to do so in the future if a prospective buyer desires to purchase even though they are made aware of the hazard. Perhaps a rider stating Geological Unstable Area could be attached to the title along with a declaration relieving the Government of any liabilities should disaster occur. Incidentally, I was well aware of this potential hazard when I purchased this property some eleven years ago.
5. Your humanitarian thoughts are accepted, however, I cannot believe that any responsible government could be so naive in believing they are doing the right thing when in fact on any given weekend from November 15th

through May 24th, there is bumper to bumper of automobile traffic passing through our area.

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I re-emphasize that you are outright robbing us as backbone citizens of British Columbia and leaving us with little choice but to accept your offer in order to have peace of mind.

I understand that the Honourable Stephen Rogers telephoned the author of the second letter to advise that 'things were being looked into.'

A more recent letter illustrates how the complainants' feelings of anxiety and frustration have turned to bitterness and anger.

Writing to the Director of the Provincial Emergency Program on February 12, 1981, one complainant said:

Your understanding is correct, I did sign my property over to the Provincial Government and there is no requirement for you to address yourself to the questions posed by me. In fact there is nothing else you need address yourself on my behalf. You have succeeded in loosing me as a problem and I must give you full marks and you can go to the top of your 'peter product' class.

[The property negotiator] would not negotiate with me, I had to retain a lawyer to talk to him before he came up \$5900 yet you indicate that we negotiated a settlement to our mutual satisfaction. This is not so, I am not satisfied, and I did not receive fair market value. I also did not receive any interest on my monies compounded from May 28th when my property value was reduced to zero by your superiors.

This matter is not yet concluded, you cannot sweep this one under the rug just yet. I intend to continue the fight with every means at my disposal until I attain a fair and just settlement.

G. One Law for the Owners, Another for Government Authorities?

B. C. Hydro did not cease its activities in the Garibaldi area during the summer of 1980. Hydro's Senior Land Manager for the area subsequently informed my staff that \$45,000 was spent in maintaining and developing the Daisy Lake Reservoir Recreational Area; \$15,000 were spent in purchasing one of the houses purchased by the Ministry as part of the acquisition program and in moving the house to the Recreational Area for use as a warden's office through which to provide information to campers using the area. Hiking trails were constructed and bridges built on parts of these trails. Additional monies were used for printing pamphlets inviting the public to use the Recreational Area, and these were distributed at the Pacific National Exhibition in August. All of B. C. Hydro's Recreational Area is within the hazard zone, and these activities were undertaken without the permission of the Ministers of Environment and Municipal Affairs. When asked why this work was done, given the existence of the hazard, the Senior Land Manager pointed out that the Forest Service had maintained its campsite on the highway, the Parks Branch had not shut down its parking lot and trails at Rubble Creek, and Highways had worked on the Rubble Creek bridge, all of which were located in the hazard area.

H. Late Summer, 1980: The Pressure Intensifies

On August 28, 1980, the Registrar of Land Titles in Vancouver was requested by the Director of the Provincial Emergency Program to add a notation to titles of all properties included in the designated area, stating that the property was restricted as to dealing and use and directing the reader to OIC 1185/80. The owners of the properties were neither consulted prior to this action or notified after the notations had been placed on their titles.

More serious problems developed towards the end of the summer. The buildings on five of the properties which had been conveyed to the Ministry were advertised for sale and were open for viewing on September 5 and 6. One of the other owners angrily wrote to the Deputy Minister of Environment on September 16:

A most irresponsible ad has been released in newspapers by the appraisers on instruction by the government. It offers the first bought houses for tender for demolition. It also states:

'Prospective buyers are advised that other buildings in the vicinity of Garibaldi will be offered for sales as they become available and to watch for further notices.'

This is outrageous. Most homes are not boarded up. Some will not be sold to the government. Since this ad there have been break-ins in Garibaldi, our home included. We have been harrassed by intruders who came to inspect our home and property which is not up for tender. We are also still paying taxes on our home and land. If we are harassed any

further by intruders there will be violence. The boarded up homes should be shown by appointment only.

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At this point the fair market value publicly promised has not been given. After a heart attack an old age pensioner has been urged to sell four acres for a fraction of their value. He has built his home and lived here a very long time, and three generations after him. Other people are pressured to sell because they are told later the government won't buy. Some are moving since the school bus is being discontinued now. In one negotiation the appointed arbitrator insists a particular interim agreement doesn't exist. Whereas in another negotiation he admits its existence but refuses to take its value into consideration.

With respect to the interim agreement referred to in this letter, it will be remembered that an independent real estate appraisal firm had been employed to determine the fair market value of the improved properties as of May 28, 1980. In making this determination, the appraiser had reviewed sales and listings of properties in the area prior to the date of the OIC. The most recent sale of a residential lot was one made on September 21, 1979 for \$19,000. There were four other sales of residential lots in the preceding nine months with prices ranging from \$14,500 to \$23,000. After adjusting for appreciation in property values since that time, the appraiser concluded that "on the basis of this information, it would appear that a good building site in Garibaldi should sell at \$30,000 [as of May 28, 1980].

It so happened that on May 23, 1980, an interim agreement had been entered into for a residential lot in Garibaldi at a price of \$43,500 (This case was briefly described on page 4, above). The sale was never completed because the OIC was approved on May 29, 1980, and section 4 prohibited the sale of land. When asked why this interim agreement was not taken into consideration in appraising land values, the appraiser replied that he simply was not aware of its existence at the time of doing the appraisals. However, the existence of the interim agreement was frequently brought to the attention of the property negotiator by owners with whom he was negotiating. The property negotiator, in fact, contacted the listing realtor of the property and apparently asserted that the interim agreement could not have been enforced and was not worth the paper it was written on. The purchaser under the agreement was also contacted by the property negotiator, and the purchaser informed my staff that the property negotiator had insisted that she had agreed to pay far too much for the property. The purchaser maintained that she believed the price fair and said that she was still willing to purchase the property at that price. I received many complaints that the land components of the Ministry's offers were much too low.

Another incident happened at the end of the summer which added to the ill feelings in the community. One owner had permitted a third party to occupy his house under what the third party believed to be a tenancy agreement. The owner had agreed to sell the property to

the Ministry and under the terms of the agreement was obligated to provide the Ministry with vacant possession on August 29, 1980; but the tenants refused to move. The landlord was in a quandary; he urgently needed the funds because he had purchased a house elsewhere. However, the Ministry refused to vary the term of vacant possession. On September 4 the tenants' possessions were moved out of doors by the landlord, some of the utilities to the house were cut off, and the house was boarded up. The tenants were able to get an order from a Rentalsman Officer to permit them to repossess the premises, but this order was successfully appealed by the landlord to the Rentalsman. The landlord was at last able to provide the Ministry with vacant possession, and the property was conveyed.

Following a threat by one of the residents to place his bulldozer on the railway tracks, the Premier and some members of the Cabinet agreed to meet with representatives of the community on board the special Cabinet train travelling through Garibaldi on September 22, 1980. The representatives expressed their concerns about the lack of compensation for unimproved lands and the hardships encountered under the terms of the timetable imposed by the Ministry when there had been no commitment made with respect to a relocation site. The minutes taken of the meeting by the residents' representatives state that "as the meeting ended, the Premier instructed [the Attorney General] to coordinate and meet with all the Ministries affected by the problems submitted by this committee and attempt to get some

answers back to the Chairman [of the Garibaldi Ratepayers' Association] as soon as possible."

On September 30, 1980, the Deputy Minister of Environment wrote to a member of the Ad Hoc Committee of the Garibaldi Ratepayers' Association and advised that the date by which properties could be sold to the Ministry had been extended from December 30, 1980 to June 30, 1981. No reason was given. Needless to say, many of those who had already sold under the pressure of the earlier deadline were upset to find that they need not have acted so quickly.

I. The Search for Alternatives

In the latter part of the summer, approximately twenty owners banded together to form the Garibaldi Heritage Committee with the purpose of attempting to get the best terms under which to remain in the area. These individuals feel that the Barrier is "a state of mind" with which they are fully prepared to live, and believe that this feeling is reinforced by the findings of the Garibaldi Advisory Panel. On October 14, 1980, the solicitor acting for this group wrote to the Honourable Stephen Rogers, Minister of Environment, and indicated that members of the group would be willing to enter into a restrictive covenant with the Government to prevent any transfer of their lands without full disclosure of the supposed risk to the

prospective purchaser, and further to absolve the Government from any liability in the event of a landslide. The solicitor wrote:

I believe it to be the philosophy of the present Government to interfere as little as possible with the free choice of individuals. If people are prepared to purchase at Garibaldi with knowledge of this supposed risk in the area and, upon giving the above mentioned releases, then surely that is all that would be necessary. Those in Government who have been involved with this issue, must realize the crushing effect of the present order-in-council. It virtually destroys the benefit of fee simple ownership of the covered land. It prevents an owner from building on his own property or even effecting repairs to a leaking roof, if read literally. Owners have, in fact, become tenants on their own land.

The Honourable Mr. Rogers replied on December 18, 1980:

In response it should be clearly understood by the Garibaldi Heritage Committee and the other ratepayers in the hazard area that the threat of a catastrophic slide from the Barrier is real and not simply a "state of mind" as suggested. This relaxed attitude toward the slide hazard will only serve to jeopardize the lives and properties of those you represent.

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It is fully appreciated that the preventative measures pursued by the government have had both positive and negative impacts. The negative aspects of these measures however, are short in their duration and inconsequential relative to the devastation that would otherwise occur should a slide have occurred in the absence of these measures.

At the invitation of the Garibaldi Ratepayers' Association, the Director of the Provincial Emergency Program, the Chief Assessor of CIAC, and the property negotiator attended a public meeting held in Garibaldi on October 19, 1980. According to the minutes of the meeting taken by the Association, the Director of the Provincial

Emergency Program provided, among other things, the following information:

1. The Government is anxious to establish a relocation site, and a proposed subdivision at Brandywine (north of Garibaldi) is under active consideration. The Government may have some difficulty in obtaining mineral rights to the area, now held by a third party.
2. The values that were used in determining the appraisals for Garibaldi (ie. fair market value, May 28, 1980) will apply for the purpose of establishing the value of lots in the relocation subdivision.
3. Improvements in Garibaldi which are sold to the Ministry, if repurchased by the owner, may be left on their present site until such time as a relocation subdivision is available. Third parties purchasing such improvements will still be required to move them within twenty-one days.

Most unfortunately, this latter option had not been made available to most of the owners who had previously sold their properties to the Ministry, and these houses had now been either sold to third parties for salvage, or demolished by a contractor employed by the Ministry for this purpose.

J. In Desperation, Call the Ombudsman

By the end of October, 1980, I had received complaints from seven owners of property and I notified the Deputy Minister of Environment on November 6, 1980, of these complaints. It appeared that there

were probably many other owners of property with similar complaints and before initiating these investigations, I wrote to all owners of property in the affected area and publicly advertised my invitation to meet with them in either Garibaldi or Vancouver on November 26 or 27, 1980, respectively. On these dates my staff and/or I met with fifty-four individuals and groups.

It was rapidly appreciated that the longer owners of improved properties delayed in selling to the Ministry, on the current basis of evaluating the properties as of May 28, 1980, the greater the loss which they would suffer. Not only were their properties no longer appreciating in value, as were replacement properties they might have to buy in the future, but inflation was also taking its toll on May 28, 1980 dollars. For this reason, I instructed my staff to investigate only the complaints which were common to many, if not most, of the owners. The major issues arising out of these complaints were identified as the following:

1. Why has the Ministry permitted the exclusion of some properties, from the provisions of section 4 of the OIC, but not other similar properties?
2. Has the Ministry of Environment improperly discriminated against the owners by not enforcing the provisions of section 4 of the OIC against B. C. Hydro (in maintaining and improving its Recreational Area), while leaving private

owners of property under the impression that they must comply with the provisions of section 4?

3. Has the Ministry of Environment applied unfair pressure to owners of improved properties in order to get them to sell their properties to the Ministry?

4. Are the criteria upon which compensation for improved properties has been determined fair, in that owners, if they choose to sell, receive a price based on the value of the property on May 28, 1980, as opposed to a price based on the value of the property on the date it is transferred to the Ministry?

5. Has the Ministry of Environment unfairly refused to vary some terms of the agreements of sale or to add others at the request of the vendors?

6. Is it just for the Ministry not to offer to purchase unimproved lands?

7. Has the Ministry of Environment acted unfairly by making no commitments with respect to the creation of a relocation subdivision, and by making available little information about where such a site would be located, how much the lots would be sold for, and what would be the priorities in distributing the lots?

8. Has the Ministry of Environment acted unfairly by failing to notify owners in writing of the effects of the OIC on their properties, and by not providing them with complete and accurate information about the terms of the Ministry's acquisition program?

These investigations were substantially completed in the following two weeks, and I wrote to the Deputy Minister of Environment with my preliminary findings on December 19, 1980.

IV. MY PRELIMINARY FINDINGS

It will be noted that the many complaints which I received, alleging that the Government's decision to enact the OIC was unjustified and that the terms of the OIC were unfair, were not investigated (for a summary of all the complaints which have not been investigated, see Appendix C).

It was, however, first necessary to identify the objectives of the Lieutenant Governor in Council in ordering and approving the OIC, in order to understand the parameters within which the Ministry of Environment was required to execute its responsibilities. I summarized my understanding of these objectives on page 4 of my letter of December 19, 1980 to the Deputy Minister of Environment (Appendix D). The Deputy Minister's reply, dated January 26, 1981 (Appendix E), stated that these objectives "coincide with my understanding of government intentions. . . ." These objectives are set out below:

- 1) that an area which presents "a potential hazard to life and property," and which requires "inter alia precautionary or safety measures for the prevention, limitation or amelioration of civil disaster" be designated a civil defense zone.

2) that the Minister of Environment be authorized to purchase property "within such parts of the designated area as he considers necessary to eliminate or reduce the danger of continued occupation of it."

3) that the development and improvement of land be halted, unless the Ministers of Environment and Municipal Affairs consent to such development and improvement.

4) given (2), that owners of property in the designated area retain the right to refuse to sell their property to the Ministry.

5) given (4), that the option to refuse to sell one's property to the Minister be a reasonable and viable alternative, and not merely a fiction.

As will be seen, a great deal hinges upon Objective #5.

Without question, I did not obtain all of the relevant documentation on these issues and did not interview all persons who may have been able to provide information. However, I did obtain all relevant information which was made available to the complainants. Further, as provided for by section 16 of the Ombudsman Act, the Ministry did

not advise me of any further information which caused me to doubt the correctness of the information upon which I had based my preliminary findings.

I made no finding on the first issue - that certain properties ought to be excluded from the provision of section 4 of the OIC. In his "Responses to Garibaldi Questions," of August 14, 1980, the Deputy Minister had stated that:

The Ministry of Environment is presently proposing to revise the boundaries to coincide with the best available information on maximum wave height and rock slide. The exclusions to date and the proposed revisions to the boundaries around Daisy Lake correspond to the 400-metre contour level (approximately 20 metres above the full level of the reservoir). The boundaries are flexible only inasmuch as new information on the scope of the hazard becomes available. South of the dam and along the Cheakamus River the O.I.C. boundaries will generally correspond to the boundaries of the 1855 slide and flow of rock debris.

I therefore anticipated that upon completion of the Daisy Lake wave study commissioned by B. C. Hydro the boundaries of the designated area would be revised in accordance with the guidelines stated, and I did not pursue this matter. It so happened that early in 1981 two of the three properties which had been the subject of these complaints were excluded from section 4 of the OIC, and I understand the third property is now also being considered for exclusion.

I should note however that an official with the Environmental Assessment Branch of the Ministry of Environment recently informed my staff that the boundaries have been redrafted (although the OIC has yet to be amended) to coincide with the 400-metre elevation level, both around Daisy Lake and south of the dam (this aspect appears to conflict with the guidelines set out by the Deputy Minister in the quotation immediately above). The 400-metre contour line was apparently selected on the basis of a "worst-case scenario" flood from Daisy Lake being created by a landslide from the Barrier.

The reply of the Deputy Minister of Environment to my preliminary findings was received on January 26, 1981. A number of the Deputy Minister's responses were well taken, and my preliminary findings were modified accordingly.

With respect to the issue that the Ministry of Environment had not taken action to prevent B. C. Hydro from improving and developing its Recreational Area following the approval of the OIC, I had suggested that the Ministry had improperly discriminated against other property owners by failing to enforce the provisions of section 4 against B. C. Hydro. The Deputy Minister pointed out that "In my opinion it would only be improperly discriminatory if we were aware of two identical infractions and had enforced the provisions of Section 4 against one and not against B. C. Hydro." This argument was accepted, and I make no finding adverse to the Ministry on this issue.

The Deputy Minister also undertook to take certain actions which, in my view, had some effect in ameliorating some of the concerns expressed by the complainants. Regarding the B. C. Hydro issue mentioned in the preceding paragraph, the Deputy Minister said:

The Senior Land Manager for B. C. Hydro has been advised that no further work by way of improvements is to be made on any of the properties held by the Corporation within the restricted area. This position was taken several months ago, and I have been assured that no further activities of the nature described will take place. It should also be noted that an application was made by B. C. Hydro to construct a caretaker's residence within the restricted area; that request was refused.

With respect to adding to the agreements of sale a term which would permit the owners to repurchase land sold to the Ministry, should the hazard ever be eliminated, the Deputy Minister stated: "I agree with your proposed recommendations on the right of first refusal and will take steps to have this proviso added to all agreements."

The Deputy Minister also advised that "the terms and conditions attached to the purchase of lots at Brandywine [the preferred relocation site] or any other location will be determined by the Ministry of Lands, Parks and Housing." He stated "I will request my colleague, the Deputy Minister of Lands, Parks and Housing to inform residents of the relocation policy if and when such information becomes available." The Assistant Deputy Minister, Regional Operations, of Lands, Parks and Housing subsequently informed my

staff that relocation planning was well advanced and that property owners in Garibaldi would be consulted about the location of the relocation subdivision, terms and conditions of the relocation program. I therefore have not made any recommendations on this issue. Whether the relocation program will resolve the complaints concerning unfair compensation is discussed in a later portion of this report.

In response to my concern that the property negotiator had refused to give owners copies of the written appraisal of their properties done by the independent real estate appraiser, the Deputy Minister wrote: "appraisals are done at the landowner's request and copies of these are currently given to the land owner." Upon further investigation, this did not appear to be the case, and I subsequently made a recommendation on this issue (see page 58, below).

The Deputy Minister stated his positions on most of the other issues and these were taken into consideration before I reached conclusions on the merits of the complaints. Further, the recommendations I had initially considered in my letter of December 19, 1980 to the Deputy Minister were substantially modified. On February 2, 1980, I wrote to the Deputy Minister and informed him of my conclusions and recommendations, pursuant to sections 22 and 23 of the Ombudsman Act. I have set these out below.

V. MY CONCLUSIONS AND RECOMMENDATIONS

I concluded that most of the complaints, relating to the Ministry's acquisition program and concerning the lack of information about this program, were substantiated. I set out in great detail my reasons for these opinions in my letters of December 19, 1980 (Appendix D) and February 2, 1981 (Appendix F). The Deputy Minister of Environment's replies to my letters were dated January 26, 1981 (Appendix E) and February 16, 1981 (Appendix G). I have summarized my reasons for these opinions below, prior to setting out each recommendation.

A. Pressure to Sell

Many of the owners of improved properties complained that they were being or had been unfairly pressured to sell their properties to the Ministry. Compensation based on fair market value presumes a willing seller and a willing buyer transacting on an open market. I concluded that in this case owners of improved properties could not be called willing sellers because of the unfair pressure upon them

to sell their properties. My reasons for reaching this conclusion are threefold:

First, the provisions of section 4 of the OIC, if not waived by the Minister of Environment and Municipal Affairs deprive the owners of virtually all of the common law rights of property and render both improved and unimproved properties virtually worthless.

Second, the imposition of the deadline of June 30, 1981 (originally December 30, 1980) by which to sell their properties to the Ministry, leaves owners in the position of holding property which they cannot sell, lease, improve, renovate, or even alter, if they do not sell to the Ministry before the expiry of the deadline.

Third, the Ministry's offer to purchase the properties at their market value on May 28th, 1980, subjects owners to suffering one, and conceivably two, additional losses, both of which increase in magnitude the longer they delay selling to the Ministry: the potential appreciation of the market value of the property since May 28, 1980, and the devaluation, through inflation, of May 28th, 1980 dollars since that date.

Given the Deputy Minister of Environment's agreement with my interpretation of the Government's objectives, that "the option to refuse to sell one's property to the Minister be a reasonable and viable alternative, and not merely a fiction" (Objective #5, page 43 above), I concluded that owners of improved properties had been and were being subjected to unfair pressure to sell. As a first step towards resolving these complaints, I recommended:

RECOMMENDATION #1

a) That the deadline for acquisition of properties by the Ministry be abolished, and that the Ministry's offer to purchase each property remain in effect until such time as all of the properties have been sold to the Ministry; and

b) That the provisions of section 4 be waived by the Ministers of Environment and Municipal Affairs to the extent that owners are permitted to undertake such improvements, renovations, alterations, and other measures which are necessary to maintain and use the properties as they are now being used, but not to the extent that the values of the properties would be substantially increased.

If this recommendation is accepted, owners of improved properties will be permitted to continue to use their properties as they are

now doing. They will not be permitted to sell or lease to third parties or significantly develop their properties as prescribed by section 4 of the OIC. They will, however, know that they will be able to sell (at fair market value as in Recommendation #2 below) and thus recover their investment at such time in the future as they decide. I believe that implementation of this recommendation will meet the Government's objectives of reducing the danger to life and property (as individuals sell out), and of permitting owners to retain their properties if they wish.

However, even with the implementation of Recommendation #1, refusing to sell one's property to the Ministry is not a reasonable and viable option because of the Ministry's current policy of calculating compensation according to the fair market value of the property on May 28, 1980. I discuss this issue below.

B. Compensation for Improved Properties Yet Unsold

Many of the owners of improved properties complained that the Ministry refused to offer fair compensation for their properties. These complaints are largely based on the criteria by which the Ministry has assessed the amount of compensation: fair market value on May 28, 1980.

I consulted with three accredited real estate appraisers, all of whom are familiar with recent events in this area. These gentlemen were unanimous in their opinion that, if the OIC were repealed, these properties would appreciate significantly in value as have similiar properties in neighbouring areas, notwithstanding the fact that the Report of the Garibaldi Advisory Panel has been released.

As cited earlier on page 24, two legal opinions were received by the Ministry which stated that the OIC did not have the effect of restricting compensation to the May 28, 1980 valuation date and that fair market value was the basis upon which compensation should be paid. One opinion specifically stated that market value should be determined at the date on which an agreement of sale is negotiated with the owner.

Given the fact that there are no alternative buyers because the market was eliminated by the OIC, and the fact that no interest in the property transfers to the Government until the date of sale, I concluded that it was unfair to assess the fair market value of the interest being transferred to the Government as of an arbitrarily selected date, months prior to the actual date of sale and transfer. It is my belief that it is unfair that owners are being pressured to sell their properties to the Ministry; it is equally unjust to ask them to accept compensation which does not represent

the current value of their properties. I therefore recommended:

RECOMMENDATION #2

That compensation paid for properties sold to the Ministry, after the implementation of Recommendation #1, be based upon the fair market value of the property on the date of sale, and that, for this purpose, fair market value be determined by multiplying the fair market value of the property on May 28th, 1980, by a factor based on the average rate of appreciation of similar properties in neighbouring communities since May 28th, 1980.

It will be appreciated that such a formula, based on current values found in neighbouring communities, is necessary because current market data may not be obtained for the Garibaldi area itself since the OIC eliminated the market for Garibaldi properties.

C. Compensation for Improved Properties Already Sold

Many of the individuals who had already sold their properties to the Ministry complained that they had been unfairly pressured to sell and that the Ministry had refused to pay fair compensation. For the same reasons set out above, I concluded that these complaints were also substantiated.

In my view, these individuals had been subjected to unfair pressure to sell their properties. I concluded that compensation paid for their properties should be determined according to the same criteria used when government lawfully forces an owner to sell his property or, in other words, expropriation. I therefore recommended:

RECOMMENDATION #3

That the amount of compensation paid for properties already purchased by the Ministry in the OIC designated area, be reassessed on the basis of "value to the owner", as of the date of sale, and that any amounts calculated in excess of that amount already paid, be paid to the vendors of these properties.

As "value to the owner" and "fair market value" are rarely substantially different, I should think that an equally acceptable manner for resolving these complaints would be to recalculate compensation paid for such properties according to the formula set out in Recommendation #2 above.

D. Compensation for Unimproved Properties

Owners of unimproved properties, ie. vacant building lots and undeveloped land, complained that the Ministry has improperly discriminated against them by refusing to acquire and pay compensation for their properties, while at the same time acquiring and paying compensation for improved properties. My solicitor advised that the wording of section 3 of the OIC was sufficiently broad so as to permit the use of funds, thereby provided, for the acquisition of unimproved properties. During the investigation, an official in the Ministry of Environment stated that he believed that the Executive Council had dictated this policy; when requested, however, no documentation which substantiated this assertion was produced. I concluded that these complaints were substantiated. It was and is my belief that leaving these individuals in their current situation is unjust and oppressive. I therefore recommended:

RECOMMENDATION #4(a)

That the Ministry offer to purchase all unimproved properties in the OIC designated area.

If the Ministry implements this recommendation, owners of unimproved properties will have little choice but to sell, since the OIC prevents them from constructing residences on their properties. I

do not suggest that these individuals should be permitted to construct residences; such action would not be consistent with the Government's intentions of halting development in the area.

However, because owners of unimproved properties would then be subjected to unfair pressure to sell, I concluded that compensation should be assessed on the same basis as if their properties had been expropriated. I therefore recommended:

RECOMMENDATION #4(b)

That compensation for unimproved properties be calculated according to "value to the owner" on the date of sale; and, to the extent that fair market value is a factor in these calculations, that fair market value be determined according to the formula prescribed in Recommendation #2.

E. Terms of the Agreements of Sale

A number of individuals complained that the Ministry had unreasonably refused to add various terms, or amend existing terms, of the agreements of sale. I discussed a number of these in my letter to the Deputy Minister of Environment of December 19, 1980 (Appendix E, pages 11 and 12). I made only one recommendation.

A number of the complainants expressed the grievance that the Ministry refused to permit them to remain in the premises for a short time after the execution of the sale, so that they would not be required to incur the additional expense of interim financing of a new residence. Given that the Ministry was permitting other residents to stay in the hazard area, and given that the buildings would be sold for salvage or destroyed shortly after the sale, I recommended:

RECOMMENDATION #5

That where vendors express the wish to be permitted to remain in the premises, without a tenancy agreement, for a period of time not exceeding one month after the date of sale, the terms of the agreement of sale be amended to provide for that.

F. Lack of Notice and Information

One of the more serious complaints, in my view, was that the Ministry has at no time informed each of the affected property owners in writing of the effect of the OIC on their property and of the terms of the Ministry's acquisition and relocation programs.

The Deputy Minister agreed with this position (Appendix E, page 4) and offered to send this information to the owners. A copy of the OIC was enclosed with the Deputy Minister's letter to the owners of March 25, 1981 (Appendix H).

Another common grievance was that the property negotiator consistently refused to provide owners of improved properties with copies of the written appraisals done on each property by the independent real estate appraiser for the Ministry. The Deputy Minister commented on this point in his letter of January 26, 1980, that "appraisals are done at the landowner's request and copies of these are currently given to the land owner." However, as mentioned earlier, this information proved to be in error, and I therefore recommended:

RECOMMENDATION #6

That copies of the written appraisals done by Penny & Keenleyside be provided to the owner, or prior owner, of each property appraised, and that those who have not sold be advised of their right to obtain an independent appraisal and of the Ministry's willingness to negotiate the amount of compensation which should be paid for each property.

VI. THE MINISTRY OF ENVIRONMENT'S RESPONSE TO MY RECOMMENDATIONS

The Deputy Minister's reply to my recommendations was dated February 16, 1981, and stated:

I have little to add to my previous correspondence in this matter except to point out that it is our intention to allow normal repairs under Section 4, although to date we have received no applications from private landowners.

I discussed this matter by telephone with the Honourable Stephen Rogers and the Deputy Minister of Environment the day following receipt of this letter. The Honourable Mr. Roger's position was that his Ministry was following guidelines laid down by the Executive Council and any amendment of these directions would have to come from that body.

Pursuant to section 24(1) of the Ombudsman Act, I submitted a report on this matter to the Lieutenant Governor in Council on February 24, 1980.

VII. EVENTS SINCE SUBMISSION OF MY REPORT TO THE LIEUTENANT GOVERNOR IN
COUNCIL

A. Actions Taken by the Deputy Minister of Environment

Since submitting my report to the Lieutenant Governor in Council, the Ministry of Environment has taken positive steps on some of the issues involved. On March 25, 1981, the Deputy Minister of Environment wrote to each of the owners of property in the designated area and enclosed a copy of the OIC. A copy of that letter is attached as Appendix G; I have set out below some of the Deputy Minister's comments which were relevant to the major issues below:

Re: the Relocation Subdivision

"The subdivision site will be selected and announced at the earliest opportunity. Serviced subdivision lots will be marketed to eligible ratepayers at a price equal to their market value as of May 28, 1980. Subdivision lots will be allocated by draw with offers for sale subject to:

- accepting compensation on existing lots
- signing off all further claims
- construction of a home within a 1 year period.

Remaining lots will be disposed of at current market value on the open market."

Re: Written Appraisals and Arbitration Procedure

"Written appraisals are being processed by the Crown's property negotiators and will be made available to applicable ratepayers at the earliest opportunity. [The Deputy Minister subsequently confirmed to me by telephone call that 'applicable ratepayers' includes all owners and former owners of improved properties.] A negotiation/appeal procedure has been finalized and will be applied to any disputed assessments [a copy of this arbitration procedure is attached as Appendix H]."

Re: Acquisition of Unimproved Property

"The question of unimproved property acquisition is being referred to Cabinet committee and will receive full Cabinet consideration in the near future."

Re: Adjustments of the Boundaries of the OIC Designated Area

"A rescheduling of the area subject to Order-in-Council 1185/80, to more precisely reflect the hazard area, is being finalized at this time."

It will be noted that the Deputy Minister's comments concerning written appraisals and the arbitration procedures will result in the implementation of Recommendation #6 above. A more important question is discussed below.

B. Will the Proposed Relocation Program Resolve the Complaints
concerning Unfair Compensation?

As mentioned above, the current relocation program is to develop a Crown subdivision and to offer lots to two categories of potential purchasers: 1) Garibaldi property owners who have sold their properties to the Ministry of Environment, and 2) all other members

of the public, including those owners of Garibaldi property who have not sold to the Ministry. Group #1 will be offered lots in the new subdivision at a price equal to the fair market value of those new subdivision lots on May 28, 1980. Group #2 will be offered lots in the new subdivision at the current fair market value of those lots. Notwithstanding any other effects, this distinction will, in my view, only serve to create more pressure on owners to sell their properties to the Ministry before the deadline expires on June 30, 1981.

Group #1 includes those owners of improved properties who have already sold their properties to the Ministry at a price equal to the fair market value of their property on May 28th, 1980. Most of these people owned a house on a lot, a few owned a house on a larger parcel of land. It may be that the Ministry believes that the relocation program will rectify the complaints concerning unfair pressure to sell and unfair compensation, as these persons will be allowed to purchase a lot at its fair market value on May 28, 1980.

I cannot agree. While this plan will adequately resolve the complaints of unfair compensation concerning the lots which these individuals sold to the Ministry (since they will be able to purchase another lot at a comparable price), it does not alter the fact that these individuals were paid less than the market value for their improvements and land (in excess of a single lot) at the date of sale.

One of the independent accredited real estate appraisers whom I consulted (the others were not asked this question) stated that properties from Squamish to Whistler had appreciated between 50% and 75% in the six months following May 28, 1980. All three appraisers agreed that Garibaldi properties would have appreciated in the same manner as have neighbouring properties, had the OIC not eliminated the market in Garibaldi. In the example below, which illustrates the loss these individuals will suffer, notwithstanding the relocation program, I have assumed an appreciation factor of 50%.

I have chosen, as an example, a family of five persons who own a house and lot which is situated in the OIC designated area. They received on October 20, 1980 a verbal offer, from the negotiator acting on behalf of the Ministry of Environment, for \$81,884.00, which represented \$30,000.00 for the lot and \$51,884.00 for the improvements. For ease of calculation, I have rounded these figures to \$80,000 (total), \$30,000 (lot), and \$50,000 (improvements). To my knowledge, this family has not yet accepted the Ministry's offer, but for the purpose of this illustration, I assume that they did sell the property to the Ministry in the latter part of 1980 and

will be eligible for a lot under the relocation program.

	COMPENSATION RECEIVED (based on fair market value, May 28, 1980)	FAIR COMPENSATION (based on fair market at date of sale (FMV at May 28, 1980 x 50%))	LOSS SUFFERED
<u>LOT</u>	\$30,000	\$45,000	None, relocation program permits them to purchase new lot at price comparable to that received for their Garibaldi lot.
<u>HOUSE</u>	\$50,000	\$75,000	\$25,000
TOTAL LOSS SUFFERED			\$25,000

This family may be one of the more fortunate ones. Those who owned larger parcels of land will not be compensated for the loss of appreciation in value of that area of land in excess of one lot.

Individuals who have not yet sold their properties to the Ministry and owners of unimproved properties will receive no benefits from the relocation program as it is presently proposed. The former group will be left holding properties which the Ministry will only pay fair market value as of May 28, 1980, notwithstanding that the current fair market values of these properties are substantially greater. Owners of unimproved properties will be left holding land which is effectively worthless: they may neither sell nor develop it.

I remain strongly in favour of creating a relocation site for owners who wish to leave the hazard area. Nevertheless, I believe that people who sell their properties to the Ministry should be compensated for the value of their properties as of the date that the interest in the property is transferred to the Ministry. It is my view that the Ministry should pay the current fair market value of these properties, and then offer the relocation sites at their current fair market values. Otherwise, owners of both improved and unimproved properties, will continue to be forced to suffer substantial losses.

Clearly not all owners of property in the Garibaldi area, and indeed not all of the complainants, will agree with this position. Individuals who own, for example, a recreational cottage and lot will be able to: (1) sell their cottage and lot to the Ministry at a price equal to the fair market value of the property on May 28, 1980; (2) purchase a lot in the relocation subdivision at a price comparable to that received from the Ministry for their Garibaldi lot; and (3) with the proceeds from the sale of the cottage, repurchase the cottage and move it to the relocation subdivision.

Unfortunately not everyone will be able to cut their losses in this fashion. Many sold their properties last summer and, because they had nowhere to move the buildings within twenty-one days, their house or cottage was sold to a third party for salvage or was destroyed. Owners of land in excess of a single lot will not be given equivalent areas in

the relocation subdivision. However, unless my recommendations are implemented, neither will they be compensated for the current fair market values of their land should they decide to sell to the Ministry.

Similarly, unless my recommendations are accepted, owners of unimproved land will not be able to purchase a lot in the relocation subdivision and will be left holding property that they can neither develop or sell.

In summary, while the proposed relocation program will probably resolve the complaints of some owners, it will not ensure that fair compensation is provided to all those adversely affected. In my view, this is unjust.

VIII. CONCLUSION

I must repeat that I have not investigated those complaints which questioned the justification for the Government's Garibaldi program which led to the OIC. I do not, then, as Ombudsman, express an opinion on that policy decision of the Government. Should such questions require further answers I consider it appropriate to have them raised in the Legislative Assembly.

Lest the Garibaldi residents stand accused of being something less than grateful for the "Government's benevolent offer" (page 22, above) three points are worth bearing in mind: (1) none of the residents to my knowledge requested the action taken by the OIC and the program developed to implement the OIC; (2) the Report of the Garibaldi Advisory Panel stated that "in the view of the Panel, it is neither reasonable or practical to completely abandon the area to all development;" and (3) many of the residents were willing to stay despite the risk and would have been prepared to indemnify the Government against future claims. Even after the findings of the Garibaldi Advisory Panel were circulated among the residents, few accepted that the OIC was the best response to the potential hazard.

I accept that the program was conceived and intended to avoid major loss of life and property in a potential disaster. The intentions were good, but I suspect serious deficiencies in the planning leading up to the Order in Council. I have not specifically investigated these planning deficiencies because it was too late to remedy them when the complainants came to me in November of 1980. The program, however, which resulted from that planning and the procedures used in implementing the OIC do not inspire confidence in the adequacy of the planning. Why, for example, if this program was fully thought through, did the Ministries involved recommend something akin to an evacuation program when the Garibaldi Advisory Panel had recommended only that further development be prevented but that it was not practical to abandon the area? What evidence was there of an imminent danger warranting the haste with which this program was forced on the residents? Why did the Government not plan the relocation site first and then move people from Garibaldi to the new site following the sale of their properties? A lot of public and private money could have been saved that way.

The risk at Garibaldi was perceived for a long time. In 1973 the Supreme Court of B.C. upheld the decision of the Ministry of Transportation and Highways to deny approval for another subdivision in the area. A lengthy and time-consuming study by geological experts was completed in 1978 which generated specific

recommendations for action. The Government then took two years to contemplate these recommendations. The planning was done by the Ministry of Transportation and Highways. The implementation of the OIC was then handed over to the Ministry of Environment.

I must criticize a number of decisions made by the Ministry of Environment and its agents in implementing the OIC. The instructions, reproduced above on pages 21-23, show that administrators decided to take May 28th, 1980 as the valuation date. Even when suitably warned by legal advisors about problems with such a decision no change was made. Somewhat arbitrarily it was decided at that level not to consider relocation costs. It was at that level also that the fatal decision was made to impose an extremely narrow time frame on the residents - applications for having one's property appraised must be submitted by September 30, 1980, and the Ministry's offer to purchase must be accepted by the end of 1980.

I consider it a grave error in judgement by the Director of the Provincial Emergency Program to prevent proper notification to the property owners and publication of the OIC. Neither can I overlook the officious efforts contemplated by some to limit access to information. The entire program before proclamation of the OIC was surrounded in secrecy and the ministries involved failed to hear or consult those most deeply affected by their impending decision.

It is acceptable in our society to give government the right to coerce citizens in the public interest or even in the citizens' own interest for certain purposes. However, while we concede such powers to government we also insist that our basic notions of fairness and equity are not violated and that the freedom of the citizen is not restricted more than is absolutely necessary and is justified by the circumstances. Several of the terms of the Ministry of Environment's acquisition program that I am bound to criticize have violated these basic precepts of fairness and justice:

That persons potentially directly affected by an administrative decision of a public authority receive adequate and timely notice of such a decision so that they may conduct their affairs accordingly;

That action akin to expropriation be followed by compensation;

That compensation be fair and equitable at least as far as tangible and measurable property rights are concerned; and

That while anxiety, dislocation and inconvenience can never be adequately compensated for, public authorities have a duty to minimize the aggravation associated with such a program.

What was most disconcerting about the objective of evacuating the area, was the manner in which it was done. Property was not simply expropriated and no one was told that they must vacate the area. Rather the terms of the OIC and the acquisition program have together worked to create such economic, administrative and other pressures on residents that they are actually being forced to sell.

Similarly the decision to take away virtually all of the property rights of those holding unimproved land, without an offer to buy these properties or otherwise to compensate these owners, is in my opinion unjust and oppressive.

The complainants are not people who are trying to take advantage of the situation. Their complaints to me were stated in moderate terms. Most of them accepted, however reluctantly and with serious doubts, that they must move after the Government had decided it would be in their best interest and in the interest of safety to do so. Most are prepared to accept the Government's judgement on the matter. They ask no more than basic fair treatment in the process. Others have lived there all their lives and have their roots in the community and the surrounding environment and are quite willing to live with the risk of that environment. They wish to be left alone by government and in return are prepared to contract not to make demands on the Government should disaster occur.

The Government started out with the best intentions to be foresightful and to take action about a potential disaster while there was time left. But events took a wrong turn early in the process, producing a veritable bureaucratic nightmare for the people affected. The complainants' most basic beliefs in justice and fairness have been badly shaken and resolute corrective action is required to restore their belief in such basic values as justice, fairness and equity.

Time is of the essence in this matter. If the present policies are not modified, owners of improved property in Garibaldi will have to sell out before June 30, 1981, or face a perpetual bureaucratic regime about what they can or cannot do with their property in this civil defense zone. Owners of unimproved property will be left without recourse from the untenable situation they now find themselves in.

There is, however, time yet for the Government to accept these minimal recommendations proposed in this report or to take alternative measures to at least mitigate the damage and the aggravation. I as Ombudsman can only recommend. I respectfully ask for the assistance of the Legislative Assembly in achieving justice in this matter.

TABLE OF APPENDICES

- A. Map of the Garibaldi Area showing Existing Structures.
- B. Order-in-Council 1185/80 and Schedule.
- C. The Complaints.
- D. Letter from the Ombudsman to the Deputy Minister of Environment, pursuant to section 16 of the Ombudsman Act, R.S.B.C. 1979, c. 306, dated December 19, 1980.
- E. Reply of the Deputy Minister of Environment to the Ombudsman, dated January 26, 1981.
- F. Letter from the Ombudsman to the Deputy Minister of Environment, pursuant to section 22 of the Ombudsman Act, R.S.B.C. 1979, c. 306, dated February 2, 1981.
- G. Reply of the Deputy Minister of Environment to the Ombudsman, dated February 16, 1981.
- H. Letter from the Deputy Minister of Environment to owner of property in the area designated by OIC 1185/80, dated March 25, 1981.

APPENDIX A

APPENDIX B

EMERGENCY PROGRAM ACT
[Sections 16, 17]

ORDER IN COUNCIL 1185, APPROVED AND ORDERED MAY 30, 1980

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that

Whereas the unique geological and hydrological features of the land described in the schedule present a potential hazard to life and property

And whereas the nature and dimension of the hazard and the consequences of civil disaster attendant thereon require the initiation of preventative measures for the protection of the public within the said described land.

Therefore, on the recommendation of the undersigned, the Lieutenant Governor, under the powers conferred by the *Emergency Program Act*, and all other powers lawfully invested in him, by and with the advice and consent of the Executive Council orders:

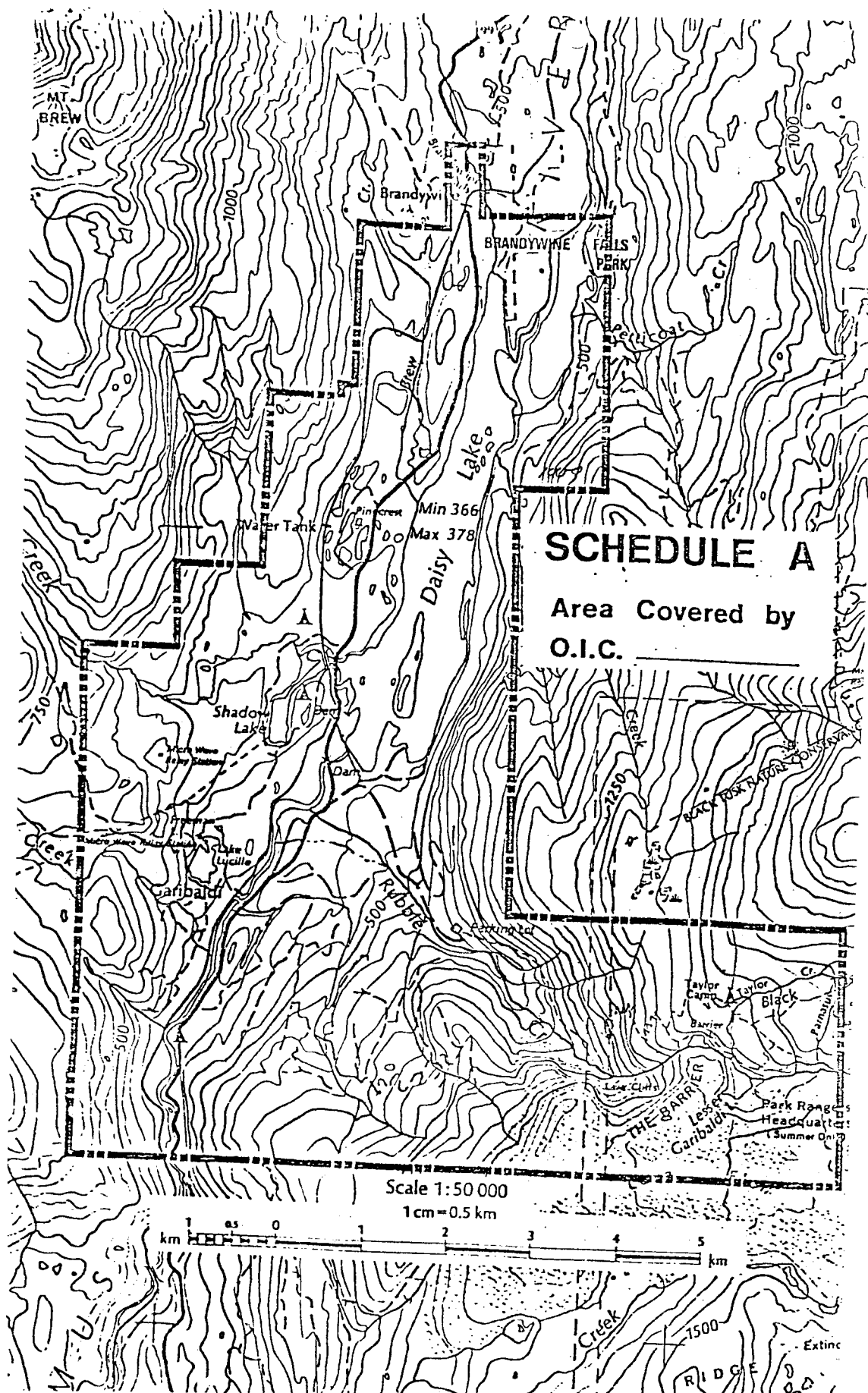
1. In this Order
 - (a) "Act" means the *Emergency Program Act*, and
 - (b) "designated area" means the zone designated by section 2.
2. The area of land described in the schedule is designated as a civil defence zone, that is to say, an area requiring inter alia precautionary or safety measures for the prevention, limitation or amelioration of civil disaster.
3. The Minister of Environment is authorized to acquire such property within such parts of the designated area as he considers necessary to eliminate or reduce the danger of continued occupation of it, and for the purposes of this paragraph
 - (a) a sum not exceeding \$7,000,000 may be expended under section 16 of the Act, and
 - (b) section 4 (c) of the Act is proclaimed in force during the period this Order is in effect.
4. In order to safeguard public health and welfare, no person or authority, including government authority, shall, without the consent of the Minister of Environment and the Minister of Municipal Affairs,
 - (a) grant, lease, sell, transfer or deal in land,
 - (b) approve subdivision or settlement plans, zoning bylaws, regional plans and land use contracts,
 - (c) issue permits or licences relating to pollution, sewage disposal, use of water, building or development, and
 - (d) undertake any form of construction, alteration or renovation of a building or structure, or dredging excavation or filling of landwithin or in respect of the designated area.

C. S. ROGERS
Minister of Environment

GRACE McCARTHY
Presiding Member of the Executive Council

SCHEDULE

All that area of land commencing at a point on the northerly boundary of Lot 4101, Group 1, New Westminster District, said point being 100 metres due east of the northwest corner; thence due north 1 900 metres; thence due east to a point of intersection with the westerly boundary of Lot 4098; thence following the boundaries of said Lot 4098; northerly, easterly and southerly to the northwest corner of Lot 4100; thence easterly along the northerly boundary of said Lot 4100 and its easterly prolongation to a point being 350 metres due east of the northeast corner of Lot 4100; thence due south 3 150 metres; thence due west 1 000 metres; thence due south 5 000 metres; thence due east 4 000 metres; thence due south 3 000 metres; thence due west 9 000 metres; thence due north 6 000 metres; thence due east 1 000 metres; thence due north 1 000 metres; thence due east 1 000 metres; thence due north 2 000 metres; thence due east to a point of intersection with the westerly boundary of Lot 4101; thence northerly and easterly along the boundaries of Lot 4101 to the aforementioned point of commencement; which area is shown outlined on the plan attached.



APPENDIX C

COMPLAINTS RECEIVED BY THE OMBUDSMAN
RELATED TO THE APPLICATION AND ADMINISTRATION OF OIC 1185/80
WHICH WERE INVESTIGATED

1. The criteria upon which compensation for improved properties is being determined is unfair (twenty-eight complaints).
2. Unfair pressure has been exerted upon owners of improved properties in order to compel them to sell their properties to the Ministry of Environment (sixteen complaints).
3. No compensation is being paid for unimproved properties (fourteen complaints).
4. The Ministry of Environment has refused to vary or add additional terms to the agreements of sale (nine complaints).
5. I received no direct notice of the effects of the OIC on my property and/or was not adequately informed about the Ministry of Environment's acquisition program and/or was not given a copy of the written appraisal of my property done for the Ministry and/or was not adequately informed about the terms of the Ministry's salvage and disposal program (thirty-three complaints).
6. My property has not been excluded from the designated area (five complainants).
7. The Ministry of Environment has not committed itself to providing a relocation site and/or has not provided adequate information about the relocation program (twenty-eight complaints).
8. B. C. Hydro and other government authorities have been allowed to maintain and/or improve their facilities in the OIC designated area (nineteen complaints).

COMPLAINTS RECEIVED BY THE OMBUDSMAN
RELATED TO OIC 1185/80 WHICH HAVE NOT BEEN INVESTIGATED

1. The amount of compensation offered and/or paid for my improved property does not fairly represent its value (thirteen complaints).
2. The Ministry will not pay compensation for other costs and/or inconveniences directly caused by the provisions of the OIC (seventeen complaints).
3. The OIC was not justified and ought not to have been approved and/or there were improper motives behind the approval of the OIC (twelve complainants).
4. The Government did not adequately consider the options for stabilizing the Barrier (two complaints).
5. I will not be able to pass my property to my heirs under my will, if I decide to stay (one complaint).
6. I was misinformed by the property negotiator acting for the Ministry (one complaint).
7. I did not receive a reply to a letter(s) I wrote to the Ministry of Environment (one complaint).
8. The Ministry put a registered a covenant on the title to my land without giving me notice (one complaint).
9. The Ministry has refused to waive the provisions of section 4 if I agree to a restrictive covenant on my property requiring disclosure of the risk to a prospective buyer and absolving the Government of any liability (two complaints).

NOTE: It will be seen that this summary differs from the complaints as paraphrased in my letter of December 19, 1980, to the Deputy Minister of Environment; that summary of the complaints was done under considerable pressure of time. More recently my staff has been able to properly categorize and tabulate the complaints received, and it is this summary which appears above..

APPENDIX D



December 19, 1980

Mr. B. E. Marr
Deputy Minister
Ministry of Environment
980 Blanshard Street
Victoria, B.C.

Dear Mr. Marr:

Re: Garibaldi Complaints

I have received a large number of complaints from residents and other owners of property in the area designated by Order-in-Council 1185/80, ordered and approved, May 29, 1980 (hereinafter referred to as the OIC). I am now writing, pursuant to section 16 of the Ombudsman Act, to inform you of the grounds upon which I may make recommendations. Most of the complainants expressed similar concerns about a broad range of issues, and consequently I have dealt with the issues as opposed to investigating the details of each individual complaint. I hope that if these general concerns can be resolved, then most of the individual complaints will be similarly dealt with.

In conducting these investigations, my staff and I have held meetings with the complainants, Mr. Ted Neale and Mr. Paul Albertson of your Ministry, and Mr. Dale Elander and Mr. Don Meikle of the firm Elander & Elander Adjusters Vancouver Ltd. Further we have had numerous telephone conversations with other members of your staff, employees of B. C. Hydro, the Ministry of Transportation and Highways, the B. C. Assessment Authority, and other agencies. As you might expect, a recitation of all of the relevant facts would comprise volumes; I will therefore limit my discussion to an analysis of the issues, generally citing only those facts which may not be at your disposal. Should this approach fail to give you all of the information you need, I will be happy to provide you with more. Please also contact my assistant, Rick Cooper, if he can assist in this manner.

Rather than list the complaints prior to my discussion of each issue, I have set out in the attached appendix a list of all the complainants and a list of the major complaints as paraphrased by my staff. In the present consideration of the major issues a number of complaints have not been dealt with. Should I subsequently decide to investigate those complaints, I will notify you of this at a future date.

I now turn to a consideration of the major issues.

THE BACKGROUND OF THE ORDER-IN-COUNCIL

Many of the complainants expressed the view that the provisions of the OIC are unjust and oppressive, because of their belief that the Barrier poses no real threat to human life and property. It is beyond the scope of my present inquiries to question whether or not this decision was itself justified and/or appropriate. No doubt the Executive Council will answer to the Legislative Assembly for this decision. It must be pointed out, however, that since the provisions of the OIC go well beyond the recommendations of the Garibaldi Advisory Panel, serious questions have arisen as to what were the considerations upon which the OIC was based. My present purpose is to review the events leading up to approval of the OIC, and to attempt to define, as precisely as possible, the objectives which the OIC was intended to achieve.

The first question which must be addressed is: what is the nature and degree of the risk, if any, posed by the Barrier? Mr. Justice Berger, in a case styled In the Matter of an Application for Approval of a Proposed Subdivision by Cleveland Holdings, S.C.B.C., Vancouver Registry X4042, heard March 21-29, 1973, concluded that there exists sufficient evidence of "a risk - a risk that reasonable men cannot exclude - that a disaster will occur within the life of the community." Berger, J. held that such a risk was sufficient grounds for denying approval to create a new subdivision in the community.

The Garibaldi Advisory Panel, in a study entitled "Report of the Garibaldi Advisory Panel" and which was completed in 1978, concluded that "the risk of landslides are considerably greater in this particular valley than in most other valleys in the mountainous regions of British Columbia. The extent to which this greater degree of risk of landslides may be compensated for in terms of overall consequences is discussed in Section 8.4." I take this to mean that, while the Panel was unable to quantify the risk, adoption of the measures outlined in Section 8.4 of the Report would, in the opinion of the Panel, reduce the risk to a level similar to that found in other valleys in B.C.

Section 8.4 outlines three measures by which the slide could be "essentially eliminated." The Panel further suggests three types of methods for "reducing the risk to human life and property." After analyzing these various methods, the Panel summarized its conclusions in section 8.4.13:

To summarize, the Panel sees no acceptable means of preventing a repeat of a rock avalanche because the source

area is so large as to make treatment of the Barrier impractical and the principal triggering mechanisms -- earthquakes, internal water pressures and extreme floods or snowmelts -- are either extremely costly to control or beyond reasonable means of control. The only practical means of minimizing risk to human life and property from another rock avalanche is to avoid or minimize development and use of the source and runout areas. However, in the view of the Panel, it is neither practical nor reasonable to completely abandon the area to all development.

On the basis of these conclusions, the Panel recommended:

- a) concentrated development, in terms of both people and property, should be severely limited in specified areas;
- b) investigation of the value of attaching a precautionary statement to titles of those lands affected;
- c) a cost-benefit analysis of the construction of a training dyke to divert debris flow away from presently occupied areas; and,
- d) a minimal ongoing surveillance program of the stability conditions at the Barrier.

It is my understanding that, immediately prior to the approval of the OIC, there were no other reports available to government, other than a preliminary estimate by B.C. Hydro of a tidal wave, created by such a landslide, with a height of between 15 and 43 metres. I turn now to a review of the OIC.

Section 2 of the OIC designates an area, described in the schedule, as a civil defense zone. I note that the area appears to encompass a region well beyond that recommended by the Panel.

Section 3 authorizes "the Minister of Environment...to acquire such property within such parts of the designated area as he considers necessary to eliminate or reduce the danger of continued occupation of it...." This provision also goes well beyond that recommended by the Panel.

Section 4 of the OIC severely limits the use of land by any person, or government authority, without the consent of the Minister of Environment and the Minister of Municipal Affairs. I have had some difficulty in determining the objective of this section of the OIC. If the purpose was merely to prevent the further improvement of property, then alternative action might have been taken to achieve this purpose without going to the length of substantially derogating the property rights of the owners.

If however the purpose of section 4 was to coerce owners into selling their property to the Ministry and vacating the area, then such an intention ought to have been expressed in legislation enabling the Ministry to expropriate the subject property. However, I do not believe that this was the purpose of the OIC for three reasons: first, powers of expropriation were not employed; second, residents have been told time and again that they have the option of remaining in the area; and, third, the Ministers specified were empowered to waive the provisions of section 4 and it may, of course, be assumed that such consent will not be unreasonably withheld.

From the above analysis, it appears to me that the purpose for proposing, and the objectives of the OIC, were and are as follows:

- 1) that an area which presents "a potential hazard to life and property," and which requires "inter alia precautionary or safety measures for the prevention, limitation or amelioration of civil disaster" be designated a civil defense zone.
- 2) that the Minister of Environment be authorized to purchase land "within such parts of the designated area as he considers necessary to eliminate or reduce the danger of continued occupation of it."
- 3) that the development and improvement of land be halted, unless the Ministers of Environment and Municipal Affairs consent to such development and improvement.
- 4) given (2), that owners of property in the designated area retain the right to refuse to sell their property to the Ministry.
- 5) given (4), that the option to refuse to sell one's property to the Minister be a reasonable and viable alternative, and not merely a fiction.

APPLICATION AND ADMINISTRATION OF THE ORDER-IN-COUNCIL

The vast majority of complaints which I have received from property owners in Garibaldi relate to some aspect of the Ministry's administration of the provisions of the OIC. I have attempted to categorize these issues, as well as my discussions of them, below.

1. Exclusions from the Provisions of Section 4

I have received complaints from five persons about this issue. Apparently, the properties owned by these people lie to the north of Pinecrest Estates which, I understand, has been excluded.

My assistant, Rick Cooper, was informed by Mr. Neale that exclusions are being granted only to those properties lying above 400 metres in elevation; it was on this basis, for example, that Pinecrest Estates was excluded. In my view, while it may be clear that all areas above this elevation are not within the area of risk, it is not at all obvious that all areas lying below 400 metres are subject to the threat posed by the Barrier.

From perusing Mr. Marr's letter, of October 31st, 1980, to Mr. Cadillac, it would appear that exclusion requests are now being held in abeyance until the wave studies have been completed. Further, in section 2 of his Responses to Garabaldi Questions, provided to Mr. Alec Robertson by letter dated August 14th, 1980, Mr. Marr stated:

The boundaries of the area designated in O.I.C. 1185-80 for preventative relief from geologic and hydrologic hazard were drawn widely in light of available information. Despite an awareness of the high degree of geological risk to life and property in the Garibaldi area, there is considerable uncertainty in the scope of that risk and of the associated hydrologic risk. The O.I.C. provides nonetheless for exclusions from its terms; two of these have been authorized to date.

The Ministry of Environment is presently proposing to revise the boundaries to coincide with the best available information on maximum wave height and rock slide. The exclusions to date and the proposed revisions to the boundaries around Daisy Lake correspond to the 400-metre contour level (approximately 20 metres above the full level of the reservoir). The boundaries are flexible only inasmuch as new information on the scope of the hazard becomes available. South of the dam and along the Cheakamus River the O.I.C. boundaries will generally correspond to the boundaries of the 1855 slide and flow of rock debris.

This approach appears to me to be reasonable. It is anticipated, therefore, that upon completion of the wave studies now being done by Western Hydraulic Consultants, the designated area will be revised in accordance with the conclusions of this study and the "boundaries of the 1855 slide and flow of rock debris". Consequently, I do not intend to pursue this matter at this time. It will be appreciated however that the Ministry may do well to offer to purchase, at this time, only those properties which will undoubtedly remain within the OIC area.

2. Enforcement of the Provisions of Section 4

A related complaint, heard from four members of the community, was that B.C. Hydro has undertaken substantial construction and maintenance work in the area during the summer of 1980, contrary to the provisions of section 4.

Mr. Colin Guernsey, Senior Land Manager with B.C. Hydro, advises that the Authority invested \$42,000 in road maintenance, hiking trails and bridge construction, the purchase and removal of one of the vacated houses to Hydro property, and related expenditures. All of these improvements were apparently done without the consent of the Ministers of Environment and Municipal Affairs. In my view, it is improperly discriminatory for your Ministry not to enforce the provisions of section 4 against B.C. Hydro, while, at the same time, apparently leaving other property owners with the impression that such provisions apply to them.

Although the Hydro and Power Authority Act, R.S.B.C. 1979, c. 188, does not specifically state that the Emergency Program Act, R.S.B.C. 1979, c. 106 applies to the Authority, it would appear that section 13 of the latter Act would apply; in this case, the Emergency Program Act and the regulations made pursuant thereto would prevail.

3. Pressure to Sell

Eleven complainants expressed the view that they felt under substantial pressure to sell their property to the Ministry. Most of these concerns stem from the severe limitations placed upon the use of property by section 4 of the OIC.

It is easily appreciated that a resident will feel pressured to dispose of his property if he is unsure of whether or not he would be granted permission, for example, to repair a leaking roof. Further, there is little point in holding a property which will effectively become almost valueless (measured in economic terms) as of June 30th, 1981 -- the deadline for property acquisitions by the Ministry. Mr. Alfred Penny, of Penny & Keenlyside Appraisals, who conducted the appraisals of these properties for the Ministry, advises that it is his opinion that 90% of those selling to the Ministry are selling because the terms of the OIC make it economically undesirable to stay. He believes that only 10% of those selling, are selling because they believe the risk of a landslide makes it advisable to vacate the area. My discussions with individual complainants would corroborate this view.

Further, Mr. Harry Jones, Assessor, North Shore, Squamish Valley area, for the B. C. Assessment Authority, advises that in determining "actual value" (as provided in s. 24(2) of the Assessment Act) of those properties which have not yet been sold to the Ministry, he concluded that because of the provisions of section 4 of the OIC, the appropriate value for the lots was comparable to the value of a campsite. He says that the average value assessed was roughly \$1000 per lot, with this amount increasing slightly according to the size of the parcel, the rental value of the improvements for the time the owners have resided on the premises since May 29, 1980, and the salvage value of any improvements.

As noted earlier, the Ministers of Environment and of Municipal Affairs may waive the application of the provisions of section 4 to individual properties. However, I would view a refusal by the Ministers to consent to the waiver of the provisions of section 4, in the cases of individuals wishing to remain in the area, as unreasonable, as it will leave owners under severe pressure to sell their properties to the Ministry. To leave residents in the situation of being the recipients of an offer which they cannot reasonably refuse appears, in my view, to be both unjust and oppressive.

The second factor which, in my view is subjecting owners to unfair pressure to sell their properties, is the fact that deadlines for the sale of property to the Ministry have been imposed. Many of the complainants state that they have been led to believe that if they do not sell their property to the Ministry by June 30, 1981, they will never be able to realize the value of their property at any time in the future. In my view, the imposition of such a deadline, in these circumstances appears to be arbitrary and unfair. I may recommend that the deadline be removed, so that those wishing to remain will always have the option to sell their property to the government in the future.

The third and final factor complained about, as creating undue pressure upon property owners to sell their property to the Ministry, is the fact that, for the purposes of determining the purchase price, values of properties have been frozen as of May 28th, 1980. Given that title to the property does not pass to the Ministry until the date of the sale the establishment of this criteria for the purposes of evaluation appears to be unfair and unreasonable. I discuss this matter further in the next portion of this letter.

I may therefore recommend that one of the following steps be taken in order to resolve these complaints:

- a) that the Ministers of Environment and Municipal Affairs advise all owners of property in the area that, if they wish to remain in the area, exclusions from the provisions of section 4 will be granted,
- b) that compensation for the decline in market value due to the effect of section 4 be paid to owners of property should they decide to remain, OR
- c) that residents be given the option of long-term leases, after sale of their property to the Ministry. In this manner, the Ministry could halt the improvement of the value of property, but permit the individual to choose to remain on the property, which appears to be the intention of the OIC. If this proposal is to be considered, I would wish to discuss further the criteria of appraising the properties, and the terms of the subsequent leases.

4. Compensation for Improved Properties

Many complainants felt that the amount of compensation being offered, or paid, is, or was, unreasonably low. I do not propose to investigate each individual situation at this time because I hope that a resolution of the issues set out below will remedy many of the individual complaints. Thus, I have investigated these complaints only to the extent that they relate to the basic criteria used for appraising the properties, the method by which an agreement is reached, and the terms of the agreements (given that they all appear to be in a standard form).

a) Criteria used in appraisals done for the Ministry.

Earlier in this letter, I considered whether or not the policy of valuing properties as of May 28th, 1980 had the effect of putting pressure on individuals to sell their property to the Ministry. I now turn to the issue of whether or not it is just, in these cases, for compensation to be based upon the fair market value of the property as of this date. This issue, of course, comprises two questions: is fair market value an appropriate basis for valuation of these properties, and is May 28th, 1980, the appropriate day for such valuations.

Fair market value is ordinarily defined as the price at which a willing seller would sell the property to a willing buyer on the open market. The difficulty, as I see it, in applying this principle of valuation in these circumstances, is that it is not at all clear how willing the sellers are, or whether the factors cited previously under the heading "Pressure to sell" are playing a significant part in the decisions to sell. In my view, for the Government to impose such conditions as to effectively force people to sell, while at the same time valuing the property on the basis that the properties are being sold willingly, appears to be unjust and oppressive. If however, the Ministry adopts either of possible recommendations (a) or (b) set out on page 8, then the economic benefits of refusing to sell would be no better and no worse than those of selling. In these circumstances, sales to the Ministry would be made willingly, and fair market value would, of course, be an appropriate measure for the purposes of valuation. If possible recommendation (c) set out on page 8 is adopted, then in my view fair market value would not be an appropriate basis, given that owners would yet be in the position of selling unwillingly. In these circumstances, I would think an alternative method of appraisal would be more appropriate.

With respect to the question of why May 28th, 1980, was chosen as valuation day for appraisal purposes, I have heard two possible explanations. Mr. Neale, at his meeting with my assistant, Rick Cooper, on December 10th, 1980, expressed the view that this policy ensured equity of treatment for all sellers. My difficulty with this explanation is that equity would only be assured if all of the properties were also purchased by the Ministry on May 28th. As it is, the owner selling at any time after May 28th will suffer two additional losses: the potential appreciation of the market value of his property since May 28th, and the devaluation, through inflation, of May 28th, 1980 dollars, since that date. Had the Government chosen to expropriate these properties on May 28th, I would have little difficulty in agreeing that this date would be the proper valuation date, given that expropriation transfers the owner's interest in property to the Government. However, in these cases, the Government obtains no interest in a property until the date of sale; surely, to value that interest according to an arbitrarily selected day which is weeks or months prior to the transfer of that interest, is unfair.

The other explanation for establishing May 28th as valuation day was suggested by Mr. Don Meikle, the property negotiator in the area for Elander & Elander. He expressed the view that property values have declined since May 28th, and the Government had therefore halted this decline for all properties by implementing this policy. This

may be true but the devaluation in property values appears to have been caused primarily by the OIC. My office has been advised by both Mr. Tom Swann of Cunningham and Rivard Appraisals, and Mr. Bill Bridge of Fred Lee and Associates (both of whom are accredited appraisers and are familiar with the area), that if the OIC were repealed today, property values would immediately appreciate significantly, notwithstanding public awareness of the conclusions of the Garibaldi Advisory Panel. Thus, it appears to me that this explanation does not justify the establishment of May 28th as valuation day, because the theoretical subsequent decline in market values was caused by the OIC itself.

In my view, as a general principle of compensation in circumstances such as these, persons adversely affected should be placed in the same position, to the extent that that is possible by way of compensation, as they would have been in had the action adversely affecting their interests not been taken. Thus it appears to me unfair for the Ministry to take advantage of the effect of the OIC in depressing (and in fact eliminating) the market since May 28th. I may therefore recommend that properties be valued according to their fair market value on the date of sale, and for this purpose the effect of the OIC on the market be ignored. I appreciate the difficulties of this approach where the market place has been eliminated. A possible method would be to determine the fair market value as of May 28th, 1980 and add to this an appreciation factor based on that found in neighbouring areas. As for those properties already sold to the Ministry, I may recommend that compensation be re-evaluated on the same basis and any additional amounts calculated be paid to the vendors.

b) The process by which agreements of sale are reached

A number of those who have sold their properties to the Ministry complained that they had felt rushed into entering an agreement of sale because of the factors cited earlier. For example, Mr. and Mrs. Frank Arundel told me that because of the December 31st, 1980 deadline, they sold in September and did not obtain a private appraisal. Had they delayed further, they believed they would have had to move in mid-winter and this was undesirable both in terms of the difficulties in moving and because their children would have had to transfer schools in mid-year. (Their complaint that they were not informed that the deadline for sales would be extended is dealt with generally later in this letter.)

While there is little that can be done now to resolve this complaint, I am concerned that these situations do not recur. To require property owners who, except for the OIC are unwilling to sell, to enter into agreements of sale under serious time constraints, can only serve to create unfair pressure on them with the result that decisions are made which are subsequently regretted. I hope that the adoption of the proposals cited earlier will serve to ameliorate this situation.

c) Terms of the agreements of sale

This issue arises out of the many complaints over both, 1) existing terms in the agreements of sale (which apparently are all in standard form) and 2) the Ministry's apparent refusal to add others. I consider these terms below.

i) Existing terms

Vacant possession - This is a term found in all of the agreements executed to date. While it is a common and reasonable term of agreements made between two private parties, I am unable to understand the Ministry's insistence on its presence in these circumstances. A number of individuals complained that it resulted in them having to obtain interim financing at very high rates in order to have another house purchased and available for occupation at the time the agreement was completed with the Ministry. Surely, in circumstances where the Ministry knows that it will immediately dispose of the house for salvage, it is unreasonable to refuse to allow the vendors to remain in the premises for a short time after the sale. The argument that this will necessarily put the Ministry in a landlord-tenant relationship is, in my view, simply without merit. Such a relationship only arises where a tenancy agreement is entered into; in these circumstances the Ministry could grant only a license to occupy. I may recommend that in future agreements, the Ministry vary this term in order to allow the vendors to acquire another residence without having to resort to interim financing.

Condition concerning disposal of improvements - Most people were relatively pleased with this condition. I am concerned however that people are not informed of the terms of the disposal and demolition program. Mr. Kidd, for example, was not aware that an owner, buying back his improvements, would be granted permission to leave the building on site for an extended period of time. Rather, he believed that the house had to be removed within 21 days (as is the case in purchases by non-owners). Consequently, Mr. Kidd did not exercise his right to purchase the house, and it has now been destroyed. I propose on page 15 of this letter that a complete and accurate statement of the available options with respect to the buy-back program, be provided to each vendor.

ii) Other terms requested

Proviso precluding future use of the land - A number of complainants have asked that the Ministry covenant to not use, or permit the future use, of lands purchased. While it is true that such a term would go far in alleviating owners' suspicions of bad faith on the part of government, I am unable to conclude that the Ministry has acted unfairly in refusing to bind the lands in this fashion. Should, for example, the Barrier be eventually stabilized, such a covenant would create needless difficulties at that time.

Right of first refusal - Other owners have requested that the Ministry agree to offer them the right to repurchase the lands, should the risk be eliminated and the Ministry permit the development and improvement of the lands at some time in the future. While owners would of course have to pay for such a term (by way of receiving less compensation), it appears to me that a refusal by the Ministry to agree to this would be unreasonable in the circumstances. If property in the area is being purchased solely to reduce the danger of human life and property, then should that danger ever be eliminated, there should be no reason why the prior owners should not be invited to repurchase the land according to a formula agreed upon in advance. I may therefore recommend that owners be invited to include such a term in their agreements of sale with the Ministry.

Lease back option - some individuals expressed the concern that the Ministry unreasonably refused, after purchasing their property, to lease it back to them until a relocation site is available. Given the current policy of basing the Ministry's offer to purchase on fair market value on May 28th, 1980, residents feel pressure to liquidate the investment in their property (so that inflation and the lack of return, do not further devalue their capital). On the other hand, moving now means that they will have to move again when a relocation site becomes available.

This problem will be alleviated if the current policy of appraising the properties according to fair market value on May 28th is amended, as proposed earlier in this letter. A much less desirable alternative to this proposal, would be the lease-back option. This would of course result in the creation of landlord-tenant relationships, but the Ministry would have little difficulty subsequently terminating these tenancies, pursuant to section 17 (demolition) of the Residential Tenancy Act, R.S.B.S. 1979, c. 365. I note also that there are precedents in British Columbia for this type of program.

Condition subsequent concerning relocation - The apparent refusal of the Ministry to bind itself to providing a relocation site was a commonly heard complaint. I consider this matter on pages 13 and 14 of this letter.

5. Compensation for Unimproved Lands

I have received a large number of complaints from individuals who own unimproved property in the designated area. These complainants allege that the Ministry is improperly discriminating against them by refusing to purchase unimproved lands.

In his Responses to Garibaldi Questions, Mr. Marr stated that, in respect of "Serviced or Serviceable Building Lots" and "Land Held for Future Development",

The purchase policy does not extend to such properties at present. Representations can be made, nonetheless to the Government in the form of a brief supporting compensation for such properties.

In a letter to Mr. Jon Perret, dated August 14th, 1980, Mr. Neale stated:

Please be advised that the Ministry does not anticipate purchasing any unimproved land within the OIC 1185 80 hazard area. The Ministry's acquisition program extends only to improved properties. Consequently the Ministry will not be making an offer to purchase your property.

Neither of these letters state that the reason unimproved properties are not being purchased is that the OIC does not provide for the purchase of such properties. Nevertheless, this question must first be dealt with in order to identify the cause of the alleged improper discrimination. My solicitor advises that the wording of section 3 of the OIC is sufficiently ambiguous as to permit the use of funds, thereby provided, for the acquisition of unimproved properties. I must conclude, therefore, that the Minister, in exercising his discretion under section 3, did not consider the acquisition of unimproved properties necessary to eliminate or reduce the danger of continued occupation of the area. I am unable to conclude that this decision was unfair.

On the other hand, unless one of the possible recommendations stated on page 8 of this letter is implemented, I would be of the view that the actions of the Ministry as they relate to owners of unimproved properties are unjust, oppressive, and improperly discriminatory. Should neither of these alternatives be implemented, I may recommend that the Ministry offer to purchase these properties as well as improved properties. The current position of these individuals is, in my opinion, inequitable given that virtually all of their property rights have been derogated without compensation.

6. Relocation

I have received twenty complaints which relate to the fact that the Ministry has made no commitments with respect to when a relocation site will be available for occupation, where such a site will be located, how much the lots will be sold for, and what will be the priorities in allocating lots.

I appreciate, from perusing the correspondence between Mr. Marr, Dr. Boydell, Mr. Harkness, and Mr. Alec Robertson, that a good deal of planning has already been conducted and that it now appears that a site at Brandywine will be developed as a relocation area. I am further advised by Mr. Albertson and Mr. Neale that the value of the Brandywine lots, for the purposes of determining a price at which they will be sold, will likely be directly comparable to the amounts paid for the lots now being purchased in Garibaldi. Added to this figure, of course, will be the cost of any services provided in Brandywine which were not available in Garibaldi.

I am pleased to see that the relocation program is going ahead and, in my view, the method of valuing the Brandywine lots as noted above, is appropriate in the circumstances. However, as stated above, the complaints which I have received centre on the fact that the Ministry appears unwilling to commit itself to this program and/or to make the agreements of sale for properties in Garibaldi conditional upon such terms.

It appears to me that such a refusal is unfair; if indeed the Ministry will proceed with the relocation program as indicated, I am at a loss to understand why a commitment to this effect cannot be made and conditions making such a commitment enforceable written into agreements of sale. If however, the Ministry is unable or unwilling to proceed with a relocation program, then false expectations have been created and property owners have been seriously misled.

7. Lack of Notice and Information

I have received many complaints which allege that the Ministry failed to notify owners of the effects of the O.I.C. on their property, and has not provided them with complete and accurate information about the terms of the acquisition program.

I am advised, by Mr. Albertson and Mr. Neale, that the Ministry has at no time directly notified all individuals affected by the O.I.C., of the provisions of the O.I.C. In my view, there is an onus upon all public bodies, when exercising an administrative function, to give notice to all parties potentially directly affected prior to the making of the decision, and to provide them with an opportunity to make representations. Because of the nature of this decision, and the fact that, in the Ministry's view, an emergency situation appears to exist, I do not think the rule need be applied with the same strictness. However, I do think, that notice ought to have been given after the O.I.C., so that individuals affected could conduct their affairs accordingly. I am most concerned by the possibility that there might have been, at least until my letter of November 12th, some property owners yet unaware of the effect of the O.I.C. on their property. It appears to me that this failure to provide direct notice was unfair and unreasonable.

I am even more concerned by the fact that owners of property have not been directly notified of the terms and conditions of the Ministry's acquisition program, the terms of the disposal/salvage program, and have been left in a state of uncertainty with respect to the relocation program. Mr. Neale's reliance on the effectiveness of the Garibaldi Ratepayers' Association and on the local grapevine as means for keeping all persons affected informed is, in my view, quite unacceptable. (My investigation revealed that the Association's mailing list contained the names of about half of those found on a list of property owners provided by Mr. Elander; Mr. Neale's name was not on the mailing list - how then can he know what information is being provided to the members?)

It should go without saying that in a program of this nature, where people's lives and, in some cases livelihoods, are being disrupted, there is a very great responsibility on Government to ensure that all persons affected are well-informed so that they can conduct their affairs properly.

To resolve these complaints, I may recommend that a letter be sent immediately, by registered mail, to all owners of property in the area, and that the following information be provided:

- a) the Order-in-Council;
- b) the details of the Ministry's acquisition program;
- c) a copy of the appraisal done by Penny & Keenlyside for that owner's property and a reiteration of the invitation to owners to get an independent appraisal; and,
- d) the Ministry's intentions with respect to when and where a relocation site will be developed; at what price it is anticipated that lots will be sold; and, how the lots in the relocation site will be distributed.

SUMMARY OF PROPOSALS

During my discussion of the issues above, I took the opportunity of suggesting various means by which some of these complaints (if substantiated) might be resolved. In other cases, I have not outlined possible recommendations at this time. For your convenience, I have summarized the proposals which I have made below:

Pressure to Sell

"I may therefore recommend that one of the following steps be taken in order to resolve these complaints:

- a) that the Ministers of Environment and Municipal Affairs advise all owners of property in the area that, if they wish to remain in the area, exclusions from the provisions of section 4 will be granted.
- b) that compensation for the decline in market value due to the effect of section 4 be paid to owners of property should they decide to remain, OR
- c) that residents be given the option of long-term leases, after sale of their property to the Ministry. In this manner, the Ministry could halt the improvement of the value of property, but permit the individual to choose to remain on the property, which appears to be the intention of the OIC. If this proposal is to be considered, I would wish to discuss further the criteria of appraising the properties, and the terms of the subsequent leases." (page 7)

Compensation for Unimproved Properties

"On the other hand, unless one of the possible recommendations stated on page 7 of this letter is implemented, I would be of the view that the actions of the Ministry as they relate to owners of unimproved properties are unjust, oppressive, and improperly discriminatory. Should neither of these alternatives be implemented, I may recommend that the Ministry offer to purchase these properties as well as improved properties. The current position of these individuals is, in my opinion, inequitable given that virtually all of their property rights have been derogated without compensation." (page 12)

Compensation for Improved Properties

"I may therefore recommend that properties be valued according to their fair market value on the date of sale, and for this purpose the effect of the OIC on the market be ignored. I appreciate the difficulties of this approach where the market place has been eliminated. A possible method would be to determine the fair market value as of May 28th, 1980 and add to this an appreciation factor based on that found in neighbouring areas. As for those properties already sold to the Ministry, I may recommend that compensation be re-evaluated on this basis and any additional amounts calculated be paid to the vendors." (page 9)

Terms of the Agreements of Sale

Vacant possession - "I may recommend that in future agreements, the Ministry vary this term in order to allow the vendors to acquire another residence without having to resort to interim financing." (page 10)

Right of first refusal - "I may therefore recommend that owners be invited to include such a term in their agreements of sale with the Ministry." (page 10)

Lack of Information

"To resolve these complaints, I may recommend that a letter be sent immediately, by registered mail, to all owners of property in the area, and that the following information be provided:

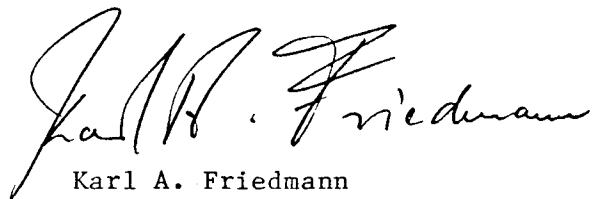
- a) the Order-in-Council
- b) the details of the Ministry's acquisition program;
- c) a copy of the appraisal done by Penny & Keenlyside for that owner's property and a reiteration of the invitation to owners to get an independent appraisal; and,
- d) the Ministry's intentions with respect to when and where a relocation site will be developed; at what price it is anticipated that lots will be sold; and, how the lots in the relocation site will be distributed." (page 13)

I have set out, in the above portions of this letter, the grounds upon which I may make recommendations. I invite your comments on these, and any other representations you may wish to make, before I reach decisions on these complaints and make recommendations as to how they can be resolved. It may be desirable however for some of these problems to be settled immediately without waiting for any formal recommendations. I would appreciate the opportunity to discuss with you such proposed settlements.

Because of the considerable anxiety being felt by virtually all of the complainants, I am concerned that these issues be dealt with immediately. As agreed between my assistant, Rick Cooper, and Mrs. Bolton, of your office, I will leave in your hands the matter of whether or not a meeting to discuss and settle these complaints would be expedient. I would however request such a meeting or your written response to this letter by January 12, 1981.

Thank you for your cooperation and assistance.

Yours sincerely,

A handwritten signature in cursive script, reading "Karl A. Friedmann". The signature is fluid and elegant, with the first letters of the first and last names being capitalized and prominent. The ink is dark and the background is white.

Karl A. Friedmann
Ombudsman

THE COMPLAINTS

- 1) I do not think that the action of the Government, in proclaiming Order-in-Council 1185-80, was justified. (twelve complainants)
- 2) I question the government's motives in enacting the Order in Council. (ten complainants)
- 3) I believe that the government is acting inconsistently by permitting the facilities of B.C. Hydro and B.C. Rail, and the highway to continue being used in the area. Further, the damage that could conceivably occur in the Squamish/Paradise Valley hasn't been taken into consideration. (eight complainants)
- 4) B.C. Hydro has not been prevented from investing thousands of dollars in improvements and maintenance in the area since May 29th, 1980. (six complainants)
- 5) I think my property should be exempted from the OIC designated area because there is no risk of damage to my property. (five complainants)
- 6) I believe that the basis upon which my property has been appraised is unfair; both because the property was evaluated according to its "fair market value" on May 28, 1980, and for other reasons. (fifteen complainants)
- 7) I am not satisfied with either the amount of compensation being offered for my property, or which was paid for my property. (twenty-eight complainants)
- 8) I am not satisfied with the terms of agreement being offered by the government and the fact that the government refuses to amend them and/or to add others. (sixteen complainants)
- 9) I think there has been undue pressure applied to me in order to get me to sell my property to the government. (eleven complainants)
- 10) I consider the government's repeated insistence that the Barrier is a danger to be a "scare tactic". (one complainant)
- 11) I believe that the government should commit itself to a relocation program. (twenty-three complainants)
- 12) I think it is unfair that the Ministry will not purchase my unimproved property. (fourteen complainants)
- 13) I have never received any direct notice from the government concerning the OIC. (eleven complainants)

- 14) I have not been adequately informed by the government regarding its actions so that I could conduct my affairs accordingly. (eighteen complainants)
- 15) I think that the fact that the Government did not release the Barrier Report until two years after its completion and/or did not act until seven years after the decision of Mr. Justice Berger in the Cleveland Holdings case to be unfair. (seven complainants)
- 16) I have/will suffer costs and/or inconveniences as a result of the OIC which are not being compensated. (twenty-two complainants)

APPENDIX E



January 26, 1981

D.M.O. 3880

Dr. Karl A. Friedmann
Ombudsman
8 Bastion Square
Victoria, B.C.
V8W 1H9

Dear Dr. Friedmann:

Re: Garibaldi

Thank you for your undated letter concerning the above, received in my office on December 19, 1980.

You state that you have received a large number of complaints on this issue and provide a list of complainants in the Appendix to your letter. A check of our files reveals very few had contacted us directly and, as it is my understanding that your office does not become involved with a case until the responsible authority has had the opportunity to investigate and failed or refused to take action, I feel we were denied this opportunity.

Under "Background to the Order in Council" you start off by saying that it is beyond the scope of your present inquiries to question the justification and/or appropriateness of the decision. However in the first two pages devoted to this topic you appear to be doing just that. Are you really suggesting that government should have stopped further development in the danger area but allowed existing structures to remain and to be sold to third parties?

The purpose of the O.I.C. as listed on Page 4 coincides with my understanding of government intentions with the substitution of the word "property" for "land" in objective 2.

.....2

Mr. Karl A. Friedmann

January 26, 1981
D.M.O. 3880

Under Enforcement of the Provisions of Section 4 you state that you consider the Ministry has been "improperly discriminatory in the failure to enforce the provisions of Section 4 against B.C. Hydro". I cannot agree with your conclusion. In my opinion it would only be improperly discriminatory if we were aware of two identical infractions and had enforced the provisions of Section 4 against one and not against B.C. Hydro. However we do agree that B.C. Hydro should comply and the following is the current situation:

"The Senior Land Manager for B.C. Hydro has been advised that no further work by way of improvements is to be made on any of the properties held by the Corporation within the restricted area. This position was taken several months ago, and I have been assured that no further activities of the nature described will take place. It should also be noted that an application was made by B.C. Hydro to construct a caretaker's residence within the restricted area; that request was refused."

Under "Pressure to Sell" the last two sentences of Page 6 defy understanding. It was as a result of demonstrations by local residents that the most recent study was commenced. The study resulted in action by Government being demanded by the residents. Anyone who has studied the reports on the landslide possibility can hardly doubt that a danger exists, and I believe you have misinterpreted the basis for the order. The Government is convinced that a hazard exists and that this hazard poses a real danger to life. It recognizes its responsibility to advise the occupants of this threat, and the seriousness with which the threat is regarded. It has set up a program whereby occupation of the area is discouraged, those occupants who wish to leave the area can do so with minimal financial loss, and no new occupants can move into the area. It is difficult to see how such a policy can be carried out without there being some pressure on residents to sell. However this applies to many situations such as floodplain designation or zoning changes.

Mr. Karl A. Friedmann

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Based on the above I have difficulty accepting your recommendations on Page 8 for the following reasons:

- a) to agree would tend to indicate that there is not a serious threat which would be inconsistent and irresponsible.
- b) to agree to compensate for the decline in market value would set a precedent for Government compensation for any decline in market value due to Government action such as agricultural land reserve designation, zoning changes, etc.

Under Compensation for Improved Properties you recommend that the May 28, 1980 valuation date be abandoned, that fair market value as of the date of sale be substituted, and that for those properties already sold, compensation be re-evaluated effective the date sold. This would appear to contradict your discussion on Page 8 and 9 where you discuss the appropriateness of "fair market value" and state "In these circumstances, I would think an alternative method of appraisal would be more appropriate". Can you clarify this for me and specify the "alternative method of appraisal that would be more appropriate" so that we may consider it?

Current Government policy is to appraise all property according to the fair market price effective May 28, 1980, and I believe this policy has been consistently applied.

Your position on "vacant possession" would put the Government in the unacceptable position of allowing people to remain in houses owned by Government when the Government believes that such an occupancy poses a threat to life.

I agree with your proposed recommendations on the right of first refusal and will take steps to have this proviso added to all agreements.

In the case of Compensation for Unimproved Lands I believe the present Government policy is clear -- no compensation for unimproved properties -- and has been fairly applied. The Ministry cannot offer to purchase these properties unless government policy is changed. Many people have

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requested that this policy be changed and Cabinet is reconsidering. I will advise my Minister that the Ombudsman also supports a change in this policy.

While this Ministry is involved in relocation planning I must point out that the terms and conditions attached to the purchase of lots at Brandywine or any other location will be determined by the Ministry of Lands, Parks and Housing. It is my understanding that the relocation plans are proceeding in a satisfactory manner and that preferential treatment will be afforded to residents displaced from the Garibaldi area.

With respect to "Lack of Notice and Information", although at the outset it seemed reasonable to use the local media and the assessors for information purposes, and I believe the program has been well publicised, I agree the Government should have provided full details to all property owners by mail. If you feel a useful purpose would still be served by it, I will instruct my staff to prepare and send the information outlined in points (a) and (b).

Regarding (c), appraisals are done at the landowner's request and copies of these are currently given to the land owner.

Regarding (d) I will request my colleague, the Deputy Minister of Lands, Parks and Housing to inform residents of the relocation policy if and when such information is available.

Many of the questions raised in your letter concern Government policy rather than the administration of that policy. I have attempted to deal with these policy issues while recognizing that they may be outside my area of jurisdiction and perhaps yours.

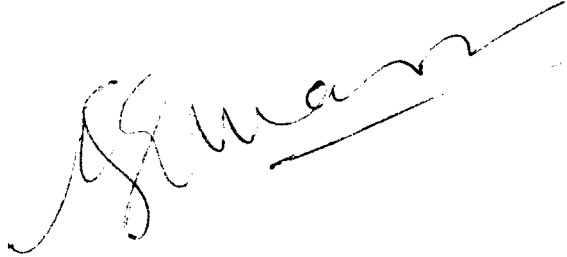
I must admit also that I have had some trouble dealing with charges based on "feelings" or "impressions" and suffice it to say that my staff, who have had a great deal of contact with the public, do not necessarily share your conclusions regarding such "feelings" or impressions".

I would suggest that there are considerable differences between us and in the interpretation of Government policy

Mr. Karl A. Friedmann

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in this case, and I would be happy to further discuss this aspect at your convenience.

A handwritten signature in cursive script, appearing to read "B. E. Marr", written in dark ink. The signature is slanted upwards to the right and is positioned above the printed name and title.

B. E. Marr
Deputy Minister of Environment

APPENDIX F



February 2, 1981

Mr. B. E. Marr
Deputy Minister
Ministry of Environment
810 Blanshard Street
Victoria, B. C.

Dear Mr. Marr:

Re: Garibaldi Complaints

Thank you for your letter of January 26, 1981, in response to my undated letter which was hand-delivered to your office on December 19, 1980. I am now writing to inform you of my decisions on these complaints and to make recommendations as to how they may be resolved. I begin by first discussing some ancillary points which you have raised.

In the second paragraph of your letter, you state:

A check of our files reveals very few [of the complainants] had contacted us directly and, as it is my understanding that your office does not become involved with a case until the responsible authority has had the opportunity to investigate and failed or refused to take action, I feel we were denied this opportunity.

A number of points should be made in response to this comment. First, it is not the policy of this office to give, as a matter of course, the responsible authority an opportunity to take corrective action before beginning an investigation into a complaint, except to the extent that this is required by section 11 (1) (a) of the Ombudsman Act. Under section 13(c), I may also decline to investigate a case where I believe that the law or existing procedure provides an adequate remedy to the complainant. Ordinarily, however, the authority has received the complaint long before I have, and it is often the refusal of the authority to amend its original decision which causes the complainant to contact my office. Certainly, in this case, there have been a number of letters by the complainants to yourself, or members of your staff, which set out many of the complaints which I subsequently investigated. From perusing the minutes published by Garibaldi Ratepayers' Association of the various meetings held between yourself, members of your staff, Ministers of the Government, and members of the Association, as well as the questions and answers contained in your memo entitled "Responses to Garibaldi Questions", it can hardly be said that your Ministry was unaware of the complaints in this matter and did not have ample opportunity to take corrective action.

Second, in the second last paragraph of your letter, you express some difficulty in "dealing with charges based on 'feelings' or 'impressions'." I am not entirely sure as to what you are referring to as neither of these words are used in my letter of December 19. I assume that this comment relates to the fact that throughout the letter I have qualified any conclusions with words like "it appears to me that." You will appreciate that, pursuant to section 16 of the Ombudsman Act, I am without statutory authority to reach a decision which may adversely affect an authority, until I have given the authority an opportunity to respond to the grounds, which appear to exist, upon which I may make recommendations. Thus, the purpose of my letter to you of December 19 was to inform you of the grounds upon which I may make recommendations, in order to provide you with the opportunity to comment on these grounds and my reasons supporting them, before I reached a decision on the merits of these complaints. I regret if there has been a misunderstanding in this regard; I would refer you to sections 16, 21, 22, and 23 of the Ombudsman Act should you wish further clarification.

I have had an opportunity to consider your reply and the various comments made therein. I am now able to reach decisions on the various complaints and to make recommendations as to how they may be resolved. I now turn my attention to this matter.

BACKGROUND OF THE ORDER-IN-COUNCIL

I included this section in my previous letter in order to set out my understanding of the objectives which Order-in-Council 1185/80 (hereinafter referred to as the OIC) was intended to achieve. I am pleased to be advised by you that the purpose of the OIC as set out on page 4 of that letter coincides with your understanding of government intentions and I have no objection to the substitution of the word "property" for "land" in objective #2. I hope that our agreement as to the government's intentions will assist in an early resolution of these complaints.

APPLICATION AND ADMINISTRATION OF THE ORDER-IN-COUNCIL

A. Exclusions from the Provisions of Section 4

The individuals who complained about this issue felt that it was unfair that some properties were excluded from the provisions of section 4 of the OIC, while their properties were not. However, rather than their property being excluded under section 4, they each preferred to have the boundaries of the OIC designated area redrawn so that their property was outside of the designated area. As mentioned in my letter of December 19, I will not pursue this matter at this time given my understanding that the boundaries will be redrawn in accordance with the guidelines set out in section 2 of your "Responses to Garibaldi Questions."

I have now received a copy of the wave study commissioned by B. C. Hydro and I understand that it is currently being reviewed by the Inventory and Engineering Branch of your Ministry. I am informed that it is hoped that this review will be completed this week. Assuming that the boundaries of the designated area will be redrawn in the very near future, I will delay making any recommendations so that these changes may be made.

B. Enforcement of the Provisions of Section 4

I appreciate your position that it would only be improperly discriminatory if your Ministry were aware of two identical infractions and had enforced the provisions of section 4 against one and not against B. C. Hydro, and I am in agreement with this position. I have therefore discontinued my investigation of these complaints for the reason that further investigation would not benefit the complainants. It does disturb me, however, that your Ministry expected and encouraged private residents to believe that they must comply, not only with the provisions of the OIC, but also with the policy developed by your Ministry respecting the acquisition program, while knowingly allowing B. C. Hydro to ignore the provisions of section 4 of the OIC.

I note your statement that B. C. Hydro has now been advised that no further improvement is to be made to the properties held by B.C. Hydro in the OIC designated area, and that an application by B.C. Hydro to construct a caretaker's residence in the area has been refused. I am aware, however, that B. C. Hydro requested permission last summer to move one of the vacated houses to one of their properties in the designated area for use as a park warden's office. Mr. Albertson of your Ministry advised that a response to this request was "held in abeyance"; B. C. Hydro went ahead with the project.

I understand that there are other government authorities who may have also made improvements in the OIC designated area, although Mr. Neale of your Ministry advised in December that no permissions for such works had been granted. In my view, these authorities should also be advised of the requirements of section 4 of the OIC.

C. Pressure to Sell

Many of the owners and prior owners of improved properties in the OIC designated area complained that they have been subjected to unfair pressure to sell their properties to the Ministry. I have decided that these complaints are substantiated for the reasons set out under this heading in my letter of December 19. I thank you for your detailed comments on this issue, but am unable to agree with some of them for the reasons set out below.

While it may be that "it was as a result of demonstrations by local residents that the most recent study was commenced," I find it somewhat difficult to accept the assertion that "the study resulted in action by Government being demanded by the residents." Indeed, the Report of the Garibaldi Advisory Panel was not released to the public until after the OIC was ordered and approved by the Lieutenant-Governor in Council on May 29, 1980. In fact, the first complaint I received from the Garibaldi area was that the Panel's report had been filed with the Government in July of 1978 and still had not been released to the public by May of 1980.

You go on to state that "anyone who has studied the reports on the landslide possibility can hardly doubt that a danger exists, and I believe you have misinterpreted the basis for the order." While I do not dispute that a danger exists, there are many who do: both Dr. V. Dolmage, whom Mr. Justice Berger described as "a geological engineer of vast experience," and Mr. C. Brawner, "a civil engineer specializing in rock mechanics" gave evidence in the case heard by Mr. Justice Berger in 1973 (which I cited in my letter of December 19) that it was unlikely that a landslide from the Barrier would occur. The fact that most residents have not accepted your Ministry's offer to purchase their properties suggests that they do not believe that a risk, as great as that perceived by your staff, exists. Even the Garibaldi Advisory Panel concluded, in section 8.14.13 of their Report, that "in the view of the Panel, it is neither practical nor reasonable to completely abandon the area to all development." Nor can I agree that I have misinterpreted the basis for the order; in fact, we are in agreement, as discussed above, as to the objectives of the Government in ordering and approving the OIC.

You further state that:

The Government is convinced that a hazard exists and that this hazard poses a real danger to life. It recognizes its responsibility to advise the occupants of this threat, and the seriousness with which the threat is regarded. It has set up a program whereby occupation of the area is discouraged, those occupants who wish to leave the area can do so with minimal financial loss, and no new occupants can move into the area. It is difficult to see how such a policy can be carried out without there being some pressure on residents to sell.

I am in agreement with the intentions of the Government as you have stated them above, with the inclusion of the words "by the Government" at the end of the second sentence. However, I am convinced that such a policy can be carried out in which there will be minimal financial loss to owners of property in the area, in which the number of people exposed to the hazard will not increase but will instead decrease over time, and in which there will be no unfair pressure on the residents to sell.

I believe that the unfair pressure, to which owners are being subjected, to sell their properties to the Ministry is primarily a result of three factors. First, the provisions of section 4, if not waived by the Ministers of Environment and Municipal Affairs, deprive the owners of virtually all of the common law rights of property and render the properties virtually valueless. Second, the imposition of the deadline of June 30, 1981 (originally December 30, 1980) by which to sell their properties to the Ministry, leaves owners in the position of holding property which they can not sell, lease, improve, renovate, or even alter, after the expiry of the deadline. Third, the Ministry's offer to purchase the properties at their value on May 28, 1980, subjects owners to suffer two additional losses, both of which increase the longer they delay selling to the Ministry: the loss of return on monies invested in the properties and the devaluation, through inflation, of May 28, 1980 dollars, since that date.

The existence of these factors has resulted in a situation in which owners are being subjected to such pressure to sell their properties to the Ministry that their properties, in effect, are being expropriated. Further, this situation is contrary to the Government's intention, as we have agreed, that the right to refuse to sell one's property to the Ministry be a reasonable and viable option. It is not a reasonable and viable option to continue to hold a property which, after June 30, 1981, one cannot sell, lease, develop, improve, renovate, or alter. If it was the Government's intention to force the owners to abandon the area, expropriation is the appropriate procedure; to achieve the same ends by placing the owners in the untenable situation they find themselves now, is, in my view, unjust and oppressive.

Assuming that it was not the Government's intention unfairly to pressure the owners to sell, the issue now is how best to remove such pressure, while at the same time permitting your Ministry to carry out the Government's objective of reducing the danger posed by the Barrier to life and property.

In my letter of December 19, I proposed a number of alternative measures which I believed would achieve these objectives. In light of your comments and after further consideration, I have decided to make the following recommendation which I believe will rectify the complaints of owners of improved properties that they are being unfairly pressured to sell. I deal with the same complaint by individuals who have already sold their properties to the Ministry later in this letter. I therefore recommend:

1. a) That the deadline for acquisition of properties by the Ministry be abolished, and that the Ministry's offer to purchase each property remain in effect until such time as all of the properties have been sold to the Ministry; and

b) That the provisions of section 4 be waived by the Ministers of Environment and Municipal Affairs to the extent that owners are permitted to undertake such improvements, renovations, alterations, and other measures which are necessary to maintain and use the properties as they are now being used, but not to the extent that the values of the properties would be substantially increased.

This of course will mean that owners of improved properties (as currently interpreted by your Ministry) will be permitted to continue to use their properties as they are now doing. They will not be permitted to sell or lease to third parties or significantly develop their properties as prescribed by section 4 of the OIC. They will, however, know that they will be able to sell (at fair market value as in Recommendation #2 below) and thus recover their investment at such time in the future as they decide. I believe that implementation of this recommendation will meet the Government's objectives of reducing the danger to life and property (as individuals sell out), and of permitting owners to retain their properties if they wish.

However, even with the implementation of Recommendation #1, refusing to sell one's property to the Ministry is not a reasonable and viable option because of the Ministry's current policy of calculating compensation according to the fair market value of the property on May 28, 1980. I discuss this issue below.

D. Compensation for Improved Properties Not Yet Sold

A number of individuals complained that the Ministry has unfairly refused to offer fair compensation for improved properties yet unsold. I have decided that these complaints are substantiated for the reasons set out in section 4(a) of my letter of December 19. I also believe that the option of refusing to sell one's property to the Ministry is not a reasonable and viable option unless owners can be assured that they will receive fair compensation for their property at such time in the future as they decide to sell to the Ministry. I base this view on the hypothesis that no reasonable person would buy a property, at this time in this area, which could not appreciate beyond its value on May 28, 1980; it is equally neither reasonable nor viable to continue to own such a property.

I have not accounted for the effect on the market of the release of the Report of the Garibaldi Advisory Panel because, in my view, the effect would be negligible. I say "would be" because there is no empirical evidence by which to determine the effect of the Report on the market; the OIC prevented any market transactions after the release of the Report. To assist in determining this issue, my staff has consulted with Mr. Tom Swann, of Cunningham & Rivard Appraisals (Vancouver) Ltd., Mr. Bill Bridge, of Fred Lee & Associates Ltd., and Mr. Alfred Penny, of Penny & Keenleyside Appraisals Ltd., all of whom are accredited real estate appraisers and who are familiar with recent events in the area. These gentlemen were unanimous in their opinion that, if the OIC were repealed, these properties would appreciate significantly as have properties in neighbouring areas, notwithstanding the fact that the Report of the Garibaldi Advisory Panel has been released. Mr. Don Meikle, of Elander & Elander Adjusters Vancouver Ltd., who is also an accredited real estate appraiser and who has negotiated the property acquisitions in this area on behalf of the Ministry, expressed a contrary opinion.

Given this consideration; the fact that there are no alternative buyers because the market was eliminated by the OIC; and, the fact that no interest in the property transfers to the Government until the date of sale, I recommend:

2. That compensation paid for properties sold to the Ministry, after the implementation of Recommendation #1, be based upon the fair market value of the property on the date of sale, and that, for this purpose, fair market value be determined by multiplying the fair market value of the property on May 28th, 1980, by a factor based on the average rate of appreciation of similar properties in neighbouring communities since May 28th, 1980.

E. Compensation for Properties Already Sold to the Ministry

The implementation of Recommendations #1 and #2 will not resolve the complaints, received from individuals who have already sold their properties, that the Ministry unfairly pressured them into selling their properties and refused to pay fair compensation. For the reasons set out earlier in this letter, and in sections 3 and 4(a) of my letter of December 19th, I have decided that these complaints are substantiated.

As you know, when Government lawfully requires the transfer of land by way of expropriation, the courts have required that compensation be assessed and paid to the owner according to its "value to the owner". This principle of valuation was defined by the Supreme Court of Canada in Woods Manufacturing Co. Limited v. The King, 1951 S.C.R. 504, as "... the owner at the moment of expropriation is to be deemed as without title . . . and the question is what would he, as a prudent man, at that moment pay for the property rather than be ejected from it." I understand that in most cases "value to the owner" varies little from one based on fair market value alone.

While these prior owners were not lawfully required to sell their properties, I have found that they were unfairly pressured to sell; I believe that compensation should be assessed on the same basis. I therefore recommend:

3. That the amount of compensation paid for properties already purchased by the Ministry in the OIC designated area, be reassessed on the basis of "value to the owner", as of the date of sale, and that any amounts calculated in excess of that amount already paid, be paid to the vendors of these properties.

F. Compensation for Unimproved Properties

Recommendation #1 does not resolve the complaints received from owners of unimproved lands. These people are now in the situation where they own land which may not be sold, leased, developed, improved, or altered. Their complaint is that the Ministry has improperly discriminated against them by refusing to acquire and pay compensation for their properties, while at the same time acquiring and paying compensation for improved properties. Given my belief that the OIC does not preclude the acquisition of these lands, I have decided that these complaints are substantiated. In my view, leaving these individuals in their current situation is unjust and oppressive. I therefore recommend:

4. (a) That the Ministry offer to purchase all unimproved properties in the OIC designated area.

If the Ministry agrees to offer to purchase unimproved lands, these individuals will then have no reasonable and viable option except to sell, unless they are permitted to construct residences and otherwise develop their properties to an extent greater than that provided in Recommendation #1. However, such permissions would not be consistent with the Government's intentions to halt the development in the area (and thus prevent the value of property in the area from increasing). I therefore do not recommend that such permissions be given. However, given that owners of unimproved lands would then be subject to unfair pressure to sell, I believe their properties ought to be assessed according to "value to the owner" as of the date of sale. I therefore recommend:

4. (b) That compensation for unimproved properties be calculated according to "value to the owner" on the date of sale; and, to the extent that fair market value is a factor in these calculations, that fair market value be determined according to the formula prescribed in Recommendation #2.

G. Terms of the Agreements of Sale

Vacant possession - I have decided that the complaints, that the Ministry unfairly refused to vary this term to allow the vendor to remain in the premises for a short period of time after the date of sale, are substantiated for the reasons set out under this heading in my letter of December 19. I appreciate your concern that this "would put the Government in the unacceptable position of allowing people to remain in houses owned by Government when the Government believes that such an occupancy poses a threat to life." However, I cannot agree with this view given your agreement that one of the Government intentions was to allow individuals to retain their property; surely it makes little difference that the Government is the owner of the premises for a short period of time. I therefore recommend:

5. That where vendors express the wish to be permitted to remain in the premises, without a tenancy agreement, for a period of time not exceeding one month after the date of sale, the terms of the agreement of sale be amended to provide for this.

Right of first refusal - I appreciate your agreement on this matter and your action in having this proviso added to all agreements. Assuming that this includes agreements of sale already executed (thus ensuring equitable treatment of all vendors), and that such terms will be registered in the Land Title Office as a charge against the Ministry's title and will run for a period of time not less than twenty years, I will not make any recommendations on this matter. Please advise if you are not in agreement with these assumptions.

Lease back option - I have decided that the complaints that the Ministry has unfairly refused to allow vendors to lease back their property until a relocation site is available for occupation are substantiated, for the reasons set out under this heading in my letter of December 19. If however Recommendations #1 through #4 are implemented, then owners will not be unfairly pressured to sell and may reasonably retain their properties until a relocation site is available. I have therefore decided not to make a recommendation on this issue at this time.

H. Relocation

I thank you for your comments on this issue, and I may take this matter up with the Ministry of Lands, Parks and Housing. I would not expect however, that any action in this respect would cause me to modify Recommendations #1 through #5, above.

I. Lack of Notice and Information

I have decided that the complaints I received, that the Ministry failed to give adequate notice to owners of the effects of the OIC on their properties, and has not provided them with complete and adequate information about the terms of the Ministry's acquisition program, are substantiated. I appreciate your willingness to instruct your staff to prepare and send the information outlined in points (a) and (b) on page 15 of my letter of December 19. I do believe a useful purpose would still be served by providing the owners with this information, but would ask that it be sent out only after some agreement has been reached between us with respect to the above recommendations.

With respect to providing owners with copies of the appraisals done by Penny & Keenleyside Appraisals Ltd. and a reiteration of the invitation to owners to get an independent appraisal, as outlined in (c), Mr. Don Meikle at a meeting on December 10, 1980, informed my assistant, Rick Cooper, that he had been instructed not to provide the owners with copies of the written appraisals. If this policy has now been changed, as suggested in your letter, I am pleased to hear of it. However, I would recommend:

6. That copies of the written appraisals done by Penny & Keenleyside be provided to the owner, or prior owner, of each property appraised, and that those who have not sold be advised of their right to obtain an independent appraisal and of the Ministry's willingness to negotiate the amount of compensation which should be paid for each property.

With respect to the information outlined in (d) on page 15 of my letter of December 19, concerning relocation, I thank you for your efforts in this regard.

I am particularly anxious that these complaints be resolved in the very near future. As you know, there are a large number of people involved in this matter, and the considerable anxiety they are now experiencing is a direct result, as I have found above, of the unfair actions of your Ministry. Consequently, in my view, there is a great onus on your Ministry to rectify these complaints quickly. For your convenience, I have consolidated my recommendations above in the Appendix to this letter.

Pursuant to section 23 of the Ombudsman Act, I would request that you inform me within two weeks from the date of this letter of the steps which have been or are proposed to be taken to give effect to these recommendations. If no steps have been taken or are proposed to be taken, please advise me of the reasons for this by the ~~same~~ date. Thank you for your continuing cooperation in this matter.

Your sincerely,

Karl Friedmann
Ombudsman

cc: Mr. John Taylor
Deputy Minister
Ministry of Municipal Affairs

APPENDIX

Recommendations of the Ombudsman, made pursuant to section 22 of the Ombudsman Act, R.S.B.C. 1979, c. 306, pertaining to the Garibaldi Complaints

1. a) That the deadline for acquisition of properties by the Ministry be abolished, and that the Ministry's offer to purchase each property remain in effect until such time as all of the properties have been sold to the Ministry; and

b) That the provisions of section 4 be waived by the Ministers of Environment and Municipal Affairs to the extent that owners are permitted to undertake such improvements, renovations, alterations, and other measures which are necessary to maintain and use the properties as they are now being used, but not to the extent that the values of the properties would be substantially increased.

2. That compensation paid for properties sold to the Ministry, after the implementation of Recommendation #1, be based upon the fair market value of the property on the date of sale, and that, for this purpose, fair market value be determined by multiplying the fair market value of the property on May 28th, 1980, by a factor based on the average rate of appreciation of similar properties in neighbouring communities since May 28th, 1980.

3. That the amount of compensation paid for properties already purchased by the Ministry in the OIC designated area, be reassessed on the basis of "value to the owner", as of the date of sale, and that any amounts calculated in excess of that amount already paid, be paid to the vendors of these properties.

4. (a) That the Ministry offer to purchase all unimproved properties in the OIC designated area.

4. (b) That compensation for unimproved properties be calculated according to "value to the owner" on the date of sale; and, to the extent that fair market value is a factor in these calculations, that fair market value be determined according to the formula prescribed in Recommendation #2.

5. That where vendors express the wish to be permitted to remain in the premises, without a tenancy agreement, for a period of time not exceeding one month after the date of sale, the terms of the agreement of sale be amended to provide for this.

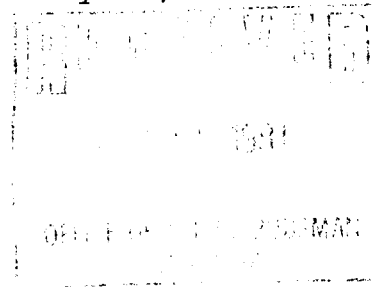
6. That copies of the written appraisals done by Penny & Keenleyside be provided to the owner, or prior owner, of each property appraised, and that those who have not sold be advised of their right to obtain an independent appraisal and of the Ministry's willingness to negotiate the amount of compensation which should be paid for each property.

APPENDIX G



February 16, 1981

Dr. Karl A. Friedmann,
Ombudsman,
8 Bastion Square,
Victoria, British Columbia.
V8W 1H9



Dear Dr. Friedmann:

Thank you for your letter dated February 2, 1981, concerning Order-in-Council 1185/80, the contents of which have been noted. I have little to add to my previous correspondence in this matter except to point out that it is our intention to allow normal repairs under Section 4, although to date we have received no applications from private landowners.

For your information, we are well advanced in the location of a new subdivision, are in the process of modifying the Order-in-Council to more accurately define the hazard area, and in the near future hope to issue a land use plan covering the hazard area.

Yours very truly,

B. E. Marr,
Deputy Minister of Environment.

APPENDIX H



March , 1981

Dear

I am pleased to report the following progress as it relates to Order-in-Council 1185-80 programs and procedures.

A. Subdivision:

- The Ministry of Lands, Parks and Housing has assumed responsibility for subdivision site selection, development and disposition.
- The subdivision site will be selected and announced at the earliest opportunity.
- Serviced subdivision lots will be marketed to eligible ratepayers at a price equal to their market value as of May 28, 1980.
- Subdivision lots will be allocated by draw with offers for sale subject to:
 - accepting compensation on existing lots
 - signing off all further claims
 - construction of a home within a 1 year period.
- Remaining lots will be disposed of at current market value on the open market.

B. Acquisition:

- Written appraisals are being processed by the Crown's property negotiators and will be made available to applicable ratepayers at the earliest opportunity.
- A negotiation/appeal procedure has been finalized and will be applied to any disputed assessments.

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C. Land Use:

- Land use policies and procedures are being finalized and will, once enacted, ensure that all uses of the Civil Defense Zone are in keeping with the intent of Order-in Council 1185-80.

D. Unimproved Property:

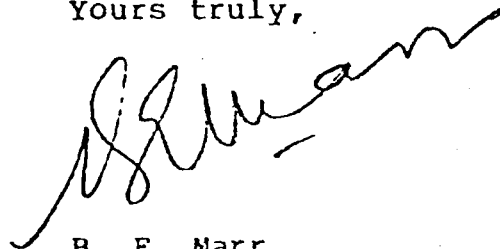
- The question of unimproved property acquisition is being referred to Cabinet committee and will receive full Cabinet consideration in the near future.

E. Schedule Adjustments:

- A rescheduling of the area subject to Order-in-Council 1185-80, to more precisely reflect the hazard area, is being finalized at this time.

I have attached a copy of Order-in-Council 1185-80 for your reference purposes. Modifications to this Order are being investigated at this time and will be brought to your attention as soon as they are proclaimed.

Yours truly,

A handwritten signature in dark ink, appearing to read 'B. E. Marr', written in a cursive style.

B. E. Marr,
Deputy Minister of Environment.

Attachment.