

SPECIAL REPORT NO. 19
to
The Legislative Assembly of British Columbia

**An Investigation into the Instability
and Recession of Willemar Bluffs
(Regional District of Comox-Strathcona)**

**Ombudsman
Province of British Columbia**

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Open Letter from the Ombudsman June 1997

Since 1987 my Office has been investigating a complaint about excessive erosion at Willemar Bluffs, near Comox, British Columbia. Numerous parties complained that the Bluffs had begun to erode at excessive rates since a sewer pipeline was installed along the foreshore in 1982. In the ten years my Office has been involved with this matter we have undertaken extensive and repeated consultations to try to seek consensual resolutions to this very problematic situation. We have particularly focussed our resolution efforts at the Regional District of Comox-Strathcona, which was granted conditional approval to install the pipeline, and the (now) Ministry of Environment, Lands and Parks, which granted the conditional approval.

Despite these lengthy and repeated efforts, the parties have been unable to achieve consensual resolution, and undue erosion continues to cause grave concern. One home is currently a mere ten metres from the edge of the very unstable bluff, and it is clearly foreseeable that the home and perhaps its occupant will fall onto the beach 150 feet below unless a comprehensive solution is found in the very near future.

Having exhausted all possibility of consensual resolution, I concluded my investigation into this matter in November 1996. I found that the Regional District of Comox-Strathcona had wrongfully failed to ensure that the conditions attached to the sewer installation approval had been fulfilled, most particularly the requirement that the foreshore be returned to its natural condition following installation of the pipeline. I recommended that the Regional District undertake specified restoration work to the foreshore along the Bluffs. The Regional District has refused to accept my findings and recommendations, and in the circumstances I am compelled to draw this very important matter to the attention of the Legislative Assembly, the Board of the Regional District, and the people of British Columbia by way of this Special Report, pursuant to section 31(3) of the **Ombudsman Act**, R.S.B.C. 1996, c. 340.

My jurisdiction over local governments was proclaimed in March 1995, and I recognize that local governments may face change and challenges in being subject to Ombudsman review. However, the fact that the Legislature has entrusted local government to the Ombudsman's scrutiny in my view affirms a commitment to local government as a strong and important component of our

democratic fabric, and along with this responsibility and authority must go administrative accountability.

It is disturbing that, in one of the infrequent cases where I make formal findings against a local government, that authority has not to date been prepared to honour those findings and recommendations. I hope that this Special Report will cause the Regional District to reconsider its position and to work with all relevant agencies to address this longstanding concern.

Yours very truly,

A handwritten signature in black ink, reading "Dulcie McCallum". The script is fluid and cursive, with a long, sweeping underline that extends to the right.

Dulcie McCallum
Ombudsman for the Province of B.C.

Introduction

Willemar Bluffs is a natural quadra sand deposit located along the beachfront, approximately two km. east of Comox, British Columbia. The Bluffs rise from the ocean approximately forty metres in places, and extend several hundred metres at a point between Point Holmes and Goose Spit. Until the early 1980s, the Bluffs were covered in most places with vegetation, including alder and fir trees, brush, flowering plants and grasses, and the toe of the Bluffs was protected by a layer of beach rock. This vegetation and rock, which had accumulated over a period of many decades, served to protect the Bluffs from excessive erosion. In addition, a reef extended perpendicular from the toe of the Bluffs at a location known as Stoker's Point, which had for years served to further protect the Bluffs from undue erosion as it diffused wave impact and limited the natural process of sand being swept away along the base of the Bluffs.

In the early 1980s the Regional District of Comox-Strathcona proposed to install a sewer pipeline along the foreshore of Willemar Bluffs, to transport sewage from the City of Courtenay to a treatment station. Approval for a "sanitary sewer pipeline over unsurveyed foreshore" was granted by the then Ministry of Lands, Parks and Housing on July 23, 1982. This approval was granted "subject to the following terms and conditions." Among those terms and conditions were:

The foreshore is to be returned to its natural condition after construction is completed.

Late spring and summer (i.e. March to October) are the recommended months for construction. Mitigation may be called for during construction.

All contractors are to be made aware of the environmental concerns and performance bonds posted to ensure their compliance.

Because of delays in the project, the sewer pipeline was installed in November-December 1982, when high tides and strong storm conditions existed. During this stormy, high-tide period, part of the disturbed foreshore was washed out to sea, and it was necessary for the

contractor to stabilize the pipeline work by utilizing rock from the reef and foreshore. This information is supported by numerous residents of the area who witnessed the construction, as well as through photographic documentation.

Shortly after this construction, numerous individuals who lived and owned property atop the Bluffs complained that, as a result of the construction, they had experienced accelerated and undue erosion, with the result that they were losing considerable portions of their property. As the ocean undercut the Bluffs, large portions of property atop the Bluffs would fall, and the bank material would be swept away along the foreshore. The process would repeat itself in a cyclical nature. While complainants acknowledge that over the long term natural erosion patterns were evident on Willemar Bluffs, like similar bluffs in the Gulf Islands area, they note that the frequency and magnitude of erosion events has, since the installation of the sewer pipeline, come to greatly exceed the historic pattern. In support of this they rely on their long time presence in the area (in one instance seventy-five years) as well as maps, surveys and photographs of the Bluffs.

On November 22, 1983 the Regional District wrote one of the property owners in respect of the concerns expressed regarding the reef destruction. The letter stated in part:

The matter of [the reef at] Stoker's Point has been recognized as a deficiency to the foreshore contract. Pursuant to Article 27 to the contract, the contractor is to be served with 10 days notice to correct the deficiency.

In April 1985 some work was undertaken through holdback funds to restore the reef. This restoration work apparently consisted of the dumping of several loads of rock, which did not prove to be similar in size, shape or stability to the original reef. The "restored" reef was not able to withstand the natural ocean action, such that within a period of months some rock sank into the sand and other rock was scattered. At this time there is no reef present comparable to that which is clearly noted in historic aerial photographs of this area.

The residents affected by this matter were very active early on in seeking to have their concerns addressed. For a variety of reasons these residents have had difficulty in getting all involved parties to respond to

their requests. It is very clear that the matter has had a profound effect not only on the property, but also on the lives of affected residents, many of whom have a deep and personal commitment to the land in question. One description of this issue made by affected home owners is as follows:

The upset to Bluff property owners' lives brought about by this sewage disaster is immeasurable. Aside from seeing their magnificent natural area, with its delightful shoreline community of birds, animals, marine life and vegetation totally destroyed as their properties drop away by the ton, there is the constant strain of taking photographs and measurements, accumulating evidence, trying to get beach repairs made and redress for loss of land, as well as depression to their property values. Writing letters, making telephone calls, attempting to get action from politicians, and recording the disaster as it proceeds, and being brushed off by each level of government takes an awful toll on the lives of residents...

Process of the Ombudsman Investigation

My Office began its investigation in January 1987. At that time it became apparent that there were two principal governmental agencies that were integrally involved with the situation at Willemar Bluffs. These were the Regional District of Comox-Strathcona, which was responsible for the sewer installation contract, and the then Ministry of Lands, Parks and Housing, which granted the Regional District the license to undertake the work in question on Crown foreshore. At that time my Office did not have jurisdiction over local governments, but my Office did consult extensively with both levels of government. Over the course of a number of years my Office sought to obtain information regarding the nature of the problem in question, and we worked very hard to try to bring all affected public bodies together in the hopes of achieving a consensual agreement towards resolution of the problem.

This was not always an easy process. As is the case with any difficult problem involving complex geophysical issues and related ocean dynamics, numerous technical issues arose. Not all public bodies were prepared to acknowledge that the rate of erosion had increased, or if it had, that the installation of the sewer pipeline had any bearing on this

matter. Similarly, there were debates as to who would be responsible, even if it could be shown that the installation of the pipeline did result in undue erosion of the bluffs.

Notwithstanding the unwillingness of the various public bodies to accept any responsibility for this difficult situation, numerous efforts to address the problem were explored. In 1988-89 discussions were held, involving this Office, regarding possible settlement of the outstanding claims through a joint contribution of \$179,000 to restore the reef and foreshore in question. These discussions arose in the context of several civil claims that had been commenced by the property owners against the Regional District of Comox-Strathcona, the Ministry of Environment and Crown Lands, and the engineer and the contractor responsible for the work. Unfortunately, these settlement discussions did not come to fruition. One party showed minimal interest, and the lawyers for certain public bodies took the position that any such settlement might prejudice their client's position regarding responsibility for this matter, and that it may have implications with respect to insurance. This was particularly regrettable given the fact that, according to my understanding, the various home owners would have been prepared to settle their claims without any compensation for lost property, so long as the required remedial work was completed. Furthermore, they were prepared to sign documents which would have released the authorities from any further claims in the event the remediation did not prove successful.

Over the next several years my Office continued its work to seek a consensual resolution of the matter, and continued to meet and consult with all affected parties. While there was some debate as to the specific cause of the erosion and who may be responsible for any harm, it appeared that all public bodies remained interested in securing restorative work, provided that they would not bear the burden of legal responsibility.

Part of the discussions that were ongoing at this time included consulting with provincial government agencies to determine whether the province might be willing to contribute towards the cost of such restoration, which by this time was estimated to be approximately \$250,000. As a result of these efforts, the province agreed to support \$250,000 in funding by way of an *ex gratia* payment. On March 5, 1993 a meeting was facilitated by my Office with the various parties, which resulted in apparent agreement that the restoration works should be

completed, and my Office agreed to draft a letter setting out a proposed comprehensive plan for such a project. Such a draft letter was circulated on April 6, 1993 and it contained, among other things, the following terms:

- The work of constructing a foreshore reef would be undertaken by the Regional District with the *ex gratia* grant of \$250,000 from the provincial government. In exchange for the grant the Regional District was to:
 - a. *Implement a Ministry-approved construction setback by-law governing development on Willemar Bluff.*
 - b. *Obtain restrictive covenants under section 215 of the **Land Titles Act** for all bluff properties, requiring Ministry approved construction setbacks for all future development.*
 - c. *Construct a properly designed and engineered reef on the foreshore off Willemar Bluff.*
 - d. *[R]etain a Professional Engineer experienced in coastal engineering to design the works and provide quality control during construction as project manager, subject to the approval of the Ministry of Environment. During the project, Mr. Brendan Holden, P.Eng. [Coastal/Oceans Engineer, Ministry of Environment, Lands and Parks] will monitor and review the project and assist and advise the project manager and the Ombudsman's Office.*

The location and general dimensions of the restoration will conform to coastal engineering requirements and consider information from old photographs, residents and any other beneficial sources.

- e. *Be responsible, with assistance from the Ombudsman's Office, for obtaining all rights-of-way and accesses: in this respect, initial approaches have been made by the Ombudsman's Office with:*

- i) *Ministry of Environment, Van. Island Region Acting Regional Director, Max Nock (Use of beach/foreshore by equipment)*
- ii) *Canadian Coast Guard, Vancouver Comox area member, Brian Balfe (**Navigable Waters Protection Act**)*
- iii) *Federal Fisheries and Oceans, Nanaimo Fisheries Biologist, Bruce Hillaby (Federal Fisheries and Oceans interests).*

f. Be responsible for future maintenance, if any, of the works.

- The owners of all affected properties would discontinue legal action and complete releases in favour of the provincial government and the Regional District.
- The project was to be a "once only" initiative to replace the natural reef, with the understanding that it was not expected to reduce natural erosion.
- One house, which was in most immediate danger of falling onto the beach below, would be relocated (with the costs paid by the Provincial Emergency Program).
- The Office of the Ombudsman would act as the coordinating Office through the project.

On May 5, 1993 the Regional District wrote my Office, with a copy to the Ministry, to indicate that it felt the proposed resolution as outlined in the draft letter was different from what they had agreed to at the March 5, 1993 meeting. The Regional District noted, among other things, concern that:

- \$250,000 would not cover all costs of the project.
- They had understood the Office of the Ombudsman would obtain all signatures from the landowners in the area.
- Requesting restrictive covenants on the affected properties regarding setbacks, and implementing a set-back by-law may have implications for potential future liability.
- The Regional District should not be responsible for design and overseeing of the project.
- The Regional District should not be responsible for maintenance of the restoration works.

In this letter the Regional District also stated:

Our understanding on March 5 was simply that the Regional District would act as a form of "paymaster" only and would release funds on a progress payment basis, upon the approval of the engineer hired by the Provincial Government. Any participation of the Regional District would be subject to the approval of the Regional District Board. It was also our understanding that any payment for engineering services would be in addition to the \$250,000 and would be covered by the provincial government. We reiterate that the Regional District has not in the past nor at the present time, assumed or admitted any responsibility for erosion of Willemar Bluffs... [W]e point out that your draft letter of April 6, 1993 would simply allow the Ministry of Environment to make the ex gratia payment and saddle the Regional District with the responsibility to put the works into effect as well as assume any long-term potential liability.

It is important to note that while the Regional District was not prepared to accept a major role in the restoration process, and while it was careful to not accept any liability for the matter, it neither contested the need for restoration nor the principle that an agreement was reached at the March 5, 1993 meeting regarding the general need for restoration.

On July 19, 1993 the Ministry of Environment, Lands and Parks wrote the Regional District in respect of the concerns noted by the Regional District and stated:

While we see certain areas where the ministry can assist in implementing the proposal, it is considered that the conditions of the grant would remain essentially as stated in the April 6, 1993 draft you reviewed. The following are the arrangements that the ministry would expect to be put into place...

I note that there is a short construction window and recognize that there must be early agreement if the Regional District of Comox-Strathcona wishes to avail itself of the opportunity afforded by the offer of a grant.

On July 28, 1993 the Regional District wrote the Ministry to advise that on July 26, 1993 the Regional District Board passed a motion stating:

THAT with regard to the Willemar Bluff Reef Restoration Project, the Regional District advise the Ministry of Environment that we can not accept the conditions in their letter of July 19, 1993 as there is [sic] obligations within that letter that the Regional District can not accept and perform.

The Ministry replied to this letter on August 13, 1993 and stated:

The conditions of [the July 19, 1993] letter are similar to those applied to other works assistance projects, although, some special conditions are necessary to protect both the regional district and the province in the event of future erosion complaints...

I regret that the offer of an ex gratia payment must lapse at the end of the current fiscal year.

It was with great regret that this Office was, at this point, forced to once again revisit this matter. This was particularly unfortunate, as the Regional District was not amenable to a potential consensual resolution that would have them accept any significant role or responsibility (financial or otherwise). Mindful of the difficult position all parties were in, my Office once again continued to explore possible solutions to this problem.

On September 7, 1994 another meeting was held with officials from the Regional District, the Ministry of Environment, Lands and Parks, the Ministry of Municipal Affairs and this Office, at which time the previously noted restoration plan was again discussed. Following this meeting my Office wrote the Ministry of Environment to determine whether there was still the potential for the provincial government to provide funds for the restoration work by way of *ex gratia* payment. However, at a meeting held on November 1, 1994 officials from the Ministry of Environment indicated that they did not have funds available for this project. Subsequent discussion between my Office and the various parties involved in the matter have not proven effective, and it is my conclusion that all reasonable efforts at consensual resolution have been fully explored in the ten years my Office has been involved with this matter. In these circumstances, it has become necessary that I

conclude my investigation and determine whether findings are warranted against an authority within the Ombudsman's jurisdiction (which, as of March 1995, includes the Regional District of Comox-Strathcona).

Findings and Recommendations

- (i) *How has the situation of Willemar Bluffs changed following installation of the pipeline?*

It is clear from a review of historic photographs that the reef at Stoker's Point was not in the same condition following the installation of the pipeline as it was prior to this time. A review of aerial photographs taken in 1968, 1975, 1981 and August 1982 show a distinct reef, which was connected to the toe of the Bluffs. A 1984 photo shows a significantly diminished reef, which is no longer connected to the toe. A 1986 photo shows a somewhat more prominent reef, but which again is not connected to the toe of the Bluffs. Similar photographs were provided to my Office from residents of the area. This information has satisfied me that the reef in question had been clearly and significantly diminished as a result of the installation of the pipeline, and that it is not in its natural condition at this time.

With respect to the rate of erosion, experts have indicated that the natural rate of erosion for quadra sand bluffs in the Gulf Islands area, of which Willemar Bluffs is typical, is approximately twelve inches per year on average. My Office has interviewed a number of individuals who have lived in the Willemar Bluffs area for many years, and these individuals have been able to provide a great deal of information in terms of historic photographs and descriptions. This information indicates that the rate of erosion of Willemar Bluffs was likely at or below such an average rate in the decades prior to the installation of the sewer pipeline, and that erosion since the installation of the pipeline is well in excess of this average.

In addition to the information provided by the complainants, during the years in which my Office has sought to develop a consensual resolution to this problem, members of my staff have visited the site regularly. These visits have also confirmed that exceptional rates of erosion continue to this day. In numerous instances several feet of property fell onto the beach below in a storm, only to be washed out to sea in short order. We have also seen many established trees on both the face and the top of the Bluffs fall in recent years. In one notable event in January 1987, one property lost a 105 foot wide strip that slipped 82 feet onto the beach, creating an avalanche of sand. Our file records indicate that,

prior to 1982, one home in question was approximately 70 feet from the edge of the Bluffs, and that only several feet of natural erosion had occurred in the previous 20 years. As of March 1996, that distance was reduced to approximately 50 feet, and at present, the minimum distance between the house and the edge of the cliff is approximately 30 feet. As a result, both the home and its occupant are in obvious and imminent danger.

During the course of this investigation, a variety of technical reviews have been undertaken and professional opinions expressed. Some such information has indicated that the installation of the pipeline has expedited the erosion, although some reports have also focused on natural forces as the cause. It is of course extremely difficult to achieve a definitive substantive determination of such issues in the context of complex ocean and geophysical factors, particularly having regard to the fact that any such review or report necessarily has potential implications for attribution of responsibility. In my view, the evidence on balance is clear that the rate of erosion since the installation of the pipeline is well in excess of the historic natural rates, and that remedial work clearly is required.

I believe there is one other very important factor, which clearly supports my conclusion in this regard. That is the simple fact that all public bodies involved have in the past reached tentative agreement that such work should indeed proceed. As noted above, the July 1993 tentative agreement contained very specific provisions regarding the work required to address the situation, and it was most unfortunate that a dispute as to the Regional District's role in effecting the actual restoration caused this agreement to falter. I believe this clearly indicates that, notwithstanding the positions parties have taken to dispute legal liability, all have acknowledged that this work needs to be done.

(ii) *What remediation efforts are required to address the present situation?*

(a) Reef restoration

Several technical reviews have been conducted by experts in relation to the issue of erosion at Willemar Bluffs, with particular attention to the issue of restoration of the reef

in question. Two reports were prepared by and for the Ministry of Environment, Lands and Parks in 1994 and 1995. Each recognized that there was a relationship, albeit delayed, between erosion at the base of the Bluffs and collapse of the Bluffs at the top. These reports also noted that a proposed reef restoration would not completely stop all erosion, and that it may have implications for adjoining beach areas including nearby Goose Spit, which requires a steady supply of sand for its own stability. One report questioned the efficacy of reef restoration, but went on to suggest such could be supported simply for "aesthetic benefit."

In early 1995 my Office requested that another report be prepared by Dr. Brian Bornhold, Coastal Engineer, Pacific Geoscience Centre, Geological Survey of Canada. Dr. Bornhold stated the following regarding a proposed reef restoration:

Suggestions for Remediation

The following suggestions for remediation will have little impact on the rate of retreat of the upper parts of Willemar Bluffs in the short term. They will continue to erode for many years before returning to their former condition characterized by localized and episodic retreat. It should be noted that it is not expected that Willemar Bluffs will ever be completely stabilized, nor is it even desirable that it should be. The material derived through erosion of these bluffs supplies sediment to the Goose Spit system; without it the beach to the west would diminish in width and the spit would undergo significant erosion.

The aim of the suggested measures is to return the beach area to a condition as close as possible to that which existed prior to construction of the pipeline and thereby to afford some protection to the toe of the bluff from wave attack. These are merely general suggestions for remedial action; any final decisions and design specifications (e.g., sizes of material to be used and its distribution) should be developed

by a coastal engineer in consultation with geologists and physical oceanographers.

- 1) Any remediation should be conducted in such a way as to appear as "natural" as possible (i.e., aesthetically acceptable to the other many users of this area). Material should be of similar character (i.e., size and shape) to that which is found on natural beaches in the area; it should **not** consist of over-sized blocks of quarried granitic material.
- 2) In the area between existing protective structures, the berm should be replaced by coarse gravelly to cobbly material in such a way as to replicate a natural winter storm profile. This berm should consist of coarser material (boulders and cobbles) rising significantly above the high tide level (probably initially about 2 metres above) at the base of the bluffs and tending seaward to finer gravelly material. This berm should be sufficiently wide so as to accommodate some redistribution as a result of severe storms and some burial by continued slope failures.
- 3) If possible, larger blocks as well as boulders and cobbles should be added to intertidal reefs to afford somewhat greater protection to the beach from storm wave attack. Past aerial photography may assist in the selection of appropriately sized material and in its distribution.
- 4) Care should be taken that sufficient sand continues to be delivered to the beach to maintain downstream beaches, including Goose Spit. Careful analysis will be required by competent coastal geologists/physical oceanographers in order to ascertain the sediment budget required to maintain these beaches. The coastal engineer responsible for overseeing the remediation would then be responsible for determining the most appropriate design, which would allow for protection of the base of the bluffs while permitting sufficient sand to enter the longshore drift.

These measures, as indicated above, should provide some stability to the base of the bluffs by protecting them from wave attack under normal conditions. There is little that property owners can do to reduce the rate of erosion on the upper parts of the bluff. Indeed these areas will not regain their former quasi-stability until they have had an ample opportunity to erode back to a lower overall angle of repose. Erosion of the upper parts of the bluff will result in continued significant loss of property and is expected to threaten some dwellings, most particularly the Buchanan residence, over the next several years. It is strongly recommended that measures be taken to ensure, to the extent possible, the safety of residents in areas that will continue to be subject to rapid rates of retreat.

Since some of the erosion in the upper parts of the bluff may be anthropogenic (related to clear-cut logging and septic fields), some reduction in rates of retreat could perhaps be achieved through addressing the groundwater drainage/seepage problem. Soils engineers could perhaps advise on the likely success of reducing groundwater flows on diminishing the erosion on the upper bluffs.

The conditions noted by Dr. Bornhold are consistent with the substantive nature of the tentative agreement that was reached in the March 1993 meeting noted above.

I am satisfied that restoration work to the toe of the Bluff and the reef in question are warranted in the circumstances, as it has been stated that this may allow a stable angle of natural repose of the Bluff to be established in this area, and that it would likely significantly limit **extraordinary** erosion. Certain natural erosion, at the historic natural rate, will of course always occur and any restoration effort must have as its principle to ensure that the reef restoration would, as closely as possible, restore the natural circumstances that existed before the installation of the pipeline.

- (b) Installation of rock along the base of the Bluffs

While most attention has focused on restoration of the reef as the requisite remedial work, two property owners in the Willemar Bluffs area, on their own initiative, installed large rock at the base of the toe in order to assist with stabilization. This has allowed the Bluff to stabilize and become covered with vegetation in these locations. It has been suggested that it would perhaps be useful to consider installation of such rock along the other properties in question. It would, however, also be necessary to ensure that such work would not have an undue impact on erosion in other nearby locations, and on the natural supply of sand to Goose Spit. I believe that this matter should be explored further in the context of the remedial efforts noted above.

- (c) Relocation of the home currently in danger of falling over the Bluffs

It is imperative that I stress the need to relocate the home, which is at present dangerously close (approximately ten metres) to the edge of the Bluffs. It appears clear that even if remedial work is undertaken, the house cannot be saved in its present location, as it will fall before the Bluffs obtain a natural angle of repose. Although the Provincial Emergency Program has previously indicated it would be prepared to effect relocation of the home, the owner has been adamant that the larger issue of beach and reef restoration must occur before she will even contemplate such relocation. It is my understanding that the Provincial Emergency Program remains willing to assist with relocation of the home. I strongly believe that all public bodies must revisit the potential relocation of this home immediately. Otherwise, it seems clearly foreseeable that the home will fall over the Bluffs in the near future, and the life of the home owner is in very significant danger at this time. In addition, the present state of the Bluffs presents a danger to persons using the beach below.

One final word bears mention in relation to the need for remedial work. Throughout the history of this project,

various representatives of the public bodies have indicated that remedial efforts may be problematic in that any such work could have implications for other areas of the Bluffs, or that unduly limiting erosion of the Bluffs may have implications for the feedings of sand further down at Goose Spit. While it is acknowledged that these are important factors to consider in the technical development of any restoration plan, it is most difficult to accept any assertion that restoring the foreshore to its natural condition would be an unacceptable alteration of the natural balance. Similarly, I find it most disturbing that, while the complex balance of forces has been cited as a factor to avoid remedial work, it was not a sufficient factor to forestall installation of the pipeline in the first place.

(d) Compensation for lost property

The home owners in question have been extremely cooperative and patient in seeking to have this matter addressed. They have impressed me with their commitment to the land and their desire to secure a long-term resolution. They have not, in the context of the complaint to this Office, sought any compensation for lost property or lost property value resulting from the extraordinary erosion. As such, I have not made any findings or recommendations in respect of this issue.

(iii) *Who is responsible for the remedial work?*

As noted earlier in this Special Report, the original approval granted to the Regional District by the Ministry of Lands, Parks and Housing was expressly subject to the following conditions:

The foreshore is to be returned to its natural condition after construction is completed.

Late Spring and summer (i.e. March to October) are the recommended months for construction. Mitigation may be called for during construction.

All contractors are to be made aware of the environmental concerns and performance bonds posted to ensure their compliance.

In my view, the Regional District, as holder of this approval, was responsible to ensure that these conditions were met, and as noted above it is my view that these conditions were not met. The construction was undertaken on behalf of the Regional District in November - December, an inopportune time of year, and the foreshore was not returned to its natural condition following the use of rocks from the reef and beach for pipeline stabilization.

I, therefore, find that the Regional District of Comox-Strathcona was wrong in failing to ensure that the foreshore was returned to its natural condition following installation of the sewer pipeline, and it is my recommendation that the Regional District effect the necessary remedial work.

In making this finding and recommendation, it is very important that one distinguish the role of the Ombudsman from that of the courts. The Ombudsman has the power to investigate complaints regarding the administration of government, and has broad powers to make findings and recommendations according to section 23 (previously s.22) of the **Ombudsman Act** R.S.B.C. 1996, c. 340 which states:

Procedure after investigation

23. (1) If, after completing an investigation, the Ombudsman is of the opinion that
- (a) a decision, recommendation, act or omission that was the subject matter of the investigation was
 - (i) contrary to law,
 - (ii) unjust, oppressive or improperly discriminatory,
 - (iii) made, done or omitted under a statutory provision or other rule of law or practice that is unjust, oppressive or improperly discriminatory,
 - (iv) based wholly or partly on a mistake of law or fact or on irrelevant grounds or consideration,
 - (v) related to the application of arbitrary, unreasonable or unfair procedures, or

- (vi) otherwise wrong,
 - (b) in doing or omitting an act or in making or acting on a decision or recommendation, an authority
 - (i) did so for an improper purpose,
 - (ii) failed to give adequate and appropriate reasons in relation to the nature of the matter, or
 - (iii) was negligent or acted improperly, or
 - (c) there was unreasonable delay in dealing with the subject matter of the investigation,
- the Ombudsman must report that opinion and the reasons for it to the authority and may make the recommendation the Ombudsman considers appropriate.
- (2) Without restricting subsection (1), the Ombudsman may recommend that
- (a) a matter be referred to the appropriate authority for further consideration,
 - (b) an act be remedied,
 - (c) an omission or delay be rectified,
 - (d) a decision or recommendation be cancelled or changed,
 - (e) reasons be give,
 - (f) a practice, procedure or course of conduct be altered,
 - (g) an enactment or other rule of law be reconsidered, or
 - (h) any other steps be taken.

This process is quite separate from a court process, and it is neither necessary nor appropriate that my investigation be limited to a question of legal liability, that is, whether negligence has been established. My focus is on whether any maladministration of governmental activity occurred and whether any unfairness has resulted to any aggrieved parties. The fact that certain issues could also have been raised in a judicial process clearly does not preclude the Ombudsman's review. In the present case several parties originally contemplated or commenced legal action. It is my understanding that one such action was settled out of court following the death of the affected homeowner, and the other actions were not pursued by the complainants, who noted the exceptionally high cost and time delay of litigation as their reason for this decision. The Regional District of Comox-Strathcona has previously taken the position that the claims of the complainants should be

pursued in court, if anywhere. For the foregoing reasons, I must most clearly reject this assertion.

Finally, I should also note that over the course of this investigation the Regional District has at several times suggested that any remedial work should be undertaken by the Ministry of Environment. Similarly, the Regional District has raised its objection to the apparent change of position on the part of the Ministry of Environment. This included the March 5, 1993 meeting and the Ministry's role in a potential restoration plan, and subsequently with respect to support for an *ex gratia* payment.

For the reasons noted in this Special Report, I believe that the responsibility for the sewer installation project and the remedial work rightly rests with the Regional District of Comox-Strathcona, in accordance with the terms of the authorization granted by the Ministry of Environment. I do not consider it necessary in these circumstances to make any finding against the Ministry of Environment. However, it is my view that the Ministry of Environment has an important responsibility to use all reasonable means to ensure that the conditions stipulated in the original approval to the Regional District are fulfilled, given that the Ministry granted the approval specifically subject to those conditions, and given that the Ministry has an obvious interest in this type of matter. It is my hope that in these circumstances the Ministry of Environment will again cooperate with the Regional District to the greatest extent possible.

The Regional District's Response to My Findings and Recommendation

On August 2, 1996, I wrote the Regional District of Comox-Strathcona pursuant to s.17 (previously s.16) of the **Ombudsman Act** to advise that I proposed to make findings against it, on the basis that the work undertaken pursuant to the approval granted to the Regional District by the Ministry of Environment did not comply with the conditions regarding recommended time of construction and the requirement to return the foreshore to its natural state. In this letter I noted my tentative recommendation that the Regional District restore the reef in question, in accordance with specifications contemplated by the tentative agreement reached in 1993. I also explained that the process established by the **Ombudsman Act** required that I give them a formal opportunity to make representations before concluding my investigation, and I requested a reply by August 19, 1996.

The Regional District responded shortly thereafter by letter. The letter stated in part:

We reiterate that the Regional District has not, nor does it now, accept any responsibility for the situation at Willemar Bluffs. There has been no proof, only opinions, offered as to the responsibility of the Regional District in this matter...

This matter has been reviewed several times by the Regional District and our position remains the same - the Regional District is of the opinion that the cause of the situation is not of the Regional District's making nor has the Regional District the necessary legal and financial resources to address the problem. As stated to [the Deputy Ombudsman], we are prepared to further discuss this matter with others who may be prepared to act. To some extent and under certain circumstances, we may be prepared to consider participating in a limited way. Such participation would of course be dependent on working through the Regional District's financial and legal concerns.

This response did not address the concerns I have raised and it did not cause me to alter my tentative findings and recommendation in any way. In order to ensure that I had fully exhausted all possibilities for

consultation I nonetheless held a conference call with both the Chair and the Administrator of the Regional District on September 3, 1996. As the new Administrator had recently assumed his position, I agreed not to issue a report for a short period of time while he had the opportunity to further review this matter. Following several further communications, I agreed to withhold any final findings until the Board of the Regional District could revisit this matter.

On October 29, 1996 I received a formal reply from the Regional District's legal counsel. The Regional District took exception with my tentative findings and recommendation and stated:

Rather, it is the Regional District's position, and our respectful submission, that the proper conclusion is that the subsidence of the Willemar Bluffs is, and always has been the result of natural causes, with the possibility of intermittent man-made contributory causes, not including installation of the pipeline.

The Regional District has also asked us to make clear that they share the Provincial Government's view that steps ought to be taken to protect the residents along the Willemar Bluffs from further subsidence of their lands and that they would endorse a Provincial Government program, designed and financed by the Provincial Government, along the lines previously proposed...

This letter did not address the issue of the timing of the sewer pipeline construction and the failure to return the foreshore to its natural condition following the installation of the sewer pipeline, which were conditions of the approval granted to the Regional District. It did argue that there was not sufficient technical data to support the contention of harm, that the Ministry of Environment should bear responsibility, and that the fact that litigation was not pursued suggests there was no merit to the complainants' claim. Each of these issues has of course been discussed in this Report, and they have not caused me to alter my position in respect of this matter. Therefore, on November 20, 1996, I provided my final findings and recommendation to the Regional District pursuant to s.23 (previously s. 22) of the **Ombudsman Act**. In that letter I stated:

My Findings:

My final findings are that the Regional District of Comox-Strathcona improperly failed to ensure that the contracts it entered into for construction of the sewer line below Willemar Bluffs contained the necessary terms and conditions to ensure compliance with the conditions of the license granted to the Regional District by the approving authority. The Regional District did not ensure that the contract required the work to be performed between the months of March to October, and it did not ensure the foreshore was returned to its natural condition.

My Recommendations:

It is my recommendation that the Regional District undertake the restoration and construction work that was referenced in the July 19, 1993 letter from John O'Riordan, Assistant Deputy Minister, Ministry of Environment, Lands and Parks to the Regional District. Specifically, the location and general dimensions of the restoration should conform to coastal engineering requirements and consider information from old photographs, residents, and any other beneficial sources. Dr. Brendan Holden, P.Eng, Floodplain Management Branch, Ministry of Environment, Lands and Parks should be consulted to monitor, review and advise with respect to the project.

It is also my understanding that Ms. Melda Buchanan has refused to allow her house to be moved until the underlying issue of the reef is resolved. Ms. Buchanan's home and safety continue to be placed in imminent danger by the present situation and I urge the Regional District to act upon my recommendations immediately.

I requested the Regional District to advise me of its intentions in this regard within forty five days. On January 3, 1997 the Regional District requested further time to reply. I extended the reply date until February 28, 1997. On April 15, 1997 legal counsel for the Regional District finally responded to my findings and advised:

I am now instructed by the Regional District of Comox-Strathcona to advise that after considerable deliberation, their position remains as outlined in my letter to you of October 29, 1996. It is their

understanding that the technical evidence does not support the suggestion that anything done or omitted to be done by the Regional District caused any subsidence or movement in the Bluffs, that being attributable entirely to the natural forces acting on the Bluffs.

Once again, this response did not address the simple fact that the conditions of the original approval, particularly the requirement to return the foreshore to its natural condition, were not complied with.

Conclusion:

It is with considerable concern and regret that after ten years of investigation, consultation and efforts at achieving consensual resolution, this matter remains outstanding. Although the matter is of a lengthy history and involves some complex issues, the central issue in question is that the foreshore below Willemar Bluffs was not returned to its natural condition following the installation of the sewer pipeline in 1982. This is a matter for which I consider the Regional District of Comox-Strathcona to be responsible, and to date it has not been prepared to take proper corrective action.

Section 31(3) of the **Ombudsman Act** provides:

If the Ombudsman considers it to be in the public interest or in the interest of a person or authority, the Ombudsman may make a special report to the Legislative Assembly or comment publicly about a matter relating generally to the exercise of the Ombudsman's duties under this Act or to a particular case investigated by the Ombudsman.

It is my hope that by documenting the results of my investigation into this matter in this Special Report the necessity of immediate action will be made widely known, and that it may result in the Regional District of Comox-Strathcona revisiting its position in respect of this very important issue. I believe that the potential danger to individuals, particularly the home currently located a mere ten metres from the edge of the Bluffs, is completely unacceptable. It is my sincere hope that this matter can be attended to without any further delay and without further undue threat to people or property.