INDIAN CLAIMS COMMISSION

EEL RIVER BAR FIRST NATION INQUIRY

EEL RIVER DAM CLAIM

PANEL

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December 1997

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PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY

On February 18, 1987, the Eel River Bar First Nation submitted a specific claim to the Department of Indian Affairs alleging that the Crown had violated the First Nation's treaty and riparian rights, provisions of the *Indian Act*, and its fiduciary obligations as a result of the construction of a dam on its reserve in 1963 and the consequent damages caused to the First Nation's fishery.[1]

Based on a preliminary analysis of the claim submission, Rem Westland, Director, Specific Claims Branch, wrote to Chief Everett Martin on December 29, 1988, stating that the claim "may have little merit." According to its review of the claim, the Department of Indian Affairs found that the Band was fully compensated for the loss incurred by the construction of the dam and that the Band Council consented to and was fully aware of the contents of the agreement signed in 1970. With respect to the Band's objection to the use of the expropriation authority under section 35 of the *Indian Act*, Westland stated that the argument could not be supported because the Band had "not adequately demonstrated that the legal procedures and requirements were not met."[2] On January 25, 1989, Chief Martin wrote to the Specific Claims Branch disputing the findings of the department's preliminary analysis and withdrawing the claim from the Specific Claims process.[3]

The First Nation resubmitted its claim in February 1992. In a letter to Thomas Siddon, Minister of Indian Affairs and Northern Development, on February 20, 1992, Chief Martin summarized the claim, stating:

> We submit, among other things, that the agreements, permits, and orders-in-councils which purport to permit the Province of New Brunswick to occupy, use, and expropriate portions of our reserve for the purposes of establishing the dam and its

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1 Everett Martin, Chief, Eel River Bar First Nation, Eel River, NB, to D.K. Goodwin, Assistant Deputy Minister, Government of Canada, Department of Indian Affairs, Ottawa, February 18, 1987, DIAND file B 8620-285 (N5), vol. 1 (ICC Documents, p. 628).

2 Rem Westland, Director, Specific Claims Branch, to Chief Everett Martin, December 29, 1988, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, pp. 654-57).

3 Everett Martin, Chief, Eel River Bar First Nation, Eel River, NB, to Acting Director, Specific Claims Branch, Department of Indian Affairs, Ottawa, January 25, 1989, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, pp. 658-59).

> related works are void and of no force or effect. We submit that we have action in trespass against the Province of New Brunswick for continuing to occupy a portion of our reserve without right or permission. . . . that there is a breach of our fiduciary rights against your department, and that the governments of Canada and New Brunswick have an outstanding lawful obligation from the breach of the treaty of 1779 respecting the destruction of our treaty right to our fishery, from the breaches of the *Indian Act*, the breach of the New Brunswick expropriation laws, which breaches may have allowed for a breach of Section 111 of the *Criminal Code* by one of your former officials, and which resulted in the illegal disposition of our lands.[4]

After the completion of confirming research and consultations with the First Nation and its legal counsel, Beverley A. Lajoie, Research Manager, Specific Claims East/Central, informed Chief Martin that the claim had been assessed and did not disclose an outstanding lawful obligation owed to the First Nation on the part of Canada.[5] On February 14, 1995, the First Nation provided another submission and clarification of evidence to Specific Claims East/Central.[6] On June 16, 1995, Pamela Keating, Research Manager, Specific Claims East/Central, wrote to Chief Martin to advise that the second preliminary legal review of their claim had concluded that "Canada owes no outstanding lawful obligation to the First Nation within the context of the Specific Claims Policy." Ms Keating's letter further suggested that the First Nation had the option of submitting the rejected claim to the Indian Claims Commission for review.[7] Immediately on receiving this response, the First Nation requested funding from the Department of Indian Affairs to conduct a comprehensive loss-of-use study.[8] On September 11, 1995, the Minister of Indian Affairs refused to grant the additional funding on the grounds that the claim had already been rejected twice, in the course of which extensive

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[4] Chief Everett Martin, Eel River Bar First Nation, Eel River, NB, to Thomas Siddon, Minister of Indian Affairs, Ottawa, February 20, 1992 (ICC Documents, pp. 674-75).

[5] Beverley A. Lajoie, Research Manager, Specific Claims East/Central, to Everett Martin, Chief, Eel River Bar First Nation, Eel River, NB, October 6, 1994 (ICC Documents, pp. 719-22).

[6] Chief Martin Everett, Eel River Bar First Nation, Eel River, NB, to Beverley A. Lajoie, Research Manager, Specific Claims East/Central, February 14, 1995 (ICC Documents, p. 723).

[7] Pamela Keating, Research Manager, Specific Claims East/Central, Ottawa, to Chief Everett Martin, Eel River Bar First Nation, June 16, 1995 (ICC Documents, pp. 728-32).

[8] Chief Everett Martin, Eel River Bar First Nation, to Pamela Keating, Research Manager, Specific Claims East, July 20, 1995 (ICC Documents, p. 733).

research had been conducted, but suggested that the First Nation could request an independent assessment of the rejected claim from the Indian Claims Commission.[9]

On September 19, 1995, the First Nation requested that the Indian Claims Commission conduct an inquiry into the rejection of its claim.[10]

MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where that claim has already been rejected by the Minister . . ."[11] This Policy, outlined in the 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[12] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.

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[9] Ronald A. Irwin, Minister of Indian Affairs and Northern Development, Ottawa, to Chief Everett Martin, Eel River Bar First Nation, Dalhousie, NB, September 11, 1995.

[10] Chief Everett Martin, Eel River Bar First Nation, Dalhousie, NB, to Indian Claims Commission, Ottawa, September 19, 1995.

[11] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[12] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereinafter *Outstanding Business*).

iv) An illegal disposition of Indian land.

Furthermore, Canada is prepared to consider claims based on the following circumstances:

i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.

ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.

The Commission has been asked to inquire into and report on whether the Eel River First Nation has a valid claim for negotiation pursuant to the Specific Claims Policy. This report contains our findings and recommendations on the merits of this claim.

PART II

HISTORICAL BACKGROUND

The historical evidence in relation to the Eel River Bar First Nation's claim, reviewed in this Part, includes several volumes of documentary evidence and the testimony provided by members of the Eel River Bar First Nation at a community session on April 23, 1996. The Commission also received testimony from Wallace LaBillois, who was a councillor and band manager during the events in question during a separate session in Ottawa on July 11, 1996.

The Commission also considered the written submissions of the First Nation and Canada, in addition to hearing oral submissions from legal counsel for the parties on February 20, 1997. The documentary evidence, written submissions, transcripts from the community session and oral submissions, and the balance of the record before the Commission in this inquiry are referenced in Appendix A to this Report.

THE TREATY OF 1779

The ancestors of the Eel River Bar First Nation were parties to the 1779 Treaty of Peace and Friendship (the Treaty of 1779) signed in Windsor, Nova Scotia, on September 22, 1779, by His Majesty's superintendent of Indian Affairs in Nova Scotia and several tribes of Micmac Indians representing the Miramichi, Pogmosche, Restigouche, and Richebouctou Indians. The Treaty of 1779 was signed in the wake of a series of raids against English inhabitants carried out by Indians at the instigation of disaffected settlers. The treaty was intended to promote peace and bring an end to lawlessness on the east coast around the Baie des Chaleurs in what is now the northeastern part of the province of New Brunswick. The treaty stipulated, in part:

> That we [the Micmacs of Miramichy] will behave Quietly and Peaceably towards all his Majesty King George's good Subjects treating these upon every occasion in an honest friendly and Brotherly manner.
>
> That we will at the Hazard of our Lives defend and Protect to the utmost of our power, the Traders and Inhabitants and their merchandize and Effects who are or may be settled on the Rivers Bays and Sea Coasts within the forementioned District against all the Enemys of His Majesty King George Whether French, Rebells or Indians.
>
> . . .
>
> In consideration of the true performance of the foregoing Articles, on the part of the Indian Affairs doth hereby Promise in behalf of government:

> That the said Indians and their Constituents shall remain in the Districts before mentioned Quiet and Free from any molestation of any of His Majesty's Troops or other his good Subjects in their Hunting and Fishing.
>
> That immediate measures shall be taken to cause Traders to supply them with Ammunition, clothing and other necessary stores in exchange for their Furrs and other Commoditys.[13]

It is generally accepted that the commodities historically traded by the Micmac were fur, moose hides, baskets, and fish.[14]

THE EEL RIVER BAR INDIAN RESERVE

The Eel River Bar Indian Reserve was set aside for the use and benefit of the First Nation by an executive order of the Province of New Brunswick dated February 28, 1807.[15] The size and specific location of the reserve were not entirely clear from the Order in Council; however, the minutes of the executive order offered the following description of the reserve:

> Ordered that the vacant tract of land on Eel River commencing at Lot No. 6 north of the mouth of the Eel River and extending to Lot No. 1 at the extremity of the Sand Beach which forms the entrance of the River – including the Eel Fishery, be reserved for the use of the Indians – with the exception of the Sand Beach formerly reserved for the public fishery.[16]

Three schedules of Indian reserves in New Brunswick for the years 1838, 1842, and 1847 describe the reserve at Eel River Bar as containing 400 acres of land on the north side of Eel River.[17] In 1867 and 1870, however, tables of Indian lands in New Brunswick describe the reserve as containing only

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[13] "Treaty Entered into with the Indians of Nova Scotia from Cape Tormentine to the Bay De Chaleurs, 22 Sept. 1779," Claims and Historical Research Centre, DIAND file X-92, pp. 2 and 5 (ICC Documents, pp. 8-9). A copy of the treaty is attached as Appendix B to this report.

[14] L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: UBC Press, 1979), 18, 63-64, 128-29.

[15] DIAND Indian Land Registry, Instrument No. 014590 (ICC Documents, pp. 14-15).

[16] DIAND Indian Land Registry, Instrument No. 014590 (ICC Documents, p. 15).

[17] "Schedule of Indian Reserves," New Brunswick, *Journal of the House of Assembly* (JHA), Appendix to "Report on Crown Lands" (Fredericton, 1838); DIAND file 271/30-13-3, vol. 1, Surveys and Reserves, Eel River Indian Reserve No. 3, Miramichi Agency (ICC Documents, pp. 17-19).

220 acres on the north shore of the river.[18] The First Nation has asserted a claim for an outstanding entitlement based on the discrepancy of 180 acres, but this claim is not before the Commission in this inquiry.

From 1807 onwards, there were numerous additions to, as well as surrenders and partitions of, the Eel River reserve, as follows:

- October 30, 1908: 79.90 acres added to the reserve;[19]
- May 22, 1928: 124.4 acres added to the reserve;[20]
- August 24, 1928: 15 acres added to the reserve;[21]
- February 14, 1929: 3½ acres surrendered by the Band for the New Brunswick International Paper Company pipeline right of way;[22]
- May 19, 1930: 1.7 acres added to the reserve "and also all marine rights and all fishing rights in connection therewith";[23] and
- September 1, 1960: section 28(2) permit granted to the New Brunswick Electric Power Commission for the use of 2.83 acres of reserve land for the electric power transmission line "for such period of time as the said right of way is required for the purpose of an electric power transmission line."[24]

When the construction of a dam on the Eel River was first proposed in 1963, the Eel River reserve contained a total of 434.67 acres of land. After the 1970 letter-permit and expropriation of land for

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[18] Indian Lands in New Brunswick, May 19, 1870, DIAND, file 271/30-13-3, vol. 1 (ICC Documents, pp. 24-25).

[19] DIAND Indian Land Registry, Instrument No. 014592 (ICC Documents, pp. 26-29).

[20] DIAND Indian Land Registry, Instrument No. 014593 (ICC Documents, pp. 30-35).

[21] DIAND Indian Land Registry, Instrument No. 014594 (ICC Documents, pp. 36-41).

[22] DIAND Indian Land Registry, Instrument No. 014595 (ICC Documents, pp. 42-47).

[23] DIAND Indian Land Registry, Instrument No. 014599 (ICC Documents, pp. 51-54).

[24] Department of Citizenship and Immigration, Indian Affairs Branch, Agreement between Her Majesty Queen Elizabeth the Second and The New Brunswick Electric Power Commission, September 1, 1960, DIAND file 271/31-3-13-3 (ICC Documents, pp. 95-97).

the headpond, the reserve contained a total land base of 368.39 acres. In 1996, Band Councillor Gordon LaBillois described the reserve as 368 acres, a "very small land base" that had been "cut up like a piece of pie" by two major highways, a transmission line, two pipelines, and two roads created as a result of the damming of the Eel River[25] (see the map of the Eel River reserve on page 162).

Administration and Control of Indian Reserves in New Brunswick

In 1958, the Government of Canada and the Province of New Brunswick entered into an agreement to clarify jurisdiction over the administration and control of Indian reserve land. Before this agreement was entered into, the federal government had been issuing letters patent under the Great Seal of Canada to convey surrendered reserve lands to private purchasers, on the assumption that it had the authority to do so. The difficulty, however, was that "two decisions of the Judicial Committee of the Privy Council relating to Indian lands in the Province of Ontario and Quebec lead to the conclusion that said lands could only have been lawfully conveyed by authority of New Brunswick with the result that the grantees of said lands hold defective titles and are thereby occasioned hardship and inconvenience."[26]

To resolve any ambiguities over who had jurisdiction with respect to reserve land and surrendered reserve land, the province agreed to transfer all rights and interests in Indian reserves to the federal government. Although this agreement made no reference to aboriginal or treaty hunting and fishing rights, it confirmed all previous land grants, provided for a right of first refusal to the province over lands surrendered for sale, and withheld from the transfer "lands lying under public highways, and minerals."[27]

The Economy of the Eel River Bar Reserve

The location of the Eel River Bar Reserve at the mouth of the Eel River on the Baie des Chaleurs was a crucial factor in the development of the economy, culture, and traditions of the First Nation.

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25 ICC Transcript, April 23, 1996, pp. 127-28 (Gordon LaBillois).

26 *Indian Reserves of New Brunswick*, SC 1959, c. 47 (ICC Documents, p. 78).

27 *Indian Reserves of New Brunswick*, SC 1959, c. 47 (ICC Documents, pp. 78-79).

The fishery on the Eel River and in the waters adjacent to the reserve has been the foundation of the First Nation's economy since at least the time when their reserve was set aside. The 1807 provincial Order in Council setting aside the reserve provided that the "Eel Fishery" was reserved for the use of the Indians, indicating the importance of the fishery to the First Nation.[28] Government efforts to secure the river's resources for the First Nation are also evident in the federal Crown's 1930 purchase of a 1.7-acre strip of waterfront, known as "Wallace Beach," which specifically included "all marine rights and all fishing rights in connection therewith" for the benefit of the First Nation.[29] The price paid for this parcel of land was $2200,[30] considerably more than that paid for the adjoining pieces, thereby indicating the economic value of having access to the fishery.

The value of the fishery was placed in context by Band Councillor Gordon LaBillois, who described the Eel River as having been one of the "richest little rivers" in the area, with the best clam flats in the province:

> The gifts that came from the Eel River were gifts that were handed down to our people here since time immemorial. Through access [to] these resources our people could always fend for themselves. It generated eight months of economic activity. We had our own economic base at Eel River.[31]

At the community session, numerous members of the First Nation told the Commissioners that the Eel River had provided them with eels, codfish, smelt, trout, salmon, herring, bass, wild and brant geese, and ducks.[32] In this small community of fewer than 200 people,[33] the fish harvests were large

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[28] DIAND Indian Land Registry, Instrument No. 014590 (ICC Documents, p. 15).

[29] DIAND Indian Land Registry, Instrument No. 014599 (ICC Documents, p. 51).

[30] Secretary, Department of Indian Affairs, to Max D. Cormier, MP, Restigouche-Madawaska, December 18, 1931 (ICC Documents, pp. 56-57).

[31] ICC Transcript, April 23, 1996, pp. 93-96 (Gordon LaBillois).

[32] ICC Transcript, April 23, 1996, pp. 14-15, 42-44 (Margaret LaBillois); pp. 30-32 (Marion LaBillois); p. 56 (Richard Simonson); p. 59 (Hubert LaBillois); pp. 64-66 (Peter Simonson); pp. 68-70 (Earl LaBillois); p. 85 (Alfred Narvie); p. 89 (Leonard LaBillois); p. 97 (Gordon LaBillois); pp. 114-19 (Rebecaa LaBillois).

[33] ICC Transcript, April 23, 1966, p. 51 (Margaret La Billois); pp. 86-87 (Leonard La Billois).

enough to preserve the excess for off-season consumption, trade for other types of food, and, later on, sale to local markets and tourists.[34]

Furthermore, the fact that this area was not suitable for agricultural development meant that the reserve economy, both subsistence and commercial, centred on the fishery – in particular, the harvesting of clams. In 1938, the Inspector of Indian Agencies had reported that no farming could be expected at this reserve because of the marshy land. A worse place could not have been chosen for a reserve, he noted, the land being essentially worthless.[35] In its Annual Reports between the early 1930s and the 1960s, Indian Affairs repeatedly stated that economic opportunities for Indians throughout the province were dismal because farming operations were limited and hunting and trapping had become scarce. This lack of opportunity for Indians in the area meant that many had to find employment as labourers.[36]

Cottage industries like knitting, snowshoe-making, small-scale trapping, and pulp-log scaling were used to supplement a family's income, but neither the resources nor the markets for these items were large.[37] Further, industry in the nearby town of Dalhousie did not provide employment for many of Eel River's residents, and many families found themselves forced to look for employment in the United States.[38]

The clam harvest was the mainstay of the reserve's economy. Several First Nation members indicated that for most of the year, the clam harvest was the centre of life on the reserve. Clams provided not only daily food and the basis of commercial economy but also a lifestyle that had been practised by many generations of Micmac Indians:

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[34] ICC Transcript, April 23, 1996, pp. 43, 51 (Margaret LaBillois); pp. 86-87 (Leonard LaBillois); pp. 32, 36-38 (Marion LaBillois); p. 66 (Peter Simonson); p. 95 (Gordon LaBillois); p. 119 (Rebecca LaBillois).

[35] Jude Thibault, Inspector of Indian Agencies, to Indian Affairs Branch, Ottawa, September 16, 1938 (ICC Documents, p. 58).

[36] DIAND, Annual Reports for the years 1931 to 1961.

[37] ICC Transcript, April 23, 1996, pp. 32, 35 (Marion LaBillois); p. 116 (Rebecca LaBillois).

[38] ICC Transcript, April 23, 1996, p. 17 (Margaret LaBillois); p. 81 (Alfred Narvie); pp. 26, 38 (Marion LaBillois); p. 56 (Richard Simpson); p. 59 (Hubert LaBillois); p. 75 (Mary McBain); p. 87 (Alfred Narvie); p. 88 (Leonard LaBillois); p. 91 (Gordon LaBillois).

> The clams, of course, the clams were our source of revenue. At that time the welfare was $1 a week for each of us and there were five of us, five children, and my mom and dad. We couldn't make a – there was no living on that. Because I remember quite well the clams were our subsistence, because we had clam pie, we had clam chowder, we had clams as they were and we had clam sandwiches. You know, that's what we were brought up on, clams.[39]

In addition to using the clams to feed their families, First Nation members sold clams, together with other food, to tourists from beach canteens and roadside stands.[40]

INITIAL PROPOSAL TO CONSTRUCT THE DAM ON THE EEL RIVER (1962)

In early 1962, the New Brunswick Water Authority (NBWA) contacted the Indian Affairs Branch (IAB) of the Department of Citizenship and Immigration to discuss the possible damming of the Eel River and its potential impact on the First Nation.

On February 27, 1962, the Maritime Regional Supervisor of Indian Affairs, F.B. McKinnon, sent a memorandum to David Vogt, Acting Chief of Resources and Trusts for the IAB in Ottawa, informing him of a discussion he had had with Dr John S. Bates, Chairman of the NBWA, who indicated that the Town of Dalhousie was interested in constructing a dam on the Eel River to secure a supply of fresh water to attract industry. At this initial stage, the NBWA had not yet decided on how to provide the water supply, and test drilling for water continued while options for construction of a dam were considered. The NBWA initially proposed that the dam be located at the mouth of the Eel River, adjacent to the reserve, where there was already a bridge to accommodate Highway 11. Since the proposal involved tidal water and was off reserve, McKinnon thought there was not much Indian Affairs could do to prevent the dam from being constructed on the Eel River; however, he expressed concern with the fact that "erection of a dam will mean the flooding of a fairly large flat which at the moment provides approximately 50% of the [Band's] clam production. It is therefore quite valuable to the Indians."[41] McKinnon suggested that any adverse effects of the dam on the

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[39] ICC Transcript, April 23, 1997, p. 14 (Margaret LaBillois).

[40] ICC Transcript, April 23, 1996, p. 47 (Margaret LaBillois); p. 118 (Rebecca LaBillois).

[41] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Acting Chief, Reserves and Trusts, Indian Affairs Branch, February 27, 1962, DIAND file 271/31-5-13-1, vol. 1 (ICC Documents, p. 126).

Band's livelihood "should be kept very much in mind when discussing alternate means for providing water for the Town of Dalhousie."[42]

Dr Bates wrote to Vogt on March 2, 1962, to confirm that the nearby Town of Dalhousie had been test drilling several sites in search of large quantities of fresh water, without success. The International Paper Company, located in Dalhousie, was the main source of employment in the town, but local unemployment was still a concern of the Town Council, which was trying to attract new industry to the area. In particular, the Town Council was interested in attracting Canadian Industries Limited (CIL), but, without a substantial supply of fresh water for industrial use, CIL would not be able to operate its plant in Dalhousie. To facilitate the establishment of the plant, New Brunswick Premier Louis-Joseph Robichaud assured CIL that his government would support Dalhousie's goals by securing at least 300,000 gallons of water per day by October 1963.

Within a week of this commitment, Robichaud asked the NBWA to act as coordinator of the project by dealing with the federal, provincial, municipal, and company agencies that would be participants in the venture. Dr Bates indicated that the most promising option was to dam the Eel River at or near its mouth, but if a tidal dam on the Eel River was the chosen option, "[t]iming is an urgent factor," since the dam would have to be constructed in the summer of 1962 to allow a year of fresh water flushing before the reservoir would be salt free.[43]

On March 9, 1962, Vogt responded to McKinnon's memorandum, advising that the IAB had not yet been contacted by the NBWA. Vogt also requested information from McKinnon on the yearly value of the Indian clam harvest, but noted:

> The Eel River being a tidal river, the water front boundary of the Eel River Reserve is ordinary highwater mark and title to the bed of the river below ordinary highwater mark is vested in the Province. If the clams are gathered below ordinary highwater mark, the public generally would have a right to harvest the clams, and consideration

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[42] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Acting Chief, Reserves and Trusts, Indian Affairs Branch, February 27, 1962, DIAND file 271/31-5-13-1, vol. 1 (ICC Documents, p. 126).

[43] John S. Bates, Chairman, New Brunswick Water Authority, Fredericton, NB, to David Vogt, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, March 2, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 127-30).

> will have to be given as to whether or not the Indian Band has any special right for which special compensation can be claimed.[44]

McKinnon's response on April 6, 1962, was that, while the Band generally harvested clams below the high-water mark, alongside the general public,

> non-Indians do so for their own use, while Indians attempt to do so commercially . . . attempts to put a dam at the road would be opposed not only by the Indians, but by just about everyone who does fish clams in that area. It could mean that public opinion would force the town to erect a dam a few hundred yards away from the road.[45]

McKinnon also attached a memorandum from Jean Bourassa, the Superintendent of the Restigouche Indian Agency, stating that "[a]lthough I do not know much of this industry," he was of the view that "50% of the revenue from clam digging in Eel River would be approximately $1,500 per year."[46] McKinnon noted that in his most recent discussion with Dr Bates, he was informed that "no action would be taken in regards to the dam without bringing together all those concerned," including the Band, the town, the NBWA, and the Department of Fisheries.[47]

In the meantime, Dr Bates advised IAB-Ottawa that the dam site was still in an exploratory stage. In a memorandum dated April 13, 1962, Vogt informed McKinnon that "Dr. Bates was instructed that the proposal should be gone into fully with you and with the Indians." Vogt also noted

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[44] David Vogt, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to F.B. McKinnon, Regional Supervisor, Amherst, Nova Scotia, March 9, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 131).

[45] F.B. McKinnon, Regional Supervisor, Amherst, Nova Scotia, to David Vogt, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, April 6, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 133).

[46] L. Jean J. Bourassa, Superintendent, Restigouche Indian Agency, Ste-Anne-de-Restigouche, Quebec, to Indian Affairs Branch, Maritime Regional Office, April 2, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 134).

[47] F.B. McKinnon, Regional Supervisor, Amherst, Nova Scotia, to David Vogt, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, April 6, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 133).

that since the clam flats are in the vicinity of the highway bridge where the NBWA was first proposing to construct the tidal dam,

> Dr. Bates indicated it might be advisable to place a dam some distance upriver from the highway bridge more or less at a point which would be opposite the International Paper water pipeline. Selection of this location would seem to obviate interference with the clam flats, and I think we and the Indians might very well press for selection of that site.[48]

Three days later, McKinnon received a further report from J.H. Sheane, the new superintendent responsible for the Eel River reserve (which had recently been transferred to the Miramichi Agency from the Restigouche Agency), advising that he and Bourassa

> checked the approximate income again during a visit to Eel River and as a result of this second look both Mr Bourassa and myself agree that the income from sale of clams by Indians is probably nearer to $5,000 than to the $1,500 figure originally submitted by Mr Bourassa. This new factor places a somewhat different light on the matter in that the clam beds are probably more valuable to the Indians than originally estimated.[49]

Despite Bates's discussion with Vogt in April 1962, during which they appeared to have agreed that it would be preferable from the Band's standpoint to construct the dam upriver (also known as Site no. 1), Bates reported to McKinnon on August 21, 1962, that "[t]he Town Council has voted in favour of a tidal dam above Eel River Bar bridge at the first bend of the river near the bridge (also known as Site no. 2)."[50] McKinnon wrote to headquarters on August 27 noting that construction of the dam at Site no. 2 would cause some flooding of reserve lands, but "there is no difficulty anticipated with the [Band] council as long as the erection of the dam will not affect the

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[48] David Vogt, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to Regional Supervisor, Maritime Region, April 13, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 135).

[49] J.H. Sheane, Superintendent, Miramichi Indian Agency, to Regional Supervisor, Maritimes, April 19, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 136).

[50] John S. Bates, Chairman, NB Water Authority, Fredericton, to F.B. McKinnon, Regional Supervisor, Amherst, Nova Scotia, August 21, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 140).

clam flats."[51] He also suggested that the water could be pumped from the reservoir through an existing pipeline, owned by the International Paper Company, which already crossed the reserve, and he requested advice on whether International Paper could grant permission to the town to use the pipeline without the approval of the Minister of Indian Affairs.

Jules D'Astous, Chief of the Economic Development Division of Indian Affairs, responded to McKinnon on September 12, 1962. He stated that 3½ acres had been surrendered by the Band for the pipeline right of way in 1929 and that International Paper could, therefore, permit the town to use the pipeline without prior approval from the IAB or the Band. D'Astous advised, however, that if reserve lands were to be flooded, consent of the Indians would have to be obtained, the town would have to apply for an easement to flood, and a survey would have to be done to confirm the area of the reserve affected by flooding.[52]

McKinnon and Sheane continued to press for Site no. 1. After discussions with the town and the Eel River Band Council, Sheane stated that although Indian Affairs did not have

> a legal right to contest the erection of the dam at [Site no. 2] I believe the officials of the town concerned might be influenced to construct at the other site if we could get an educated opinion which would support the Indians reasoning that the clam beds may be partially or wholly destroyed if the dam is constructed at the site indicated.[53]

Sheane suggested that the effects of the dam required further investigation and he put forward the names of two experts on shellfish – Dr J.C. Medcof of the Atlantic Biological Station, Fisheries Research Board, in St Andrews, New Brunswick, and Dr E.R. Drinnan of the Oyster Culture Station – who might be able to assist by providing "a ruling prior to the next stage of negotiations with Dalhousie" on questions relating to the effect of the dam on the water current, whether the clams

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[51] F.B. McKinnon, Regional Supervisor, Amherst, Nova Scotia, to Indian Affairs Branch, August 27, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 144).

[52] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, to F.B. McKinnon, Regional Supervisor, Amherst, Nova Scotia, September 12, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 145).

[53] J.M. Sheane, Superintendent, Miramichi Indian Agency, to V.J. Caissie, Assistant Regional Supervisor, Maritime Regional Office, September 24, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 146).

were "attracted to the muddy areas further upstream during early stages of their development," and the possibility of contamination in the stream.[54]

McKinnon adopted Sheane's proposal and wrote to Dr Medcof on October 1, 1962, seeking his assistance in determining the effect of the proposed dam on the clam beds before proceeding with negotiations with the town. McKinnon drew attention to the Band's concerns:

> The area in question has long been known as a good clam producing area and the Indians fear that the erection of a dam may seriously affect this fishing. According to the Indians, the area to be flooded is one where clams are found in the early stage of development, although actual digging is not carried out at that point. The good producing area of today will be just below the dam, and tides and currents will be affected.[55]

On October 30, 1962, McKinnon discussed the matter with Dr Medcof and Dr J.S. MacPhail, also of the Atlantic Biological Station. Dr Medcof's report states that McKinnon was interested in knowing

> (1) Whether placing a dam in the estuary[56] of this river would affect the clam productivity of flats in the estuary below the dam and of flats outside the estuary in the Bay of Chaleur . . . and
>
> (2) Whether any likely damage would be diminished by moving the dam site a short distance upstream.[57]

The Band's concerns about the potential impact on the clams were apparently presented to Dr Medcof. The relevant excerpts of his findings and conclusions are set out below:

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[54] J.M. Sheane, Superintendent, Miramichi Indian Agency, to V.J. Caissie, Assistant Regional Supervisor, Maritime Regional Office, September 24, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 146).

[55] F.B. McKinnon, Regional Supervisor, Amherst, Nova Scotia, to Dr J.C. Medcof, Assistant Director, Fisheries Research Board, Biological Station, St Andrews, NB, October 1, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 147-48).

[56] The term "estuary" refers to the wide mouth of a river where the tide meets the current.

[57] Dr J.C. Medcof, Assistant Director, Biological Station, Fisheries Research Board of Canada, to Dr J.L. Hart, Director, Fisheries Research Board of Canada, November 1, 1962 (ICC Documents, pp. 150-51).

> The old idea of there being a need for a sanctuary for a breeding population was held by Indians of the area and this was the reason for proposing shifting the site upstream. They also, like many clam fishermen of this area, believe clam flats are replenished after digging, by migration of young clams to them from other areas.
>
> All we could say was that:
>
> (1) The area to be submerged has never, to our knowledge, produced clams, so there would be no reduction by encroachment on productive areas.
>
> (2) Dam construction would change the pattern of water circulation in the lower estuary and removal of substantial amounts of fresh water from the river system by the town of Dalhousie would raise the average salinity of the water in the lower estuary. These two changes are liable to affect the nature of bottom sedimentation and settlement of clam spat in the lower estuary where some rather poor, seldom-harvested clams grow. However, the interaction of these factors is so complex that we could not predict whether damming would effect a beneficial or deleterious change in the small area of productive clam ground in the lower estuary. Much less could we predict whether placement of the dam a few hundred feet further up the estuary from the site chosen by the town would be better from the point of view of conservation.
>
> (3) *We were confident that, no matter which dam site was chosen, the clam production of flats along the shore of the Bay of Chaleur (which are the industrially important flats) would not be affected.*
>
> (4) There is no sound basis for the theories (a) that special sanctuaries for breeding stocks are required to sustain production or (b) that young clams migrate from one area to another to replenish dug-out areas.[58]

Given that the purpose of consulting Dr Medcof was to obtain support for moving the dam to Site no. 1, his initial analysis of the situation offered little assistance to Indian Affairs and the Band. McKinnon noted that in view of Dr Medcof's opinion, "we really have no irrefutable arguments to insist that the town choose the upper site, at least in so far as clam production is concerned."[59]

Dr Medcof's report was provided to Chief Alfred Narvie and the Eel River Band Council and was discussed with the Band generally at a meeting held on November 20, 1962. Although Sheane

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[58] Dr J.C. Medcof, Assistant Director, Biological Station, Fisheries Research Board of Canada, to Dr J.L. Hart, Director, Fisheries Research Board of Canada, November 1, 1962 (ICC Documents, pp. 150-51). Emphasis added.

[59] F.B. McKinnon, Regional Supervisor, Amherst, to Miramichi Indian Agency, November 5, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 156).

could not attend the meeting, he provided the following report to the Maritime Regional Office of the IAB:

> *The Band have decided that they will not permit the town authorities to cross over or use their land for this purpose because they feel there is a very strong possibility that the clam beds will be damaged with the erection of such a dam. However they have permitted a preliminary survey and they understand that the latest thinking is that the dam should be constructed further upstream away from their land altogether.* This new development which I could not confirm with the town authorities has apparently come about because it has been discovered that the banks of the river on the reserve side consist chiefly of moss which would not hold back the water. Thus construction of a dam at the point proposed would not be effective without the addition of a levee along the river bank.
>
> For the foregoing reason, the Band decided at their meeting to leave the matter in abeyance until the location of the dam is finally decided. *I understand if the town utilize the present proposed location [Site no. 2], the Band will do all in their power to prevent same.*[60]

McKinnon informed Dr Bates that the Band was opposed to Site no. 2 and that the location "above the Eel River Bar bridge at the first turn of the river might have to be abandoned for lack of footings."[61] Dr Bates planned to meet with Vogt in Ottawa during the week of December 10 to discuss the possibility of paying compensation to the Band:

> Mr. McKinnon indicated strong objection by the Indian Reserve to a dam at this lower location [Site no. 2] on account of affecting clam digging. Surely compensation could take care of any definite reduction of annual revenue, if it becomes clear that the largest possible storage reservoir for water is desirable and feasible.[62]

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[60] J.H. Sheane, Superintendent, Miramichi Indian Agency, to Maritime Regional Office, November 26, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 157). Emphasis added.

[61] John S. Bates, Chairman, New Brunswick Water Authority, Fredericton, to Town of Dalhousie and New Brunswick International Paper Company, November 29, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 158).

[62] John S. Bates, Chairman, New Brunswick Water Authority, Fredericton, to Town of Dalhousie and New Brunswick International Paper Company, November 29, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 158).

Dr Bates arranged to meet with Vogt in Ottawa on December 14, 1962, noting that "the development plan has reached an advanced stage."[63] Bates met with Vogt and with W.P. McIntyre of the IAB and informed them that the dam was to be built at Site no. 2 despite the Band's objections. Jules D'Astous provided the following report on this meeting to McKinnon:

> I understand that a sufficient volume of water could be obtained to supply the anticipated requirements of Canadian Industries Limited by building the dam at site no. 1. However, it is anticipated that the capacity of the New Brunswick International Paper Plant will be increased and in a matter of years an additional volume of water will be needed. To ensure an adequate supply of water for the town of Dalhousie and industry users, it is necessary to build a dam at site no. 2.
>
> On the basis of reports supplied by you and the Agency, Dr. Bates was told that the Indians would oppose construction at site no. 2 because of anticipated [adverse effect on] clam harvest. Although Dr. Bates and the Water Authority are not empowered to negotiate a settlement of Indian claims, Dr. Bates did suggest that the clam resources might be compensated by calculating the annual volume and value of the clam harvest and capitalizing this annual value. Further, [he] suggested that a survey of the clam resources be made during the 1963 season.
>
> We pointed out to Dr. Bates that in addition to a claim for damage to clam production, it would appear that the town of Dalhousie will have to negotiate an agreement with the Indians for Reserve land needed to anchor the dam and for the retaining wall. Also, if the building of the dam should result in flooding of the Reserve land the town would require an easement to flood.[64]

D'Astous advised McKinnon that he should begin to communicate with town officials to impress on them the need to "make known its requirements at an early date and open negotiations with the Indians. Delay in this connection could make it difficult or impossible for the town to fulfill its commitment to C.I.L. for next October."[65]

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[63] John S. Bates, Chairman, New Brunswick Water Authority, Fredericton, to David Vogt, Chief, Reserves and Trusts, Indian Affairs Branch, December 3, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 160).

[64] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to Regional Supervisor, Maritimes, December 18, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 162-63).

[65] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to Regional Supervisor, Maritimes, December 18, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 162-63).

Dr Bates sent his own report on the results of this meeting to the Town Council and to International Paper on December 18, 1962, with copies to the IAB:

> The Indian Affairs Branch thinks the Indian Reserve will feel concerned regarding the dam at the lower site. . . . However, it is obvious that the potential of the Eel River cannot be made available at about 10 million gallons per day in low-water periods unless the tidal dam is so located.
>
> Compensation is a matter for negotiation by the Town of Dalhousie through the Indian Affairs Branch. So far as clams are concerned, it appears desirable to make a survey next summer through the Department of Fisheries and to estimate the possible decrease in annual value for capitalizing as compensation. Some points of law need clarifying, including the question of basin ownership by the Province of New Brunswick in relation to the rights by the Indian Reserve for clams above the bridge.
>
> Section 35 of the *Indian Act*, 1952-56, simplifies procedures in connection with negotiations or expropriation.
>
> The Indian Affairs Branch assumes that land acquisition might include a strip around the basin for flooding, a wide cross section of the lower river for the dam, a strip across the peninsula for the proposed wall, perhaps the peninsula area on the river side of the wall and possibly other parcels.[66]

Finally, Dr Bates wrote that the IAB had also suggested that "employment of local Indians on construction and later on regular work in the area undoubtedly would help forthcoming negotiations with the Indian Reserve."

On January 3, 1963, when McKinnon responded to D'Astous's report on the December 14 meeting, he offered his views on the Band's right to compensation for its losses for damaged clam production:

> Eel River is tidal and it is our understanding that the Band does not enjoy riparian rights and therefore has no more claim to the clam fishing than the non-Indians, or for that matter anyone who wishes to fish clams in the area. We are only indirectly asking compensation for the loss of clam production by making compensation for the land need high enough to cover indirectly loss of clams. *In previous discussions with the town, we have made it clear to the town engineer that we could not oppose the town in their desire to erect a dam at that particular site, insofar as the river itself*

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[66] John S. Bates, Chairman, New Brunswick Water Authority, Fredericton, to Town of Dalhousie, Dalhousie, NB, and New Brunswick International Paper Company, Dalhousie, NB, December 18, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 164-65).

> *is concerned, but that the moment they stepped beyond high water mark, they would be on the reserve, and at that point we would request such compensation as we felt would be adequate to cover not so much the land, but the clams.*[67]

In short, although McKinnon did not think that the Band had any special or exclusive right to harvest clams on the flats, he felt that negotiations with respect to reserve land required for the dam should be conducted in such a way as to ensure that compensation was also provided for damage to the livelihood of Band members. McKinnon's proposed strategy, therefore, was to use compensation negotiations with respect to land required for the project as leverage to cover the Band's damages indirectly for loss of clams.

D'Astous acknowledged receipt of McKinnon's letter and apparently shared his view that "the Eel River is tidal and therefore ownership of the bed of the River is vested in the Crown and does not form part of the Reserve. Furthermore, fishing rights would be exerciseable by the public at large."[68] D'Astous indicated that he would await the outcome of an upcoming meeting with town officials to discuss the dam.

NEGOTIATIONS BETWEEN THE EEL RIVER BAND AND TOWN OF DALHOUSIE: PHASE 1 (1963)

On January 21, 1963, the Band held a meeting on the Eel River reserve to discuss the proposed dam with town officials. This meeting was attended by J.H. Sheane; Vince Caissie, McKinnon's Assistant Supervisor; Mr Furlotte, Dalhousie Town Councillor; Mr Petersen, Town Engineer; and Mr Smith, the mill engineer for International Paper Company. McKinnon's report states that:

> At this meeting, the Indian group advanced reasons which appear quite logical to us [the IAB], to prove that the erection of a dam would very likely completely destroy the clam beds and also put an end to smelt fishing during the winter months. These reasons all have to do with the change which will be made in the tide and current pattern and are too lengthy and complicated for me to attempt to explain here. *Because of this, the Indians have indicated that they will refuse to grant permission to the Town unless compensation is in the form of employment in existing or*

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[67] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Indian Affairs Branch, January 3, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 166). Emphasis added.

[68] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, to Regional Supervisor, Maritimes Office, January 11, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 170).

> *proposed industries.* Understandably the Town representation at this meeting could not commit themselves to any arrangements of this nature, but agreed to return to the Town Council and to secure information from those industries after which a second meeting would be held. . . .
>
> At an afternoon meeting between Town officials and Department representatives, the Town sought information on expropriation. *They were referred to Section 35 of the Indian Act, and were told that there was no certainty that the Governor-in-Council would grant permission in the face of complete opposition from the Band Council.*
>
> *Is there any likelihood that the Governor-in-Council would act against this opposition? If it should come to that, I think we can be reasonably certain that pressure will be brought to bear by the Provincial Government, which has confirmed the undertaking of the Town to provide water in sufficient quantities for the C.I.L. plant.*[69]

D'Astous agreed with McKinnon that "*the Minister would be very reluctant to approve expropriation contrary to the wishes of the Indians. He might do so if convinced that the necessity of the case justified expropriation. You should impress on Town officials the desirability of doing everything possible to meet the wishes of the Indians.*"[70]

Meanwhile, Dr Medcof began preparations to complete a survey of clam production with the assistance of J.S. MacPhail of the Atlantic Biological Station. Dr Bates indicated in a memorandum dated January 17, 1963, that rather than using a survey of clam harvests for the spring of 1963 as the basis for calculating annual yield, the "better approach would be to measure standing crop next spring [1963] as soon as the ice clears and before any construction begins and to measure it again a year after and possibly two or three years after as well. This would be the best way to find out whether damming has caused a change and, if there is a change, whether it is an increase or a decrease and how much." Medcof added that the 1963 survey should be considered tentative and

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[69] F.B. McKinnon, Supervisor, Maritime Regional Office, to Indian Affairs Branch, January 21, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 172-73). Emphasis added.

[70] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Ottawa, to Regional Supervisor, Maritimes, February 4, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 178). Emphasis added.

"[t]o be fair, therefore, any settlement arrived at during the first year or two after dam construction should be regarded as tentative and subject to adjustment."[71]

On February 6, 1963, McKinnon met with the project's engineering assistant, Brian Barnes, and was informed that the town's preference for Site no. 2 was under reconsideration. The NBWA had discovered that its preferred site would incur expenses for reconstruction of the highway that no one could afford and that a site 1200 feet further upstream was being considered [Site no. 1]. Barnes's report of this meeting states that McKinnon "reiterated his earlier impression that the Indians felt they were being discriminated against by the residents of Dalhousie and that the Indians would be more co-operative if they could be assured of jobs in the town. He felt that the upper site would be more satisfactory as far as the Indians were concerned."[72]

On March 28, 1963, Sheane wrote to McKinnon reporting that the town's manager, Mr W.E. Petersen, had called to say that "his group" had recently met with the Band:

> *He [Mr. Petersen] states that the Band have authorized his crews to begin land clearing and diking immediately on the land portion. He stated that they had agreed to accept Dr Medcoff [sic] as an authority when compensation is considered but that they wanted an agreement signed before work was commenced on the dam.* He and the Council are still proceeding in their efforts to obtain jobs for the men . . .
>
> The town solicitor is presently drawing up a preliminary agreement which the Indians of course will not sign without consultation with Indian Affairs officials. He will inform me when this document is ready. Possibly he may be rather more optimistic than the situation warrants but he appears to feel now that a mutually satisfactory agreement can be arrived at with Eel River Band members.
>
> . . . it now appears that a further meeting should be held soon with the Indians to discuss the town proposals and if agreement is reached, to take the necessary resolutions. I should like an opinion re the foregoing as soon as possible . . . It is considered essential that we be present if any agreements are in prospect.[73]

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[71] Dr J.C. Medcof, Assistant Director, Fisheries Research Board of Canada, Biological Station, St Andrews, NB, to J.L. Hart, Director, Fisheries Researcher Board of Canada, Biological Station, Ottawa, January 30, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 175-77).

[72] Memorandum, Brian Barnes, Engineering Assistant, New Brunswick Water Authority, Fredericton, February 12, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 179-81).

[73] J.H. Sheane, Miramichi Indian Agency, to Maritime Regional Office, March 28, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 185). Emphasis added.

On April 1, 1963, McKinnon provided a lengthy report to IAB-Ottawa on the status of the negotiations with the Band and of a meeting between the Band and the town, although it is not clear whether he was referring to the same meeting recounted by Sheane. In his report, McKinnon confirmed the town's decision to move the dam to Site no. 1, 1200 feet upstream from the mouth of the river. He noted that the new site was selected "because of objections by the Indians, and also because of additional costs," and that this new proposal was presented to the Band by the town. Although the new site "would entirely clear the clam beds," McKinnon noted that it "would necessitate the erection of a dyke on reserve land, and result in flooding approximately 49 acres of swamp shore land." With respect to the meeting with town officials, McKinnon reported that

> the Indians again remained opposed to the dam, because of effects they claimed it would have on the fishing. They maintained, however, their previous stand that they would allow the Town to erect a dam if employment was provided to the able-bodied Indians on the reserve. It was also agreed at the meeting that the degree of loss to the fishing industry would be determined by Dr. J.C. Medcof of the Fisheries Research Board (Specialist in shell fish) and that both parties would accept his ruling. I enclose herewith a photocopy of a memo dated January 30th in which Dr. Medcof comments on the entire proposal.[74] You will note that Dr. Medcof is not prepared to say now whether this dam will have detrimental effects (or beneficial effects for that matter) on the fishery. Violent objection was taken by the Indians to the comment in Paragraph 9, Page 2. The Indians estimate their production of clams yearly at $30,000. The Indians at that meeting were asked to present to the Town their views as to what compensation should be if the fisheries were entirely destroyed.
>
> A week later, another meeting was held on the Reserve, this time with the Indians only, in an attempt to arrive at a fair compensation. Roughly, the proposals were as follows:
>
> (1) Compensation for land flooded at the rate of $1,000.00 an acre. (This amount is totally unrealistic in our views, but was possibly the result of false information obtained by an Indian from some non-Indian involved in recent Federal Government purchases of land for the nearby Charlo Airport. It was reported that the rate of $1,000.00 an acre had been paid, while in fact the highest rate was $175.00 an acre.)

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[74] Medcof had commented that "[i]f this statistical report were correct and the Indian claims of annual Eel River landings valued at $1,500 were correct, we would deduce that Eel River alone contributed three quarters of the total catch from District 63 in 1962. We seriously question this – someone is probably wrong somewhere." Dr J.C. Medcof, Assistant Director, Fisheries Research Board of Canada, Biological Station, St Andrews, NB, to J.L. Hart, Director, Fisheries Researcher Board of Canada, Biological Station, Ottawa, January 30, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 175).

(2) A total amount of $210,000. for the loss of clams based on an annual value of $30,000. multiplied by seven.

(3) A total of $17,500. for losses to other fisheries based on an annual crop valued at $2,500. multiplied by seven years.

It was further resolved at the meeting that these amounts would be reduced considerably if the Town could provide employment for the Indians. It is to be noted here that these amounts are based on entire losses and the percentage which would be paid to the Indians will be based on Dr. Medcof's survey.

I indicated earlier that the Indians have taken exception to the statement in Paragraph 9 of Dr. Medcof's report. The Indians are now in the embarrassing position of having to admit to us their actual gains from fishing, which needless to say would affect their relief to a considerable extent, or accepting Department of Fisheries figures and our own estimates of former years, thereby reducing considerably the amount of compensation they can hope to receive. In any case, it appears quite safe to say that the figure of $1,500.00 is far from correct. We have found some records kept by an Indian showing that in the month of July he purchased approximately 1,700 pails of clams at an average value of $1.50 per pail. This man is one of two buyers on the Reserve, and his purchases would equal approximately half the total production. His figures alone for one month of an eight-month season would be sufficient to prove that Department of Fisheries' figures are inaccurate. If we can believe the reports given to us by the Indians, and I am not prepared to reject them without adequate proof, it would seem that the yearly production was in the vicinity of 20,000 pails per year, which in turn would represent the $30,000 claimed by the Indians . . .

Following this meeting with the Indians, it was decided that our next step would be a meeting of the various unions operating in the Town of Dalhousie. Unfortunately, all the unions were represented by only one man, the President of the Union's Council. He did not offer too much hope in the field of employment, because of the seniority factor in unions, and the fact that there are unemployed union members in the Town at the moment, but he did agree to present our case at the general meeting of the Unions in the hope that they may have some solution to offer . . .

At that meeting, the Town Manager admitted to us that work was already underway on the construction of the pipe line and the pump house in the Town. This does not yet affect Indian land, but the Town was very anxious to go ahead with certain phases of the job which would affect the reserve. We suggested to the Mayor and the Town Manager that it would be an opportune time to meet the band again to

> obtain their consent to this phase of the work, and also to offer counter proposals to those offered earlier by the band.[75]

McKinnon also attached to his memorandum a brief prepared by Indian Affairs, which was presented to the President of the Dalhousie Unions' Council, to support the First Nation's request for employment opportunities for the 10 to 15 able-bodied Indians on the reserve. This brief stressed that the coming of Canadian Industries Limited to the town was entirely dependent on obtaining a supply of fresh water. In order to obtain the water, the Indians' economy might be severely damaged, thereby necessitating that they be compensated in one form or another. Although Canadian Industries Limited would create approximately 45 jobs, the Indians were not qualified because the company required high school graduates. Therefore, Indian Affairs maintained that owing to "the possible total or partial destruction of their livelihood, the Indians should not be required to compete for jobs in Dalhousie on the same basis as local residents who have everything to gain by the erection of the dam."[76] It requested that special efforts be made to find employment for the Indians in other fields in the town – if they were given preferential treatment with respect to job opportunities, the Department was "prepared to contribute time and money" to assist in matching suitable candidates to jobs. Finally, Indian Affairs indicated that other unions across the country were very cooperative; it hoped the executive of the Dalhousie unions and its members would support the Band's request in view of the potential destruction of its fishing industry.

On April 9, 1963, the Band Council passed a Band Council Resolution (BCR) outlining terms and conditions under which construction of the dam would be acceptable to the Band. It reads as follows:

> 1. We, members of the Eel River Band of Indians, at a meeting held on April 9th 1963, Eel River Reserve, Province of New Brunswick do hereby resolve that permission be granted to the Town of Dalhousie, its agents, servants and workmen to enter upon our reserve and carry out the work necessary for the full completion of a dyke and dam as contained in the drawing by the Maritime Marshland

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[75] F.B. McKinnon, Maritime Regional Supervisor, Amherst, to Indian Affairs Branch, Ottawa, April 1, 1963 (ICC Documents, pp. 186-91).

[76] Transcript of Document 90, Proposed Remedial Action to Offset Possible Destruction of Eel River Indians Economy (ICC Documents, pp. 189-91).

Rehabilitation Administration, and to enter upon our Reserve whenever required to carry out the necessary maintenance upon the said dyke and dam.

2. Whereas the said dyke and dam will result in the flooding of certain shore lands as shown on the said drawing, the Town of Dalhousie shall on or before December 31st, 1963, or as soon as title to the land is acquired, compensate the band in the form of a $4,000.00 (Four Thousand dollars) payment for the land so flooded or utilized or in the form of land acceptable to the band as represented by the Band Council, in an acreage equal to that which will be flooded. The band further recommends that the Governor in Council grant to the Town the right to avail itself of the expropriation procedures as contained in Section 35 of the *Indian Act*.

3. Should the erection of the dam have an injurious effect on fisheries, it is further agreed that the Town of Dalhousie shall between September 1st and September 15th of the year 1967 pay compensation for one half the losses to the annual clam production of the entire river between the dam and the bridge on Highway No. 11 at the rate of 7 x $1.50 per 6 quart pail, and for losses to the annual smelt production at the rate of 7 x 6¢ per pound. The losses to the clam fishing shall be determined by the Fisheries Research Board of Canada and the losses to smelt fishing by the Area Representative of the Canada Department of Fisheries. These losses must be entirely due to the construction and erection of the dam.

4. Notwithstanding the provisions of paragraph 3 the amount of compensation to be paid by the Town for losses to the fisheries shall not exceed $50,000.00 (Fifty Thousand Dollars).

5. The band further agrees to reduce, under the provisions of paragraph 3 or 4, the compensation for losses to fisheries at the rate of 5% of the total amount payable for every male Indian who from the signing of this resolution until September 1st, 1967 will have obtained by any means and from any source, employment, the remuneration from which directly or indirectly shall not be less than $2,000.00. A commission to be composed of three members; one to be appointed by the Council of the Eel River Band, a second to be appointed by the agents of the Town of Dalhousie and the third to be mutually agreed upon by the Band Council and the said Agents, shall meet not less than every six months to determine if the employment is of such a nature as to qualify the Town to apply the 5% reduction. The commission shall determine its own terms of reference.

6. Whereas the New Brunswick Water Authority has indicated that the creation of a trout fishing pool as a tourist attraction in the reservoir created by the dam, would have no injurious effect on the water, the Eel River Band proposes to request assistance from the Indian Affairs Branch to further study this possibility. If the New Brunswick Water Authority grants permission to develop such a fishing pool, the Town of Dalhousie shall not object to and shall support only the application of the Eel River Band to the Province of New Brunswick for these exclusive fishing rights of the Band Members [from] such a pool. The town may be released from the

> provision of this clause at the discretion of the Minister of Citizenship and Immigration.[77]

The Band Council Resolution was signed by Chief Alfred Narvie and Councillors T. Frank Martin and Peter W. Narvie.

McKinnon sent a copy of the Band Council Resolution to IAB-Ottawa on April 16, 1963, along with a long memorandum indicating that the resolution was signed after a general Band meeting for the purpose of discussing the proposed construction of the dam. McKinnon stated that 25 eligible voters had attended the meeting, and that 24 of them had voted in favour of the proposed "agreement," which had apparently been distributed to Band members for their consideration. McKinnon noted that "[t]here are eighty-seven eligible voters in this band, but only thirty-eight are living on the reserve at the present time. The others are away, most of them in the United States."[78] McKinnon explained each of the clauses in turn. With respect to the question of authority to expropriate in paragraph 2, he explained:

> *The last sentence in paragraph 2 is self-explanatory and results in the fact that we wish to avoid surrender meetings. Because of the unavailability of the majority of voting members present, we would require at least two surrender meetings.* In the meantime we could not give to the Town unconditional authority to proceed with the work, and the Town in turn would not be able to meet the October 31st deadline set by the industry which is establishing in Dalhousie. *This was fully explained to the Band members and there were no objections voiced.*[79]

With respect to the employment clause, McKinnon wrote in later correspondence that "[i]t was felt that industries and services in the Town could reasonably absorb in their labour forces the twenty or so men on the reserve. It was made very plain at the beginning that the Indians were much more interested in the possibility of providing regular employment than in the casual earnings from

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[77] Band Council Resolution, April 3, 1963 (ICC Documents, p. 192).

[78] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Indian Affairs Branch, April 16, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 194).

[79] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Indian Affairs Branch, April 16, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 194-95). Emphasis added.

clam-digging."[80] Therefore, it is clear that this clause was meant not only to create job opportunities but to provide *full* employment for the able-bodied men on the reserve. McKinnon noted in his report, however, that "it will be difficult to enter [it] in legal documents. Hard fast rules are going to be difficult to establish here." Also, the Band Council Resolution contained a proposal to develop a trout fishing pool as an economic development project for the Band, suggesting again that the focus on economic development and employment may have reduced the cash compensation provided for in the resolution. Finally, McKinnon noted that "the Indians raised the question of future possible damages, as a result of a break in the dam or some such incident. The Indians signed the resolution on the understanding that the matter of Town responsibility in such an event would be determined and if it proved necessary that it be spelled out in the agreement, it would be done at Headquarters. It would be appreciated if the matter was given consideration."[81]

On April 24, 1963, D'Astous responded to McKinnon's report and request for instructions on the steps to be taken to conclude the agreement between the Band and the town:

> [I]t appears the Town will require an area of land on which to place the reserve end of the dam, an easement to flood adjacent land and access over the reserve to the dam. A grant with respect to the land, flooding and access presents no problem especially if the grant can be made under the authority of Section 35 of the *Indian Act*. In this connection, the Solicitor for the Town of Dalhousie should be asked to provide proof of the fact that the Town has a statutory power to expropriate land needed for the Town water system.
>
> At the moment we are not certain whether the Indians have a legally enforceable claim for loss of income from clam harvesting and other fishing should the construction of the dam have an adverse effect on clam and fish production. However, an answer to this question is not essential if a legally enforceable agreement is reached with the Town to pay compensation in the event of a reduction of income from the fishing.

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[80] F.B. McKinnon, Regional Director of Indian Affairs, Maritime Regional Office, Amherst, NS, to Dr J.C. Medcof, Assistant Director, Fisheries Research Board, Biological Station, St Andrews, NB, January 9, 1968, DIAND file 271/31-513-3-1, vol. 1 (ICC Documents, p. 342).

[81] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Indian Affairs Branch, April 16, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 195-96).

> The compensation scheme embodied in the Council Resolution will require some thought and it is being referred to the Departmental Legal Adviser for consideration and advice.[82]

On the same day, D'Astous sent a copy of the Band Council Resolution to the IAB Legal Advisor to request his "views as to the incorporation of the terms of the proposal in a legally enforceable agreement."[83]

On May 6, 1963, McKinnon wrote back to D'Astous to confirm that he had sought proof from the Town of Dalhousie of its power to expropriate. He also wrote to clarify what he saw as the basis for the compensation negotiations with the town:

> From the very beginning of our negotiations, we made it plain to the Indians and to the Town that the Indians had no legal claims to any of the fisheries in the river because it was tidal. *The legal basis for a settlement for loss of clams rests, in our views, simply in the fact that if the Town does not accept to pay for such losses, the Indians would simply not allow them access over the reserve in order to construct and maintain the dam. While the land in itself is only worth a few dollars, it protects clam production in the river to which the Indians have access. In reality, the Town will be paying all its compensation for the land, since the Indians realize they cannot sell what they do not own. The value of the land, however, will depend on the effects the dam will have on the fishing. For this reason, it is necessary that the value of those fisheries becomes part of the total settlement.*
>
> As long as the agreement which has been signed by the Indians and will be signed by the Town makes it binding upon the Town to respect the terms incorporated for fishing losses, it is all we require. If, however, the Town could conceivably break the agreement later on on the basis of the fact that the Indians do not own the fishing, then it should be made very clear now, because I am convinced that the band will take an entirely different view.[84]

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[82] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Ottawa, to Regional Supervisor, Maritimes Office, April 24, 1963, DIAND file E-5661-3-06013D2, vol. 1 (ICC Documents, p. 197).

[83] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Ottawa, to Legal Advisor, Indian Affairs Branch, April 24, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 198-99).

[84] F.B. McKinnon, Regional Director of Indian Affairs, Maritime Regional Office, Amherst, NS, to Indian Affairs Branch, May 6, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 201). Emphasis added.

On May 8, Town Manager Petersen wrote to McKinnon to advise him that the town did have expropriation powers pursuant to provincial legislation. A copy of the *Towns Act*[85] was later provided to the IAB as proof of the town's authority to expropriate lands for the purpose of carrying out any of its powers and duties.[86]

On June 4, Sheane wrote to McKinnon to suggest that since clam digging was under way on the river, Dr Medcof's clam survey should be carried out as soon as possible "before the beds have become partially depleted. You will agree that this would be detrimental to the Indians case and in favour of the town."[87] He also advised that the Indians were not accepting offers of employment to clear the land to construct the dike because Chief Narvie indicated that the town was offering $40 to $75 per acre, whereas members of the Band did not feel they could make any money unless they were paid $100 per acre.[88] A week later, Sheane wrote that the dispute over the clearing work had escalated, but appeared to have been resolved through negotiations between the Band, Sheane, and town representatives, and that the work was being completed by Band members at a compromise figure of $90 per acre. Sheane also pointed to "the urgent necessity of having the agreement obtained by ourselves from the town and the Indians, processed by the Department. Following completion of the present work phase[,] actual dam construction will commence and it would be unfortunate if the project had to be cancelled following a large expenditure on the part of the Town."[89]

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85 *Towns Act*, RSNB 1952, c. 234, and amendment, c. 70.

86 W.E. Petersen, Town Manager, Town of Dalhousie, to Indian Affairs Branch, Maritimes Office, May 8, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 203). Petersen cited the "Acts of the Legislature of New Brunswick 10-11 Elizabeth II, 1961-62, Chapter 70, Sections 131 and following" as the basis for the town's expropriation powers.

87 J.H. Sheane, Superintendent, Miramichi Indian Agency, to Maritime Regional Office, June 4, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 206). The first survey was actually carried out in July 1963 (ICC Exhibit 2, tab 18).

88 J.H. Sheane, Superintendent, Miramichi Indian Agency, to Maritime Regional Office, June 4, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Document p. 206).

89 J.H. Sheane, Superintendent, Miramichi Indian Agency, to Maritime Regional Office, June 11, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 209).

In the meantime, D'Astous had written again to the Departmental Legal Advisor seeking an opinion and an assessment of the proposed agreement.[90] On August 19, 1963, D'Astous wrote to McKinnon indicating that the Legal Advisor had concluded that expropriation would not be appropriate in these circumstances. According to the Legal Advisor, the expropriation powers conferred on the Town of Dalhousie by the provincial *Towns Act*

> are exercisable by the Town only in the event that an agreement is not or cannot be reached with the land owner. The Council Resolution, provided the terms thereof are acceptable to the Town, is tantamount to an agreement and therefore the expropriation powers are not exercisable.[91]

Therefore, the Legal Advisor recommended that an interim permit be granted under section 28(2) of the *Indian Act* pending a surrender of the land from the Band and a formal grant of land to the town by letters patent. D'Astous advised that the Department was working on a draft permit and suggested that McKinnon request that the town pass a resolution to accept and approve the April 9, 1963, Band Council Resolution "as the basis for a formal agreement between ourselves and the Town." Sheane made this request to the town, and a formal resolution from the town was provided on September 12, 1963, and forwarded to the Legal Advisor.[92]

It was not until November 22, 1963, that D'Astous sent to McKinnon a first draft of the agreement, prepared by the Department, which attempted to reflect the "meaning and intent" of the April 9, 1963, Band Council Resolution.[93] Under the terms of this draft agreement, the Band was to

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[90] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Ottawa, to Legal Advisor, Indian Affairs Branch, June 18, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 212).

[91] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Ottawa, to Regional Supervisor, Maritimes, Indian Affairs Branch, August 19, 1963, DIAND file E-5661-3-06013-D2, vol. 1 (ICC Documents, p. 220).

[92] J.E. Sheane, Superintendent, Miramichi Indian Agency, to W.E. Petersen, Town Manager, Dalhousie, NB, September 3, 1963, DIAND file, E-5661-3-06013-D2, vol. 1 (ICC Documents, p. 223); W. Edgar Petersen, Town Manager, Dalhousie, NB, to J.E. Sheane, Superintendent, Miramichi Indian Agency, September 12, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 225); Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, to Legal Advisor, Indian Affairs Branch, September 26, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 227).

[93] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, to Regional Supervisor, Maritimes, November 22, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 228-29).

receive $4000 from the town for rights to use reserve land plus a maximum payment of $50,000 in compensation for the loss of the fishery, to be calculated at the rate of "$10.50 per six (6)-quart pail of clams" and 42 cents per pound of smelts.[94] (The figure of $10.50 per pail appears to be a typographical error, since the 1963 resolution states that the price shall be based on $1.50 per pail, a sum more consistent with reports on the market value of clams.) In December 1963, Sheane and McKinnon provided their comments on the draft agreement prepared by IAB-Ottawa. D'Astous asked them not to discuss the draft with the Band or the town at this point, since he wished to continue to work on the draft with the Legal Advisor before reviewing it with the parties. Accordingly, Sheane's and McKinnon's views were their own and do not purport to represent those of the Band. Sheane expressed concerns about the method used to calculate compensation and the difficulty in estimating the loss of clam and smelt production. In view of these concerns, Sheane stated: "I cannot agree that any final agreement to sell the land be signed until iron-clad guarantees regarding compensation are made by the town."[95]

McKinnon echoed Sheane's comments about the difficulty in assessing losses to the fishery, since no survey figures were yet available. (These figures were provided approximately a month later, although the survey itself was conducted in July 1963.) McKinnon also emphasized that with respect to the employment clause, the parties understood it to mean permanent employment, not a "series of jobs of a purely temporary nature." Finally, McKinnon expressed doubts about Dr Bates's sincerity regarding the establishment of a trout fishery:

> [I]t was my opinion at the time that his [Dr Bates] suggestion that a trout fishery be established was simply bait. The Indians were told so by myself at one of the meetings, but it was added that we would press for a firm commitment from Dr. Bates. So far he has skilfully avoided our requests to put this offer in writing, but we shall continue pressing him to do so.[96]

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[94] Draft Agreement between Canada and Town of Dalhousie, [November] 1963 (ICC Documents, pp. 230-33).

[95] J.H. Sheane, Superintendent, Miramichi Indian Agency, to Maritime Regional Office, December 4, 1963 (ICC Documents, p. 243).

[96] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, to Indian Affairs Branch, December 10, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 245).

The dam on the Eel River was completed by November 1963, without an agreement on compensation or any formal authorization provided under the terms of the *Indian Act* in the form of a surrender, expropriation, or permit.

NEGOTIATIONS ON EMPLOYMENT AND VALUE OF THE CLAM FISHERY: PHASE 2 (1963-68)

From 1963 until early 1968, negotiations continued between the town and the Band in an attempt to reach agreement on the terms and conditions of a formal and legally binding document. Many problems arose between the parties, and the NBWA withdrew from the negotiations until early 1968. The main problem was that the town was either not making any efforts or was unable to secure employment for the Band. Whatever the reasons, the result was that efforts to reach agreement on terms concerning employment, value of the clam fishery, and other matters of concern to the Band became more difficult as time passed.

To assess properly the compensation payable to the Band under the terms of the 1963 Band Council Resolution, three surveys of the soft-shell clam population at Eel River Cove were conducted in July 1963, July 1964, and August 1967 to determine whether any damage was caused to the clam harvest as a result of the dam's construction. The first of these three surveys was done by Dr J.S. MacPhail of the Atlantic Biological Station in July 1963 (before the dam was completed), and his complete report was forwarded to the IAB on January 15, 1964. Dr MacPhail's report suggests that, given the dam's position upstream from the productive clam flats, it was unlikely that there would be any effect on the water level in the cove at periods of low tide. The report indicates that there was a ready market for selling clams to tourists and picnickers, and that diggers sold their catch for $1.50 to $2.00 per 6-quart pail of clams, but that they could receive as much as $2.25 per pail if the clams were steamed. In previous years, surplus stocks of clams were sold to factory processors in Buctouche for $1.00 per pail. Dr MacPhail's main conclusions were as follows:

> Clams are indeed abundant in Eel River cove. A total of 77,000 6-quart pails of marketable clams is remarkable today for 39 acres of flats. This is equivalent to about 350 bushels per acre which was considered good digging in our coastal areas 15 years ago. Several factors likely contribute to maintaining this good population of clams.
>
> (a) The flats are always submerged. This makes digging a difficult task and prevents efficient recovery of clams from the soil that is turned. It also

prevents systematic turning of the populated ground. In short, it tends to reduce the intensity of the fishery.

(b) There is no processing plant in the immediate vicinity to handle low-priced catches in excess of high-priced tourist purchases. This, too, reduces the fishing intensity by confining the greatest fishing effort to the summer months.

(c) If weather conditions are unfavourable, particularly on week-ends during the summer months, sales to tourists and picnickers drop drastically and consequently digging is slight until accumulated catches are sold.

(d) There are relatively few persons in this area who wish to supplement their earnings by digging clams. This absence of intense digging is exemplified by the comparatively higher density of clam populations in sections 1, 2 and 3 than in sections 4, 5 and 6 . . . where soft, muddy soils are a deterrent to diggers although the rewards for fishing would be greater.[97]

Dr MacPhail stated in his acknowledgments that he was "indebted to Chief Alfred Narvie, Eel River Band, for general background knowledge and history of the clam fishery in Eel River Cove."[98]

As mentioned above, the issue of compliance with the understandings set out in the 1963 Band Council Resolution concerning employment became crucial in the discussions that followed. There was much discussion of how to make the clause work, including suggestions that the commission referred to in the resolution be constituted right away to get its views on how to draft this term in the agreement.[99] On January 14, 1964, IAB officials met with representatives of the Band and the town in the presence of Magistrate J.T. Troy, who was to serve as the independent member of the committee, to discuss the wording of this clause; at the end of the meeting, however, it was agreed that the wording in paragraph 3 of the draft agreement was sufficient because it would give the committee "all possible freedom . . . to operate efficiently and fairly."[100]

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[97] Eel River Band, Eel River Indian Reserve No. 3, Expropriation for Dam Specific Claim, Draft Historical Report, undated (ICC Exhibit 4, p. 105).

[98] Eel River Band, Eel River Indian Reserve No. 3, Expropriation for Dam Specific Claim, Draft Historical Report, undated (ICC Exhibit 4, p. 106).

[99] Jules D'Astous, Chief Economic Development Division, Indian Affairs Branch, to Regional Supervisor, Maritimes, December 19, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 254).

[100] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, to Indian Affairs Branch, January 27, 1964, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 256).

On April 23, 1964, the Band requested a meeting with the Mayor and the Town Manager, which Sheane and Caissie also attended, "to express their dissatisfaction at the attitude of the Town and also to suggest that a second look at the agreement be taken with a view of adding much stronger clauses dealing with employment."[101] McKinnon's report on this meeting noted that

> . . . some Indians felt that the deal should be entirely cancelled and forgotten.
>
> From the very beginning of negotiations, the Indians were interested only in obtaining employment. It was their feeling, as well as ours, that paragraph 3 of the agreement would be sufficiently attractive to the Town to have them make special efforts to locate employment for the Indians. This has apparently not been the case, and so far after almost one year, not one Indian has been able to obtain employment. At all our meetings subsequent to the passing of that agreement, the Town has found excuses such as their lack of control over the mill, the C.I.L. plant, and other employers, pressure on the council for municipal jobs by Town residents, and the number of unemployed in the Town. They feel this is justification for their lack of action in this respect.[102]

McKinnon forwarded with his report copies of two letters he had sent to the National Employment Office and to the International Longshoremen's Association, each of which raised a concern with respect to practices or efforts made in relation to employment that the Band had identified as worthy of investigation. McKinnon concluded by saying that "if no action has been taken to have the Minister confirm the agreement," none should be taken until the IAB heard further from him in relation to his inquiries.

Over the next several months, numerous concerns were expressed by Indian Affairs officials about the lack of job opportunities made available to members of the Band. In his Agency report to D'Astous of June 4, 1964, McIntyre stated that the "Indians and Field staff however are of the opinion the Town authorities have made little effort to obtain employment for Indians." He had the impression, however, "that the Town is not so much evading its undertaking as that the Mayor is at

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[101] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, to Indian Affairs Branch, April 27, 1964, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 258).

[102] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, to Indian Affairs Branch, April 27, 1964, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 258).

a loss to know how to go about fulfilling it."[103] On August 5, Sheane reported to Ottawa that Chief Narvie could provide evidence that Band members were being discriminated against because "the permanent Longshoremen's Union in Dalhousie are still bringing in their relatives and ignoring the seniority system."[104] From the time when the 1963 Band Council Resolution was passed, only a few band members[105] had acquired permanent positions, but McKinnon suggested in 1965 that at least some of this employment was "a direct result of the forceful representations made by Mr. Sheane and this office."[106]

At the same time, Sheane reported that "the Fisheries people conducted another survey with preliminary indications of a decided drop in the clam resources."[107] Nevertheless, it was difficult for the IAB to reach any definite agreement on compensation until the Department of Fisheries completed its clam surveys to determine the extent of the dam's effect on the fishery. On September 3, 1964, the second clam survey report was provided by Dr MacPhail. He wrote that "[t]he most remarkable change since the construction of the dam [in November 1963] is the small amount of water remaining on the flats at periods of low tide."[108] Dr MacPhail's main conclusions in relation to the clam survey were as follows:

> 1. Comparison of the two years' estimates of volumes of marketable clams available indicates that there were only two-thirds as many as in 1963. In

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[103] W.P. McIntyre, Economic Development Division, Indian Affairs Branch, to Chief, Economic Development Division, Indian Affairs Branch, June 4, 1964, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 266).

[104] J.H. Sheane, Superintendent, Miramichi Indian Agency, to A/Chief, Economic Development Division, August 5, 1964, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 269).

[105] Superintendent J.H. Sheane refers specifically to four men who had become permanent members of the Longshoremen's Union in a memorandum to the Maritime Regional Office on January 14, 1965 (ICC Documents, p.275).

[106] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, to Indian Affairs Branch, January 18, 1965, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 276).

[107] J.H. Sheane, Superintendent, Miramichi Indian Agency, to A/Chief, Economic Development Division, August 5, 1964, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 269).

[108] Eel River Band, Eel River Indian Reserve No. 3, Expropriation for Dam Specific Claim, Draft Historical Report, undated (ICC Exhibit 4, p. 114).

> section 3 there is a considerable difference in the volume of available marketable clams – about 70% less than in 1963. This may be the result of heavy fishing since the soil in this portion of the cove is easily dug and consequently is a favourite spot for both picnickers and commercial diggers to gather clams. However, marketable clams are still abundant in Eel River Cove averaging about 230 bushels per acre which is high compared with most clam producing flats in the Maritimes. Young clams are still abundant and there are prospects of good digging in 1965.
>
> 2. When the total numbers of clams taken in the 1963 and 1964 samplings are compared, there appears to be no essential differences in the population . . . The relationship of nonmarketable to marketable clams is approximately 65% and 35% respectively for both years.
>
> 3. The great reduction in the amount of water over the flats at periods of low tide makes digging easier. Picnickers, in particular, who previously dug one-half pail will now double that amount with the same effort. This may encourage greater numbers of people to work the flats, eventually resulting in a reduction in the clam populations.[109]

MacPhail stated that the results of the 1964 survey did not "permit a clear conclusion on the direct or indirect effects on clam stocks of damming the estuary of Eel River"[110] and, therefore, recommended that the area be sampled again in 1966 to better assess the long-term effects of the dam on clam production.

Between the spring of 1964 and the spring of 1966, negotiations had slowed down considerably, for reasons not entirely clear from the record. In the intervening years, a substantial turnover in the participants had taken place. The Town Manager had died,[111] and the Mayor and one councillor had been replaced. The task of convincing the new representatives that they had a legal responsibility, in the absence of an agreement signed by the Minister, was onerous.

In the spring of 1966, the Band's and the IAB's dissatisfaction with the employment situation came to a head. McKinnon wrote to the IAB reporting on a meeting held on April 5, 1966, with

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[109] Eel River Band, Eel River Indian Reserve No. 3, Expropriation for Dam Specific Claim, Draft Historical Report, undated (ICC Exhibit 4, p. 115).

[110] Eel River Band, Eel River Indian Reserve No. 3, Expropriation for Dam Specific Claim, Draft Historical Report, undated (ICC Exhibit 4, p. 116).

[111] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, to Indian Affairs Branch, September 15, 1965, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 280).

Mayor Dillon Arsenault and one of his councillors concerning the town's lack of effort in securing jobs for the Band. The town's representatives suggested that the IAB meet directly with representatives of the pulp mill to find out what the problem was. Although McKinnon was of the view that this was supposed to be the town's responsibility, he agreed to do so to prompt some action. The mill's representatives indicated that because of the length of the unions' unemployed members' lists, it would be some time before new employees could be offered work. They also indicated that "[a]pproximately a year ago the Mill instituted a new policy, whereby people with less than a Grade 10 education would not be considered for employment unless it was absolutely necessary," but that they were willing to consider Band members who did not meet this requirement once the unemployed members' lists were retired.[112]

McKinnon indicated that he did not place any faith whatsoever in the explanations offered by the town for this regrettable situation. He wrote:

> It is becoming quite obvious that the Town, now enjoying the water privileges, are not doing too much if anything at all to satisfy the spirit of the agreement by providing employment for the Indians. I think this accusation can be documented quite easily. Since the agreement was entered into, the Mill went from a five day week to a seven day week, and this resulted in the hiring of a fairly large number of people. Although the Indians have their applications at the mill, the Town apparently did not make any representations to the Manager for special consideration to Indians. This is quite contrary to what the Town Council leads us to believe. There has been at least one municipal project, the construction of a fire hall, where Indians could have worked, but the Town made no effort to employ any of them. As a matter of interest also, even during the construction of the dam itself, Superintendent J.H. Sheane had to visit the Town Office at least on one occasion to complain very strongly because Indians were not being given employment.[113]

McKinnon concluded by stating that both he and the Band were of the view that it was time to issue an ultimatum to the town and to seek full value of the clams:

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[112] F.B. McKinnon, Regional Director, Maritime Regional Office, to Indian Affairs Branch, May 2, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 286).

[113] F.B. McKinnon, Regional Director, Maritime Regional Office, to Indian Affairs Branch, May 2, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 287).

> The value of those clams was established two years ago, if you remember, at something like $115,000.00. Were we to use the formula employed with Indians in the North when trap lines were destroyed, I believe we would multiply this annual value by seven making it a grand total of $805,000.00. Since the Indians are only laying claim to half the clams, this would still represent close to a half million dollars.[114]

He added that the Band Council intended to launch a media campaign, the plan being "to simply shame the Town by making it known as far and wide as possible that the Indians have put their livelihood at stake in order to improve the economic prospects of the Town and that the Town on the other hand has apparently not been willing to give any consideration at all to the desire of the Indians for full employment."[115] Given the apparent need to issue an ultimatum to the Town Council, McKinnon called for a special meeting between the town and the Band Council.

The meeting was held on May 18, 1966, and was attended by eight of nine town councillors, the town's former negotiator, three Band Council members, two other Band members, and Sheane and Caissie on behalf of the Department. McKinnon reported that the meeting had become "quite stormy" when Mayor Arseneault interrupted Sheane's summary of the situation to deny "that they had any responsibility to assist in locating employment. He categorically refused to recognize that this was the intent of the employment clauses in the agreement and ended by indicating that he had no intentions of interceding with anyone to secure employment for Indians." The Band Councillors felt it was futile to continue the discussion and left the meeting, although Sheane and Caissie stayed on for another hour "in the hope that the Mayor might recognize the full implications of his position and consent to compromise. He had not when they left."[116]

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[114] F.B. McKinnon, Regional Director, Maritime Regional Office, to Indian Affairs Branch, May 2, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 287). McKinnon is referring to the figure presented in the 1964 clam survey, where McPhail found that 77,017 pails of marketable clams were available to the diggers. (This number x 1.50 = 115,000).

[115] F.B. McKinnon, Regional Director, Maritime Regional Office, to Indian Affairs Branch, May 2, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 287).

[116] F.B. McKinnon, Regional Director, Maritime Regional Office, to Administrator of Lands, Indian Affairs Branch, Ottawa, May 20, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 288-89).

McKinnon also reported that Sheane and Caissie met with the Band Council and some Band members later that evening to ask that they let things cool down before taking any action: "This is a level-headed council and it is felt they will remain calm; Councillor Wallace LaBillois intends however to give this situation some publicity in the newspaper." McKinnon painted a bleak picture:

> One thing is reasonably certain. The Indians will refuse to allow any reduction in the compensation for any reason, and particularly in the form suggested in the so-called agreement as it related to employment. I would suspect it will be impossible to salvage any part of the agreement.
>
> The Council felt that the next step was a band or council meeting at which a legal officer of the Branch would explain the present status of the agreement and recources [sic] under the law available to the Indians. It was felt that you should be the one to attend this meeting, and Mr. Caissie agreed to relay the message to you. Mr Labillois [sic] said he would extend an invitation to Mr Len Marchand, whom he knew and whose position he felt might have a salutory [sic] psychological effect on the Town Council.[117]

McKinnon asked the Administrator of Lands at the IAB for a prompt response to his letter and reiterated his request for a meeting on June 23, 1966.

Despite McKinnon's unequivocal request for a meeting between IAB officials and the Band Council to discuss the available legal options, there is no record of any further action until December 13, 1966, when the executive assistant to the Assistant Deputy Minister of Indian Affairs, R.F. Battle, asked D'Astous to draft a letter to Wallace LaBillois requesting the town's support in hiring 15 Indians as "part of the consideration in connection with the use of the Indian property in question." This letter seems to have been prompted by a conversation concerning events at Eel River that Battle had with Wallace LaBillois at a meeting in Winnipeg the previous week.[118]

The pace of the negotiations began to accelerate as senior officials at the Ottawa headquarters of IAB became more actively involved in the matter. On December 19, 1966, D'Astous, as Director of Administration, wrote to the Acting Chief of Lands to advise that he had spoken with Wallace

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[117] F.B. McKinnon, Regional Director, Maritime Regional Office, to Administrator of Lands, Indian Affairs Branch, Ottawa, May 20, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 288-89).

[118] J.D. Darling, Executive Assistant, Department of Indian Affairs and Northern Development, to Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, December 13, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 291).

LaBillois to follow up on his conversation with Battle regarding employment for the Band. LaBillois apparently felt that there was no point in pursuing discussions with the town about employment and that adequate cash compensation should be sought instead:

> The situation is that the Indians have given up all hopes of having the City of Dalhousie help them find jobs. They want the Branch to serve notice to the Mayor that the terms previously negotiated do not stand anymore and that what is expected of the City now is an offer in money for full compensation of the land taken, the land flooded, the loss or revenue from clam digging, etc. The Indians mentioned the settlement should not be less than $100,000 but I do not think we should mention any figures at this stage.[119]

On January 27, 1967, Battle wrote to Mayor Arsenault stating that the dam was now in operation and that the fisheries had been adversely affected. He noted that while the town was benefiting from the arrangement, there had been no benefits whatsoever for the members of the Eel River Band, nor did it appear there would be. Battle pointed out that "[a]s is the practice in the Indian Affairs Branch of this Department, it has been left to the Indian Band, assisted by Regional and Agency officials of the Branch, to negotiate with your town to achieve adequate compensation. The continued lack of success makes it necessary now for Department officials here in Ottawa to intervene on behalf of the Band." Since the Band was no longer interested in obtaining employment assistance from the town because of its lack of effort, he advised that "[t]he position now taken by the Band, which the Department supports, is that it is entitled to full compensation for the loss it has suffered, both to its lands and its means of economic support. . . . I must point out that the Band has been deprived of its just entitlement for over three years and in view of this I would ask that you consider payment of compensation as early as possible."[120]

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[119] Jules D'Astous, Director of Administration, Indian Affairs Branch, to Acting Chief, Lands, Membership and Estates Division, December 19, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 292).

[120] R.F. Battle, Assistant Deputy Minister, Indian Affairs, Ottawa, to Mayor Dillon Arsenault, Town Hall, Dalhousie, NB, January 27, 1967, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 301-02).

The Town Administrator promptly responded to Battle's letter, advising that the Mayor and the Council were willing to meet for a full discussion at his earliest convenience.[121] This meeting was postponed, however, first on account of Battle's illness and then by Indian Affairs' decision to wait for the final study by the Fishery Research Board.[122] Dr Medcof wrote to McKinnon in July to request that he advise Chief Narvie and the Agency that he intended to be at Eel River Cove on August 1, 1967, to complete the third, and final, survey on the clam populations.[123]

Dr Medcof completed his report, entitled "Third Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya arenaria) Population," in November 1967.[124] The report, which was forwarded to the IAB in late January 1968,[125] contained the following summary and conclusions:

> 1. Before 1963 the physical and biological characteristics of Eel River Cove seem to have been changing slowly – so slowly as to create the impression that the cove was a stable system. Since 1963 the tempo of change has increased rapidly. Evidence of extensive sedimentation is conspicuous from the 1967 general survey – coarse sediments are depositing in the extreme north and south ends and the mouth of the cove is being choked with gravel. At both ends salt marsh plants are appearing on the clam flats. Fine sediments are depositing in the middle reaches of the cove where formerly-firm soils are becoming very soft. The cove is behaving as a sediment trap and slowly converting to a salt marsh. In the north, the area of flats suitable for clam stocks is decreasing. And the rest of the cove's productive clam ground is deteriorating as a clam habitat, because of silt deposition.

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121 Daniel E. Noel, Town Administrator, Town of Dalhousie, NB, to R.F. Battle, Assistant Deputy Minister, Indian Affairs, Ottawa, February 17, 1967, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 303).

122 G.A. Poupore, Chief, Lands, Membership and Estates, to Regional Director of Indian Agencies - Maritime Region, June 8, 1967, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 305).

123 J.C. Medcof, Assistant Director, Fisheries Research Board, Biological Station, St Andrews, NB, to M.A. MacDonald, District Protection Officer, Department of Fisheries, Newcastle, NB, July 25, 1967, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 309-10); J.C. Medcof, Assistant Director, Fisheries Research Board, Biological Station, St Andrews, NB, to F.B. McKinnon, Regional Director of Indian Affairs, Maritime Region, Amherst, NS, July 25, 1967, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 311).

124 J.C. Medcof, Fisheries Research Board, Biological Station, St Andrews, NB, "Third Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya arenaria) Population," November 1967 (ICC Exhibit 2, tab 20).

125 J.M. Anderson, Director, Fisheries Research Board of Canada, Biological Station, St Andrews, NB, to F.B. McKinnon, Regional Supervisor, Indian Affairs Branch, Amherst, NS, January 25, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 344-45).

2. These changes are traceable to damming which has greatly shortened the estuary and forced changes in behaviour of tides. The ebb and flood phases of the tidal cycle have been shortened and the high-slack and low-slack phases have been lengthened. This favours heavier sedimentation in the cove by allowing more sediments to deposit out during the high-slack phase and reducing the proportion of the deposited silt that is flushed out of the cove during the following ebb phase.

3. Flats have been exposed at low tide since 1963 instead of always being covered by water as formerly. *Digging is easier and this has led to great increases in clam harvesting effort.* The annual harvest was high immediately after damming (1964 and 1965) because accumulated stocks were being exploited and fishing effort has remained high. *As a result the volume of the standing crop of marketable clams (more than 2" long and 6 or more years old) has decreased 63% since 1963. Besides this the size-composition of the stock has changed. Marketable population compared with 35% in 1963 and 1964. Since 1965 the annual harvest has decreased but the number of diggers remains high – a typical symptom of an intense fishery.*

4. Decreases in marketable clam stocks and in landings are attributed partly to increased harvesting (removal) but mostly to smothering. Smothering is a well-known incidental effect of digging and is caused by deep burial of clams when diggers turn the ground and tramp the mud.

5. *With reduced abundance of marketable clams the effort required to dig a pail has increased. This does not discourage picnickers very much because they dig for recreation. But it does affect Indians who dig for income and as a result, their current charge for a pail of clams has risen from about $1.50 in 1963 to $2.00-$2.50 in 1967. They state that in spite of higher sale prices their income is less because clams are so scarce.*

6. The stock of young clams has also decreased in the important clam-producing sections of the cove. This is partly because, as a habitat for clams, the cove is deteriorating and partly because of smothering as described above. The prospect is that the resource may continue to decline because of increases in smothering rates in the intense fishery.

7. Since 1963 and 1964 the centre of abundance of clam stocks has shifted appreciably from south to north, partly because of heavy harvesting in the south and partly because of poorer reproduction in the south. Clam production and landings in middle sections of the cove (where there is least evidence of sedimentation) seem to be suffering less than that in northern and southern parts.

8. Damming increased availability of marketable clams to diggers by exposing flats at low tide that were formerly covered by water at all phases of the tidal

cycle. *Increased availability led to increased numbers of diggers and heavier harvesting (removal of stock) and to heavier mortality from smothering that is directly and indirectly traceable to damming. This is the first statement that the Fisheries Research Board, as arbiter, was asked to supply to the contracting parties.*

9. The early history of the Indian fishery in Eel River Cove is sketchy but there was general agreement on trends reported by many people and for more recent times we have reasonably firm data. These include Department of Fisheries statistics which seem to portray a faithful history. At the time these statistics seemed unacceptable to the Indian Band but without them we are without any clue but hearsay, as to what transpired. We were obliged to use them and we think they furnished information that can be useful to the contracting parties in reaching a fair settlement.

10. The tenor of terms of the contract implies that Indian fishermen are to be compensated for decreases ("losses") in their annual landings of clams. However, the contract specifies a formula for calculating compensation and this formula involves only total landings. There is no fixed size-relationship between total landings and Indian landings and use of the formula gives unrealistic results. *Because of this and other ambiguities we have derived four different measures of "losses", from which compensation could be calculated. Those that seem fairest are based on estimates of changes in annual landings by Indians.*

11. *Between 1963 and 1967 the Indians' average annual landings seem to have decreased by 56% from an estimated 2,062 pails before damming to 911 after damming.* This decrease could be used in calculating compensation but it disregards the fact that landings cannot be maintained at 1964-1967 average annual level. *The fairest settlement of all would seem to be compensation for the 70% decrease from pre-dam average annual landings by Indians (2,062 pails) to the 1967 Indian landings (620 pails). This is the second statement FRB was asked to furnish.*[126]

The four methods for calculating the losses to the Eel River Band proposed by Dr Medcof are summarized below:

- Comparison of average annual landings before and after damming (212), multiplied by one-half (the then-current proportion of Indian landings to total landings) and then by seven years, resulting in a total reduction of 742 pails. Since the average annual landings were

[126] J.C. Medcof, Fisheries Research Board, Biological Station, St Andrews, NB, "Third Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya arenaria) Population," November 1967 (ICC Exhibit 2, tab 20, pp. 38-41). Emphasis added.

determined by using the "two bonanza years, 1964 and 1965," Medcof felt that this would not be a fair measure of damages because it was unlikely that clam diggers on the cove could "ever again make such heavy landings."

- Assuming that total annual landings remain the same as in 1967, compensation could be based on the decrease in total annual landings as a result of damming (963), multiplied by one-half (the then-current proportion of Indian landings to total landings) and then by seven years, resulting in a total reduction of 3374 pails. Medcof suggests, however, that this does not take into account the fact that the proportion of Indian diggers decreased from about 75 per cent in 1960 to about 33 per cent in 1967 because the number of non-Indian diggers increased significantly over this same period.
- Calculating compensation based on the decrease in total annual Indian landings (rather than one-half the decrease in total landings), multiplied by seven years, resulting in a total reduction of 8057 pails.
- Long-term average annual Indian landings (based on the 1967 Indian landings of 620 pails and the corresponding decrease of 1442 pails from pre-dam landings), multiplied by seven, resulting in a total reduction of 10,094 pails.[127]

Dr Medcof concluded that the last formula (which when multiplied by $1.50 per pail would have produced a figure of $15,141 total compensation for losses to the Band's clam harvests) was most consistent with the terms agreed to between the Band and the town.

Dr Medcof submitted a copy of his report to Dr J.M. Anderson, Director of the Fisheries Research Board, on December 22, 1967, along with a detailed memorandum setting out his thoughts on the interpretation of the draft agreement between the town and the Band. He did not think that the memorandum was appropriate to include in the report itself, but he hoped it might be of assistance "in clarifying the highly complex and somewhat confused Eel River Cove clam problem."[128] It is significant that Dr Medcof also sent a confidential copy of his memorandum with his personal views on the draft agreement to McKinnon for his review and comments. Under the heading "General View," Dr Medcof's memorandum states:

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[127] J.C. Medcof, Fisheries Research Board, Biological Station, St Andrews, NB, "Third Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya arenaria) Population," November 1967 (ICC Exhibit 2, tab 20, pp. 31-35).

[128] J.C. Medcof, Fisheries Research Board, Biological Station, St Andrews, NB, to J.M. Anderson, Director, Fisheries Research Board, Biological Station, St Andrews, NB, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 324).

> Viewed objectively, this contract seems to favour interests of the Town of Dalhousie more than those of the Indian Band in three ways: (1) The Town was to get an advantage and benefit; the Indian Band was to get only conditional compensation for possible losses. (2) The town's benefit was to be indefinitely continuing; the Indians' compensation was to be partial and was to cover only seven years' possible losses. (3) The dollar value of the town's investment in the dam would be expected to increase when dollar values of real estate increased, whereas the per-pail price for clams ($1.50) was fixed in the terms of the contract.
>
> In 1963 nobody foresaw how great and long-lasting the effects of damming would be. Now we have seen the effects. There were losses and they seem likely to continue indefinitely – not just for seven years. We realize now that the risk the Indian Band took was very real. We also realize that the terms of the contract, even when interpreted most generously, provide incomplete compensation. This is the value of 10,094 pails of clams valued at $1.50/pail. This compensation price is fixed in the contract but the current average price of clams after only four years has increased by 50% to $2.25.
>
> . . . The Indian Band's annual clam fishery has long been a source of both income and food and it has been reduced by an estimated 70% for an indefinitely continuing period. The contract says nothing about loss of the food resource and they promise to compensate for income losses for a 7-year period only.

Further on he continues:

> Because of these seeming inequities I would suggest that before the contract is settled, the contracting parties consider adopting modified terms that would not appear to favour one party more than the other . . .
>
> *I would suggest that, as Canadians, the Indian Band should qualify not for mere compensation for losses to the end of 1972, but for a true and lasting sharing with the Town of Dalhousie of total benefits that have arisen from building the dam on the reserve land.*[129]

Although Dr Medcof acknowledged that a number of practical suggestions could be advanced to address the apparent inequities of the draft agreement, he suggested two options in particular: the establishment of a fund that would earn the Band about $4000 per year in interest to offset dwindling values of the dollar; and the town to pay an annual sum of money to the Band based on the annual loss of 1442 pails of clams.

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[129] J.C. Medcof, Fisheries Research Board of Canada, Biological Station, St Andrews, NB, to F.D. McKinnon, Regional Supervisor, Indian Affairs Branch, NS, December 22, 1967, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 324-31). Emphasis added.

NEGOTIATIONS TO FINALIZE THE TERMS OF THE AGREEMENT: PHASE 3 (1968-70)

McKinnon wrote to Dr Medcof on January 9, 1968, to inform him that he agreed entirely with his views. He noted that although the Band was reluctant to allow the town to construct the dam when it was first proposed, members felt that this would create regular employment in local industry and a "great deal of trust was therefore placed in the Town officials." McKinnon added that, "[a]s the matter stands, there is *no agreement*, the Town has no . . . permission to occupy the part of the reserve, and technically the Indians could insist that the dam be removed." Despite being unable to conclude an agreement on compensation because of the lack of information on the dam's effect on the fishery, McKinnon noted that there were rumours that the town would be seeking to increase the capacity of the reservoir, in which case the Band could find itself "in a very strong position not only to dictate the terms of a new agreement, but also to ensure that they are reasonably compensated for the initial action of the Town."[130]

On February 15, 1968, the NBWA suddenly reappeared when it informed Indian Affairs that a proposal was under way to acquire an additional 82 acres of reserve land by early spring to increase the water storage capacity of the reservoir. The NBWA would also require a waterline right of way of less than 2 acres to construct a second pipeline next to the existing one to pump additional water from the Eel River for the New Brunswick Electric Power Commission's thermal plant. Accordingly, the Director of the NBWA, J.G. Lockhart, requested advice on what steps should be taken to enter into negotiations with the Band either to purchase or arrange an exchange for the land required for the project. The project, which apparently did not involve the town, was to be financed by the Atlantic Development Board and owned by the province.[131]

On March 21, McKinnon confirmed that he had discussed the matter further with Lockhart, who had not been advised by Mayor Arsenault that previous commitments to the Band by the town were still outstanding. In view of the fact that the Band had not yet agreed to terms for previous

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[130] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Amherst, NS, to J.C. Medcof, Assistant Director, Fisheries Research Board, Biological Station, St Andrews, NB, January 9, 1968, DIAND file, 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 343). Emphasis in original.

[131] J.G. Lockhart, Director, New Brunswick Water Authority, Fredericton, NB, to F.B. McKinnon, Regional Supervisor, Indian Affairs Branch, Department of Citizenship & Immigration, Amherst, NS, February 15, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 349).

flooding, Lockhart informed McKinnon that "the Province would likely take over the negotiations with the band council for the settlement of all claims and for permission to enlarge the reservoir."[132] J.H. MacAdam, the Deputy Administrator of Lands, IAB, responded to McKinnon's letter, stating that "it should be made clear to the Authority that there can be no further commitment of land on this Reserve until settlement has been made for the land already given to them."[133] Accordingly, Caissie wrote to Lockhart on April 4, 1968, expressing concern with the fact that local newspapers had reported that the province approved a request for funding to allow the Atlantic Development Board to proceed with additional development on the Eel River reservoir:

> I am a bit concerned that the Indians may not appreciate the fact that the decision to proceed with this work has been made public and there has yet to be official permission granted by the band for the use of reserve land. The longer this is delayed, the greater may be the difficulties to reach an amicable settlement.
>
> As it was indicated in your office [by Caissie and Sheane], negotiations between yourself and the Band should be undertaken at the earliest possible moment. Otherwise, your construction schedule may suffer. *I should like to point out, again, that because of a number of difficulties which have arisen in the past over use of Indian land, the Department has taken the attitude that no use of reserve land for any kind of development will be permitted until a full settlement has been reached.*[134]

In closing, Caissie stated in no uncertain terms that there "must be full settlement of the initial claim before additional development will be permitted." He requested a response on whether the NBWA would assume the town's liability with respect to the initial claim.

On April 24, 1968, the Director of Indian Affairs, J.W. Churchman, briefed Assistant Deputy Minister of Indian Affairs Battle on recent developments. He suggested that although negotiations had been delayed for some time, it would be worth awaiting the NBWA's position on whether it would undertake the town's responsibilities to compensate the Band for land taken and for damages

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[132] F.B. McKinnon, Regional Director of Indian Affairs, Maritime Regional Office, Amherst, NS, to Indian Affairs Branch, March 21, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 350-51).

[133] J.H. MacAdam, Administrator of Lands, to Regional Director, Maritimes Regional Office, Department of Indian Affairs, April 2, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 352).

[134] V.J. Caissie, Regional Superintendent of Development, Maritimes Regional Office, Department of Indian Affairs, to J.G. Lockhart, Director, New Brunswick Water Authority, April 4, 1968, DIAND file 271/31-5-13-3-1, vol. 2. The original is not in the ICC Documents, but a transcript is provided in ICC Exhibit 4, p. 167. Emphasis added.

caused by the dam before resuming negotiations. "[T]he Water Authority may prove to be more tractable than the Town of Dalhousie officials," he wrote, "and in any event, the fact that their original claim for compensation remains unresolved will strengthen the Band Council's bargaining position concerning the additional land required at this time."[135] The local IAB officials confirmed that negotiations would be put on hold pending the outcome of discussions between the town and the NBWA on who would be responsible for finalizing an agreement. In any event, Caissie reported, "*the Band Council have indicated that they intend to drive a hard bargain with whomever negotiations are resumed.*"[136]

Hand-written notes of various meetings between the Band and other parties in May, June, and July 1968 were provided to the Commission by Wallace LaBillois, who was a Band Councillor at the time of these negotiations.[137] These notes, although sketchy, provide an important insight into the Band's perspective on the negotiations that took place from 1963 to 1968. On May 1, 1968, LaBillois chaired a meeting between the town, the NBWA, the IAB, and representatives of the Band. He noted in this meeting that since the "original meeting that took place in 1963 a total of 10 meetings had taken place and each of these meetings had been called by the Indians. He said that so far as the Indians of Eel River Bar was concerned it was evident that they had taken the initiative and had made every attempt to make the agreement a workable one." After LaBillois stated that town officials "had done little or nothing to try and live up to any parts that were written into the agreement," Mayor Arsenault said "that it was almost impossible to go by the old agreement" because the town could not convince any business or union that it "must hire Indians."[138] Councillor LaBillois summarized his views on the extent of the Band's losses and suggested a compensation package, which he calculated as follows: (1) $220,000 for losses in smelts, based on 11 nets multiplied by $1000 per net multiplied by 20 years; (2) $1.2 million for the complete loss of the clam

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135 J.W. Churchman, Director, Department of Indian Affairs, Ottawa, to Assistant Deputy Minister, Department of Indian Affairs, April 24, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 353-54).

136 J. Wilkins, Department of Indian Affairs, memo to file, April 26, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 355). Emphasis added.

137 Minutes of meetings (ICC Exhibit 3).

138 Minutes of meetings (ICC Exhibit 3, p. 1).

fishery, based on 20,000 buckets at $3.00 per bucket multiplied by 20 years; and (3) additional compensation for losses of revenue from salmon and angling sport in the Eel River and "fowling."[139]

Councillor Wallace LaBillois chaired another meeting held on the Eel River reserve on May 23, 1968, with only the Band Council and representatives of the town in attendance. The notes of this meeting indicate that Mr LaBillois reviewed the minutes of the last meeting and stated that the Band had requested $900,000 in compensation based on $30,000 multiplied by 30 years. Mr LaBillois then said that, "after thinking over their losses," the Band was now increasing its proposal to $50,000 for 50 years, for a total of $2.5 million, as compensation for losses to the clam and other fisheries. He also stated that the Band Council would be prepared to exchange land, so the town agreed to consider land prices and report back on this option. LaBillois asked that "it be written in the agreement that every effort be made to get employment for the Indians."[140]

On June 4, 1968, another meeting was held between the Band Council, the NBWA, and the town officials, but it is difficult to discern from the notes who was proposing what. The notes do suggest, however, that there was some discussion over the following elements of a proposed compensation package: $500,000, or $10,000 per year for 50 years; approximately 350 acres of land in exchange for 82.3 acres required for the reservoir, or $15,000 in lieu of land; access to water for fishing, hunting, and trapping; and one-half cent for every 1000 gallons of water pumped out of the reservoir for a period of 20 years, at which point the rate could be renegotiated.[141]

On June 21, 1968, another compensation package was proposed during a meeting between the Band Council, the NBWA, and the IAB, but again it is not clear from the notes who was proposing what. The main elements of this proposal were $23,000; $200 per acre; $18,000 to be realized for clearing the land along the reservoir and the International Paper Company pipeline right of way; expenses; sluice gates to be turned over to the parks department; 325 acres of land, to be

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139 Minutes of meetings (ICC Exhibit 3, p. 3).

140 Minutes of meetings (ICC Exhibit 3, p. 5).

141 Minutes of meeting, June 4, 1968 (ICC Exhibit 3, p. 8).

received within 30 days after execution of agreement; and one-half cent per 1000 gallons pumped, with a $25,000 minimum allowing up to 15 million gallons.[142]

On August 20, 1968, the Eel River Band Council passed a resolution instructing the Minister of Indian Affairs to issue a one-year permit to the Province of New Brunswick, as represented by the Department of Natural Resources, "to enter on our reserve in order to carry out certain works in connection with a dam, water lines and allied works" until a formal agreement could be negotiated between the Band and the NBWA and signed by the Department of Indian Affairs and the province. Attached to the Band Council Resolution as Document A was a "Memorandum Respecting Points Agreed upon Between the New Brunswick Water Authority and Members of the Eel River Band Council" (Memorandum of Agreement).[143] The preamble to the Memorandum of Agreement states that the dam was erected in a manner that encroached on lands of the Eel River Band and that, as successor in title and interest to the Town of Dalhousie for the operation and maintenance of the dam, the NBWA intended to raise the water level of the reservoir, but "wishes to compensate the Band for damages and losses suffered by the Indians as a result of the erection of the dam and creation of the headpond by the Town of Dalhousie and to further compensate the Band for losses and damages that may be suffered as a result of the raising of the water level to 9 feet geodetic elevation."[144] In addition to flooding more reserve land by raising the water level of the headpond, the NBWA also required land for the road leading to the headpond and a strip of land adjacent to the existing International Paper Company pipeline to establish another pipeline and pumphouse. For its part, the Band agreed to take all necessary steps to arrange for an absolute surrender of the lands as soon as possible.

With respect to compensation and other key terms, the NBWA and the Band agreed to the following:

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142 Minutes of meeting, June 21, 1968 (ICC Exhibit 3, pp. 9-11).

143 Eel River Band Council – Miramichi Agency, Eel River, NB, August 20, 1968, Band Council Resolution (ICC Documents, pp. 356-62).

144 Memorandum of Agreement, August 20, 1968 (ICC Documents, pp. 357-58).

(1) 260 acres (referred to as the "LeBlanc-Arsenault property") in exchange for the absolute surrender of approximately 82 acres, or payment of $15,000 in lieu of the land;

(2) an annual sum calculated at the rate of one-half cent per 1000 U.S. gallons pumped from the headpond and Eel River to be paid to the Band "due to their loss of revenue and benefits caused by the erection and operation of the Eel River Dam and in particular due to the loss of revenue and benefits from the clam, salmon and smelt fishery and the reduction in migratory birds and other natural resources";

(3) with respect to water pumped, the NBWA to pay a minimum of $10,000 per year, unless the volume of water pumped is less than 1825 million U.S. gallons per year, in which case the Band shall be paid according to the formula;

(4) the amounts payable for water pumped to remain in effect for a period of 20 years, at which time the amounts payable to be subject to review and negotiation by the parties and to be reviewed every five years after that;

(5) the Band to have access to the headpond to the extent that the NBWA had authority to provide such permission;

(6) the NBWA to enter into a contract with the Chief of the Band for the sum of $18,000 to clear the approximately 82.4 acres of land required to increase the water level of the headpond;

(7) if the NBWA should cease to operate the Eel River water supply system, the Band to have the first opportunity to purchase the lands; and

(8) the NBWA and its employees to have a right of access to the reserve for the purposes of inspecting, constructing, maintaining, and repairing the Eel River headpond, dam, and water supply system.

This Memorandum of Agreement was signed by Chief Alfred Narvie, Councillors Wallace LaBillois and Mrs Wallace (Lillian) LaBillois, and by two officials of of the NBWA, Chairman E.S. Fellows and Director Lockhart.[145]

The following day, Caissie sent a memorandum to IAB-Ottawa, attaching a copy of the Memorandum of Agreement for review. Caissie noted that shortly after having a telephone conversation with MacAdam about the proposed agreement between the Band and the NBWA, "Councillor Wallace Labillois called to indicate that they were anxious to sign this agreement as soon as possible and could I please go up for Tuesday, August 20." Caissie confirmed that he and the Superintendent of the Miramichi Indian Agency, R.M.J.J. Guillas, attended on behalf of the IAB

[145] Memorandum of Agreement, August 20, 1968 (ICC Documents, pp. 357-58).

and that the parties signed the agreement at that meeting. Caissie indicated that some points might require clarification. In particular, he noted that the term providing for compensation for water pumped would not compensate the Band for water already pumped, but "[t]his is well understood, and is acceptable to the Band." Caissie also questioned whether the release clause could bind all Band members. Finally, he suggested that the section providing for a right of first option to purchase the flooded lands if they were no longer required by the NBWA should be made more clear in the final agreement.[146]

On September 9, 1968, McKinnon and other IAB officials from the Miramichi Agency met with the Chairman and Director of the NBWA along with P.A. MacNutt, solicitor for the NBWA, to discuss key points of the agreement and possible amendments. McKinnon questioned whether the NBWA had authority to expropriate land and was advised that, although the NBWA lacked such authority, the province did have such powers. McKinnon also expressed concerns about transferring administration and control over all the land required by the NBWA:

> The question of transferring control and management for the flooded land, and of a lease only for the pipeline right-of-way, was mentioned, and there was some hesitation on the part of the Water Authority to accept this. I indicated to them, however that this was merely a suggestion, and that there might be some other solution to it, but that we would not grant all the land involved here and face the future possibility of the Province refusing to pay as per the formula agreed upon on the arguments that the Indians were neither the owners of the water or the clams.[147]

McKinnon also expressed concern that the release for future damages be carefully reviewed:

> I got the impression . . . that they [the NBWA] intended this Section to provide them with a release against claims by an Indian for, say, damage to his house due to the raising of the water table in the area. There is no likelihood that this kind of damage would occur, since most of the houses are well below the dam, but I don't think that

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[146] V.J. Cassie, Regional Superintendent of Development, Maritime Regional Office, to Indian Affairs Branch, August 21, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 363-64).

[147] F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, to H. MacAdam, Indian Affairs Branch, September 12, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 370-71).

> we should free the Water Authority from any future possible damages to private property.[148]

McKinnon added that he had asked the Band Council to pass a Band Council Resolution permitting the Minister to exercise his powers under section 35 of the *Indian Act* to expropriate lands to be flooded.

On September 12, 1968, the Band Council passed a resolution requesting that "Section 35 of the *Indian Act* be applied to grant land to the New Brunswick Power Authority."[149] When McKinnon forwarded the Band Council Resolution to the IAB for approval, he added that certain matters should be included in the preamble to any agreement, including the Band's "moral entitlement" to the clams and water and recognition of the fact "that all parties are cognizant of the desire of the Indians to secure employment to offset the losses from exploitation of natural resources, and all will exercise whatever influence they have to fill that desire."[150]

The draft agreement was then submitted by the Deputy Minister of Indian Affairs, J.A. MacDonald, to the Minister of Indian Affairs, the Hon. Jean Chrétien, for approval, with a recommendation that the Department grant a permit under section 28(2) of the *Indian Act* authorizing the commencement of construction and operation of the dam by the NBWA for a period of one year. Indian Affairs apparently had some concerns about the proposed terms of the agreement, which provided for a release of the town and the NBWA from liability for all damages "which heretofore has been or hereafter may be sustained as a result of" the dam. When it was submitted to Minister Chrétien for approval, however, the Deputy Minister stated that the payment of $25,000 was intended to compensate the Eel River Band "for any damages sustained as a result of the earlier use of the land by the Town without agreement," and there was no mention at all of future damages.[151]

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148 F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, to H. MacAdam, Indian Affairs Branch, September 12, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 371).

149 Eel River Band Council, Band Council Resolution, September, 12, 1968 (ICC Documents, p. 373).

150 F.B. McKinnon, Regional Director, Maritimes Regional Office, Amherst, NS, to Indian Affairs Branch, October 3, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 374).

151 J.A. MacDonald, Deputy Minister, Indian Affairs Branch, Ottawa, to Jean Chrétien, Minister, Department of Indian Affairs, September 10, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 368).

It is also important to note that Indian Affairs did not intend to seek a surrender from the Band as proposed in the Memorandum of Agreement; rather, the Department would use the one-year period "to seek the authority of the Governor in Council under the provisions of Section 35 of the [*Indian Act*] to grant Letters Patent for the lands required in favour of the Water Authority. In conjunction with this action the Branch would draft a permit for use of the water pipeline for a term of twenty (20) years for consideration based on the gallonage of water pumped through it."[152] The document indicates that Minister Chrétien gave his approval to issue a section 28(2) permit to the NBWA pending final settlement of the terms with the Band.

It appears from a November 20, 1968, letter from McKinnon to Lockhart that the solicitor for the NBWA, MacNutt, was to contact MacAdam, Administrator of Lands at IAB-Ottawa, to prepare the terms of the final agreement for the Minister's signature. The NBWA was also expected to contact the Surveyor General immediately for instructions on an acceptable survey plan to avoid any delay in concluding the agreement. Since there had been no response from MacNutt or the NBWA, McKinnon wrote to Lockhart to find out what was delaying their discussions.[153] A month later, Lockhart responded that discussions with the Ottawa office had been opened by MacNutt and that a survey plan had been submitted to the Surveyor General for approval. This letter was the first of many written on behalf of the NBWA apologizing for various delays.[154] Just four days earlier, the Surveyor General had written to the NBWA to advise that its survey plan was not acceptable and that survey instructions would be sent after all relevant information had been collected.[155]

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[152] J.A. MacDonald, Deputy Minister, Indian Affairs Branch, Ottawa, to Jean Chrétien, Minister, Department of Indian Affairs, September 10, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 369).

[153] F.B. McKinnon, Regional Director, Maritime Regional Office, Amherst, NS, to J.G. Lockhart, Director, New Brunswick Water Authority, Fredericton, NB, November 20, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 378).

[154] J.G. Lockhart, Director New Brunswick Water Authority, Fredericton, NB, to F.B. McKinnon, Regional Director, Maritime Regional Office, Amherst, NS, December 23, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 382).

[155] R. Thistlethwaite, Surveyor General, Surveys & Mapping Branch, Department of Energy, Mines and Resources, Ottawa, to C.J. Garland, Project Engineer, New Brunswick Water Authority, Fredericton, NB, December 19, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 380).

On January 3, 1969, MacNutt responded to what he described as "a slight misunderstanding between myself and Mr. MacKinnon [sic] at our meeting in September of 1968 concerning the Water Authority's acquisition of certain lands on the Eel River Indian Reserve."[156] McKinnon had raised three points of particular significance: (1) that the annual payment for water pumped out of the Eel River should be based on "a more material form of consideration than the clam and fishing rights"; (2) that the annual payment should be based on a lease of the pipeline right of way rather than granting outright ownership to the NBWA; and (3) that the NBWA should seek to expropriate the land required rather than proceeding with the formal procedures for surrender. MacNutt responded to these comments as follows: (1) the agreement referred to clam and fishing rights because "the Indians would be most uncooperative if there was not specific compensation for the loss of these rights regardless of the existence of those rights"; (2) the NBWA preferred to have an "absolute transfer of the fee" with respect to the pipeline right of way, rather than leasing this interest; and (3) the NBWA preferred to expropriate the land under the authority of the provincial *Expropriation Act*. MacNutt also expressed some trepidation with renegotiating the Memorandum of Agreement without the Band's direct involvement:

> Note that the memorandum was based on negotiations directly with the Band and I am not sure as to how far we can now go in altering the basis on which we negotiated the memorandum. In other words are you required to abide by the Band's decisions or is it possible for you to sway their approach so that we might more efficiently bring the memorandum into effect.[157]

On January 9, MacAdam responded to MacNutt by stating: "Inasmuch as this Agreement was negotiated by the Eel River Band Council, I have forwarded the proposed changes to the Council through Mr. McKinnon, for its reaction and consents. Any changes must be acceptable to the Indians before this Department can take any action to deal with the land."[158] On the same day, MacAdam

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[156] P. MacNutt, Solicitor, Department of Justice, NB, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, January 3, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 384).

[157] P. MacNutt, Solicitor, Department of Justice, NB, to J.H. MAcAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, January 3, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 386).

[158] J.H. MacAdam, Administrator of Lands, to P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, January 9, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 393).

wrote a memorandum to McKinnon stating his views on the Memorandum of Agreement; in particular, he stressed the importance of the Band having a "firm option" to acquire the lands if they are no longer required for the present purpose, and he noted that a Band Council Resolution already accepted the use of expropriation authority under section 35 of the *Indian Act*.[159] On January 14, MacNutt responded to MacAdam and expressed concerns about the fact that his suggested revisions were forwarded to the Band; he did not want to have to renegotiate the "whole of the understanding," but intended to address Band members' concerns in the technical wording of the agreement to be used to effect the transfer of lands and the payment of compensation. Accordingly, he asked MacAdam to "please not submit the proposed changes to the Council and advise me how far we can go in streamlining the documentation required."[160] The IAB continued to negotiate with the NBWA directly, on behalf of the Band, and, despite MacNutt's request, the IAB also continued to seek the Band's approval of changes to the original memorandum.[161]

On February 4, 1969, McKinnon wrote to MacAdam requesting that they seek further clarification from the province before asking MacNutt to prepare the draft agreement. In particular, McKinnon was quite concerned about transferring title to the lands outright to the province, particularly in relation to the parcel required for the pipeline. McKinnon wrote that although he was not a lawyer,

> I fail to detect in Mr. MacNutt's letter of January 3, 1969 any assurance whatsoever that at some future date someone in authority in the Province, or the courts, might not rule that this agreement is invalid because the Indians did not have the legal rights to the clams or the water and could not demand what appears to be an exorbitant settlement. In your letters, you appear to go along with the idea that a title to the land could be transferred to the Water Authority, in some final form. I appreciate the difficulty that the Water Authority may have because of the requirements imposed

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[159] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, to Regional Director, Maritime Regional Office, Department of Indian Affairs, January 9, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 394).

[160] P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, January 14, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 395).

[161] For instance, see F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, to J.G. Lockhart, Director, New Brunswick Water Authority, Fredericton, NB, May 8, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 417), where McKinnon confirms that a copy of the draft agreement was sent to the Eel River Band Council for their comments before final approval was given by Ottawa for execution of the document on behalf of the Band.

> by the A.D.B. [Atlantic Development Board], but we must ensure that the full intent of this agreement is respected. *It is obvious that the Province is paying for damage to clams and for the water. If this is the way the agreement reads, then what protection will the Indians have against this agreement being invalidated at some future date because the Indians do not have any legal rights to the clams and the water? You mentioned to me at one time that we needed a hook on which to hang our hats. It seems to me that the hook will disappear if the agreement is written in the form in which the Province wants it written.*[162]

It is apparent from the exchange of correspondence on this subject that McKinnon and virtually everyone other than members of the Band were operating under the assumption that the Band did not have any special claim or treaty rights to clams and other marine resources affected by the dam. Nevertheless, it was also obvious that the NBWA intended to provide compensation for damage to the Band's fishery (whether or not the Band did have recognized fishing rights), and McKinnon was seeking ways of ensuring that the Band retained some interest in the land to justify the payment of compensation to the Band and to ensure that the NBWA complied with the intent of the agreement.

MacAdam apparently agreed with McKinnon's concerns because, on February 18, 1969, he wrote that the land required for flooding would be transferred to the Province of New Brunswick by Order in Council under the authority of section 35 of the *Indian Act*, but "land for the pipeline and access was to be granted by an easement for as long as required for purpose intended subject to payment based on the rate of ½ cent per 1,000 U.S. gallons."[163] In addition, $15,000 would be paid to the Band in lieu of an exchange for the land required for flooding, and $25,000 would be provided in exchange for "a general release of all other damages sustained by the Band, as a result of the flooding." MacAdam instructed McKinnon to use this memo to expedite his discussions with the Band Council and the NBWA.

Meanwhile, the Band was concerned over the delay and suggested that "interest be payable on the monies unless the matter is settled shortly." Caissie agreed to mention this suggestion to the

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[162] F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, to Indian Affairs Branch, Ottawa, Ontario, February 4, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 399). Emphasis added.

[163] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, to F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, February 18, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 401).

NBWA and to travel to Eel River to "discuss the possibility of the Band constructing cottage buildings on the lands fronting the water."[164]

On April 8, 1969, MacNutt sent a draft agreement to MacAdam for his comments. McKinnon provided his comments to MacAdam on April 11, indicating that the NBWA had covered all the points discussed, but disagreed with transferring administration and control of the parcels required for the pipeline, pumphouse, and access road to the province:

> It is proposed that the land required for the pipe line and the pumphouse be covered under an easement, but that the land under the road leading to the dam be part of those lands which it [sic] to be covered by a transfer of administration and control. It was always our understanding that the road would also be covered by an easement and this would ensure to the band, utilization of this road without any interference from the New Brunswick Water Authority, providing, of course, that the band would not either interfere with the Water Authority making use of that access road. . . . This is extremely important because the band is proposing to develop the shore of the lake created by the dam for the marina and for cottage sites and it will be, of course, absolutely necessary that the band provide access to that development.[165]

When MacAdam returned the draft agreement to MacNutt with his comments, McKinnon's concerns were reflected in the proposed changes. MacAdam, therefore, maintained that the Band would grant an easement with respect to the pipeline, pumphouse, and access road rather than transfer the lands to the NBWA. He also wrote:

> Since . . . it is the intention of the Authority to compensate the Eel River Band of Indians for damages and losses suffered as a result of the erection of the Dam and creation of the headpond by the Town of Dalhousie and to further compensate them for damages sustained in raising the water level to nine feet geodetic elevation, and [the release clause] implies that the compensation of $25,000 included future damages sustained by the Eel River Band of Indians, it is suggested that the paragraph should be amended to more clearly define the intent outlined by the 5th recital. I am of the opinion that it should be amended as follows: . . . "may be

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[164] Author unknown, to V.J. Cassie, Superintendent of Development, Maritime Regional Office, March 5, 1969, DIAND file, 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 403).

[165] F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 405). J. Wilkins also expressed his general agreement with the draft agreement and suggested that it be approved as satisfactory and returned to the Band Council and the NBWA for execution (ICC Documents, p. 406).

> sustained in consequence of the erection of the Eel River Dam, Eel River water supply system and the Eel River headpond."[166]

MacAdam also pointed out that the clause regarding access by NBWA workers on the reserve to service the dam appeared to allow unrestricted access to the entire reserve, and that it should be rewritten to provide for "access subject to approval by the Band Council."[167]

When these proposed changes were submitted to the Band Council for its approval, Councillor Wallace LaBillois informed the IAB that, "since the delay in the execution of this agreement is not of the band's making, and neither is it entirely due to the action of this Department, the payment should be made for the water which is now being pumped."[168] The NBWA had apparently started pumping water about a week previously, at about 500 gallons per minute. In submitting this proposal to the NBWA, Caissie also noted that LaBillois stated that the "band hopes to assume shortly the management of all their affairs, and they would like to receive for their records an original of the agreement."[169] Caissie noted in a later memorandum that a copy of the provisional plan was satisfactory and that the matter would also be discussed with the Band later that week.[170]

On July 17, 1969, MacNutt wrote to MacAdam to advise that the NBWA would not agree to any changes with respect to either paragraph 8, respecting payment of $25,000 in exchange for a release for all past, present, and future damages caused by the dam, or paragraph 11, respecting unrestricted access to the headpond without prior approval of the Band Council.[171] MacNutt also

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166 J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, to P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, April 21, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 411).

167 J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, to P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, April 21, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 411).

168 F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, to J.G. Lockhart, Director, New Brunswick Water Authority, Fredericton, NB, May 8, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 417).

169 F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, to J.G. Lockhart, Director, New Brunswick Water Authority, Fredericton, NB, May 8, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 417).

170 V.J. Caissie, Superintendent of Development, Maritime Regional Office, to Director, Indian Eskimo Economic Development, June 4, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 420).

171 P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, July 17, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 424).

wrote McKinnon on the same day informing him that the NBWA was not prepared to pay for pumping operations currently being carried out, as they were not "normal pumping operations" as understood in the draft agreement. An extra copy of the draft agreement, which MacNutt hoped would be the final draft, was enclosed for Wallace LaBillois, who had requested that a copy be forwarded to him.[172] In view of MacNutt's unwillingness to change the agreement, MacAdam wrote to McKinnon on July 22 stating that the IAB would not insist on any amendments unless McKinnon or the Band Council objected.[173] On July 29, Caissie provided the following comments to MacAdam, with the caveat that he was not a lawyer: (1) the annual payment for water pumped should be based on annual, not daily, consumption; (2) paragraph 11 respecting access should require prior approval of the Band to prevent the NBWA from gaining access "all over the reserve for all sorts of purposes without having to pay additional compensation for damages caused by such activities"; and (3) paragraph 8 was unsatisfactory because the Band did not intend to give the NBWA unlimited permission theoretically to "go over the reserve and in the process of carrying out repairs, bulldoze through existing lands without having to pay any compensation . . . for damages caused by such activities."[174] Finally, he noted that the Band Council was displeased with the fact that the NBWA did not intend to pay for water being presently pumped.

On August 6, 1969, the Assistant Superintendent of the Miramichi Indian Agency, H.W. Hennigar, attended a meeting at Eel River to discuss the draft agreement.[175] In a memorandum prepared by Hennigar the next day, he confirmed that certain clauses of the agreement were not acceptable to the Band Council. With respect to paragraph 7, the Band Council also understood that the pumpage fee of one-half cent per 1000 gallons of water was to be based on annual and not daily

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172 P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, to F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, July 17, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 431).

173 J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, to F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, July 22, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 432).

174 V.J. Caissie, Acting Regional Superintendent of Economic Development, Maritime Regional Office, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, July 29, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 433-34).

175 R.M.J.J. Guillas, Superintendent, Miramichi Indian Agency, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, August 8, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 437).

consumption. Paragraph 8 was not satisfactory because it would not protect the Band's "properties in future years should any disaster occur" and, therefore, it should be reworded to confine the release to those damages caused by the "erection of the Eel River Dam, Eel River Water Supply System and the Eel River headpond."[176] Finally, the Band Council also did not accept paragraph 11 and suggested that it limit the NBWA's access "for the purpose of inspecting, maintaining, and repairing the Eel River headpond, dam, and water supply system over the access road leading to the Eel River Headpond, dam and water system." The Band Council's position was communicated to MacNutt in a memorandum from MacAdam on August 20, 1969, along with suggested wording to address their concerns.[177]

On December 3, 1969, MacNutt responded that the amendments requested with respect to both the pumping of water and the compensation for damages incurred as a result of crossing the reserve for inspection purposes had been approved by the NBWA. However, the NBWA was adamant that paragraph 8 not be changed, since it was "their understanding that the negotiations were conducted on the basis that the $25,000.00 would cover past, present, and future damages."[178] The NBWA took the position that $25,000 far exceeded the present purchase value of the land, on the understanding that it would cover past, present, and future damages. The Band and the Department, in contrast, had taken the position all along that the $25,000 was to compensate the Band for the unauthorized use of the land to construct the dam and for the loss of the fisheries.

On January 23, 1970, Superintendent Guillas of the Miramichi Agency sought to arrange further meetings between Indian Affairs, the Band Council, and the NBWA to resolve these outstanding issues. Guillas advised that Wallace LaBillois, who was now the Band Manager, had informed him that he would arrange the meeting on the Eel River reserve and that he would be

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176 H.W. Hennigar, Assistant, Miramichi Indian Agency, Department of Indian Affairs, to R.M.J.J. Guillas, Superintendent, Miramichi Indian Agency, Department of Indian Affairs, August 7, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 436).

177 J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, to P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, August 20, 1969, DIAND file, 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 438-39).

178 P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, December 3, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 444-45).

inviting persons "to attend this meeting to enable the Band to be protected and guided in formulating their last submission to be approved by our Legal Branch and the New Brunswick Water Authority."[179] Before the meeting could be set up, however, LaBillois called the Agency office to say that "he was in contact with Mr. E.S. Fellow, Chairman of the New Brunswick Water Authority, and between them they decided there was no need to hold further meetings, and that the Water Authority was to advise their solicitor to contact the Eel River Band and process the final documents for signature immediately." Guillas added that "[i]n view of this development we will not pursue this matter any further at this time but will leave it to the discretion of the Eel River Indian Band to pursue themselves, should they feel that finalization of these documents is not being processed within the limited time they have set for themselves."[180]

Although Guillas thought that the matter should be left to the Band's discretion to settle, H.T. Vergette, Acting Chief of the Indian Lands Division, disagreed with this approach. On January 30, Vergette wrote to C.T.W. Hyslop, the Acting Director of the Economic Development Branch, to advise that many issues remained outstanding, including the release clause, and, therefore, he was of the view that

> without firm and determined direction and assistance from our field and regional representatives, the matter will not be resolved for a further indeterminate period. There is a considerable sum of money involved here (in excess of $40,000) and so far as the Indians are concerned it has been under process in some form or another since 1963, without any apparent end in sight.[181]

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[179] R.M.J.J. Guillas, Superintendent, Miramichi Indian Agency, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, January 23, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 446).

[180] R.M.J.J. Guillas, Superintendent, Miramichi Indian Agency, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, January 23, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 446).

[181] H.T. Vergette, Acting Chief, Lands Division, Economic Development Branch, Department of Indian Affairs, Ottawa, to C.T.W. Haylop, Acting Director, Department of Indian Affairs, January 30, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 447).

Hyslop acted on Vergette's recommendation by sending a letter to McKinnon asking that he "review the whole transaction and implement whatever procedures you determine are required to bring about an early settlement."[182]

On February 24, 1970, C.B. Gorman, the Acting Regional Director of IAB for the Maritimes, responded that there did not seem to be any real impasse and that he had been advised by Wallace LaBillois that the NBWA was still reviewing the proposed agreement. Gorman advised that a meeting between the Band Council and the NBWA was being arranged within the next week or two.[183]

On March 19, 1970, the Eel River Band Council passed a Band Council Resolution accepting the terms proposed by the NBWA. The resolution, which was signed by Chief Alfred Narvie and Mrs Wallace LaBillois, set out the following terms:

A. $15,000.00 upon the signing of the agreement (Clause 3 Subsection a)

B. $25,000.00 in consideration of and compensation for conveyances to be made under Clauses 1 and 2.

C. An annual sum determined by the volume of water pumped in accordance with the formula established under Clause 4 (One half cent per 1,000 U.S. gallons pumped, payable on a quarterly basis and based on a year beginning April 1st.) The minimum annual payment is to be $10,000.00 except when the annual volume pumped falls below 1,825,000,000 U.S. gallons.

It is understood that irrespective of daily gallonage pumped[,] payments will be made on the basis of the number of U.S. gallons pumped per day to a maximum of 15,000,000 U.S. gallons per day indicating an annual payment to the Band of $27,375.00

The agreement is to be enforced for a period of twenty years after which it may be renegotiated on a five year basis.[184]

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[182] C.T.W. Haylop, Acting Director, Department of Indian Affairs, to Regional Director of Indian Affairs, Maritime Regional Office, Amherst, NS, January 30, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 449).

[183] C.B. Gorman, Acting Maritimes Regional Director, Department of Indian Affairs, to C.T.W. Haylop, Acting Director, Department of Indian Affairs, 25 February 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 450).

[184] Eel River Band Council, Eel River, NB, Band Council Resolution, March 19, 1970 (ICC Documents, p. 451).

Acting Superintendent V.E. Rhymer forwarded the Band Council Resolution to the Regional Office and noted:

> The Council is desirous of obtaining remuneration from the Water Authority agreement as soon as possible. Part of the funds are committed to the proposed park and town site development. In addition, the Band Council will be purchasing the home of Mr. Wallace Labillois [sic] with part of the revenue to be obtained, leaving Mr. Labillois in a position to proceed with his loan under the Revolving Fund Loan Regulations to acquire the Handicraft business at Fredericton.[185]

Despite the Band Council's apparent interest in proceeding quickly, MacAdam wrote a terse letter to Gorman on April 1, 1970, urging him to clarify certain terms of the draft agreement. There was no indication that concerns with respect to the release and access clauses had been adequately addressed by the Band and the NBWA. He added:

> I am very concerned about that section of the agreement numbered Clause 8 [the release clause] as it is presently drafted, and consider you should ensure that the Band Council is completely aware of its provisions before they approve it. In addition, the Band Council should be fully aware of the intent of the clause numbered 11 dealing with access over all the Reserve lands by workmen and employees of the Authority before they sign the agreement. As a matter of fact, I cannot see how the Band Council could reasonably approve the provisions of Clause 8 as it is presently drafted, since they nor anyone else for that matter, cannot forecast what damages may occur in the future, as a result of the construction of the dam.[186]

Interestingly, MacAdam took some pains to explain what he saw as the respective roles and responsibilities of Indian Affairs in Ottawa and the Regional Office vis-à-vis the Band Council:

> Since it is not the function of this office nor is it feasible for us to enter into the negotiating process between applicants for the use and occupation of Indian

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185 V.E. Rhymer, Acting Superintendent, Indian Affairs Branch, to Maritime Regional Office, March 20, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 452).

186 J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, to Acting Regional Director, Maritimes Regional Office, Department of Indian Affairs, April 1, 1970, DIAND file 271/31-5-13-3-1, vol. 1, Rights-of-way, Gaslines and Pipelines, Eel River IR 3, NB Water Authority, General (ICC Documents, pp. 454-55).

> Reserve lands, and the Band Councils responsible for the Band's interests therein, the responsibility for ensuring that this matter is satisfactorily resolved rests in your office or that of the Agency Superintendent.
>
> As you will be aware from previous correspondence, the draft agreement is to be approved and signed by:
>
> (a) The Water Authority
> (b) The Eel River Band Council, and
> (c) the Minister
>
> in that order. It is essential that the agreement contain provisions which the Minister may approve before it reaches him. For this reason, it is equally essential that you ensure that the unreasonable provisions of the present clauses 8 and 11 [the release and access clauses] are suitably negotiated and resolved *before* the agreement is signed by the Band Council.[187]

Responding to MacAdam's concerns, Gorman wrote to MacNutt on April 7, 1970, to inform him that after receiving the comments of a legal advisor at Headquarters, the Band and Indian Affairs could not accept the release and access clauses as they stood. Gorman emphasized that while the Band did not want to obstruct the NBWA's ability to maintain the dam, "I think you will agree that this would have to be under some formal type of control."[188] Gorman also wrote to Acting Superintendent Rhymer to ask that he take all necessary steps to ensure that an agreement is reached between the Band Council and the NBWA; in particular, he instructed Rhymer to "contact the Water Authority in Fredericton and ensure that they are aware of the council's wishes. You may wish to take along a representative of the council; however, I will leave this up to you and the council to decide."[189]

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[187] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, to Acting Regional Director, Maritimes Regional Office, Department of Indian Affairs, April 1, 1970, DIAND file 271/31-5-13-3-1, vol. 1, Rights-of-way, Gaslines and Pipelines, Eel River IR 3, NB Water Authority, General (ICC Documents, pp. 454-55). Emphasis in original.

[188] C.B. Gorman, Acting Regional Director, Maritimes Regional Office, Department of Indian Affairs, Amherst, NS, to P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, April 7, 1970, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, pp. 456-57).

[189] C.B. Gorman, Acting Regional Director, Maritimes Regional Office, Department of Indian Affairs, Amherst, NS, to V.E. Rhymer, Superintendent, Miramichi Agency, April 10, 1970, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 458).

On April 17, Rhymer met with NBWA representatives to discuss the release clause. He reported that the difficulty lay in the fact that the NBWA's interpretation of the clause differed from the Department's interpretation:

> According to Mr Lockhart and Mr Fellows this clause covers all lands described in Section 1 [the area to be transferred to the NBWA for the headpond] and 2 [the areas subject to an easement for the pipeline, pumphouse, and access road] only marked in red and orange on the plan forwarded. Mr Lockhart and Mr Fellows both assured me that any future damage caused by the dam beyond the red and orange line have the same meaning and rights whereby the Band or individual would have recourse for any damages, injury and loss to person and property.
>
> It is anticipated a meeting with the Eel River Band Council will be held this week and Section 8 will be fully discussed with them in order to obtain their approval or disapproval of this Agreement. When we have the Council's decision you will be advised.[190]

According to MacNutt, three copies of the agreement were forwarded to Hennigar on May 8 for execution by the Band Council and the Department of Indian Affairs. He also suggested that this agreement "represents the latest series of compromises and adjustments as decided on between the Water Authority and the Band of Indian Affairs [sic] with Mr. Hennigar's consultation."[191]

On May 15, 1970, Rhymer reported that a formal agreement was signed on May 14, 1970, by representatives of the NBWA, the Eel River Band Council, and Her Majesty the Queen in right of Canada as represented by the Department of Indian Affairs and Northern Development. The agreement was signed by E.S. Fellows, Chairman, and J.G. Lockhart, Director, on behalf of the NBWA; Chief Councillor Alfred Narvie and Councillors Mrs Wallace LaBillois and Howard LaBillois on behalf of the Band Council; and C.T.W. Hyslop for the Minister of Indian Affairs and Northern Development. The terms and conditions of the agreement (a copy of which is reproduced in Appendix C of this report) are summarized below:

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190 V.E. Rhymer, Acting Superintendent, Miramichi Indian Agency, Chatham, NB, to C.B. Gorman, Acting Regional Director, Maritimes Regional Office, Department of Indian Affairs, Amherst, NS, April 20, 1970, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 459).

191 P.A. MacNutt, Solicitor, Department of Justice, Fredericton, NB, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, May 22, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 471).

- Clause 1 provides that Canada is to obtain the necessary approval from the Eel River Band to transfer administration and control of reserve lands flooded as a result of increasing the level of the headpond to the Province of New Brunswick as represented by the Minister of Natural Resources.

- Clause 2 states that Canada will make all necessary arrangements to transfer a grant of easement to the NBWA over reserve lands required for an access road, water pipeline, and pumping station.

- Clauses 3, 4, and 7 provide that in consideration for the transfer of lands required for the headpond, the NBWA shall pay $15,000 to the Band, plus an annual sum based on one-half cent per 1000 U.S. gallons of water pumped from the Eel River and headpond subject to the following provisos: (1) that the minimum payment to the Band shall be $10,000 per year unless the amount pumped is less than 1825 million U.S. gallons for that year; (2) any amount pumped in excess of 5475 million U.S. gallons in a year shall not be considered in the calculation of compensation to be paid, resulting in a maximum payment of $27,375 per year.

- Clauses 5 and 6 state that the annual payment for water pumped shall be payable at the agreed rate for a period of 20 years, after which it shall be subject to review and negotiation between the parties every five years. Where the parties are unable to reach agreement, any party can request an arbitrator to resolve the dispute.

- Clause 8 states that the NBWA shall pay $25,000 to the Band in consideration for the transfer of land described above and "to cover the cost of all damage, injury and loss to person and property of the Council which may heretofore or hereafter be sustained in consequence of the erection and operation of the Eel River dam, Eel River water-supply system and the Eel River headpond and subject to section 11 the repair and maintenance of same."

- Clauses 9 and 10 provide that the Band shall have the right to erect and maintain a commercial marina on the headpond and shall have a first option to purchase any lands transferred to the Province if such lands cease to be used for the purposes of a water supply system.

- Clause 11 provides that the NBWA and its employees shall have a right of access to the reserve for the purposes of inspecting, constructing, maintaining, and repairing the Eel River headpond, dam, and water supply system, but shall pay reasonable compensation for any damage done to reserve property or crops.

Rhymer's report to the Maritime Regional Office on May 15, 1970, also confirmed that, in addition to the $15,000 and $25,000 payments provided for in the agreement for the conveyance of land to

the NBWA, the amount of $9591.12 was payable to the Band for water pumped from the Eel River from July 4, 1969, to March 31, 1970, and thereafter for each quarter commencing on April 1, 1970.[192]

On May 25, 1970, D. Greyeyes, the new Regional Director of the Maritime Office, forwarded the signed agreement to Ottawa and recommended that it be signed on behalf of the Minister of Indian Affairs and returned to him for distribution. In his memorandum, Greyeyes stated:

> Clause 8 of the agreement has been discussed at length with officials of the Water Authority and the Band Council to ensure full understanding of the provisions contained therein. The interpretation by the principals of the Water Authority is that this clause covers all lands described in Sections 1 and 2 only which are marked in red and orange on the plan provided. Assurance is consequently given that any future damage caused by construction beyond these boundaries would be subject to damage claims.
>
> Paragraph [11] would be normal to allow proper maintenance to the dam and water supply system. It is expected that any use of reserve lands for these purposes would be at the consent and with the approval of Band Council.
>
> The Band Council are fully aware of all conditions contained in the agreement and by Resolution dated March 19th, 1970 gave their consent to acceptance.[193]

Vergette, the Acting Chief of the Land Division, also recommended to Hyslop, the Acting Director of the Indian-Eskimo Economic Development Branch, that the agreement be executed.[194] Accordingly, the agreement was duly executed by Hyslop on behalf of the Minister.[195]

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[192] V.E. Rhymer, Acting Superintendent, Miramichi Indian Agency, to Maritime Regional Office, Department of Indian Affairs, May 15, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 470).

[193] D.G. Greyeyes, Regional Director,, Maritime Regional Headquarters, Department of Indian Affairs, Amherst, NS, to Indian and Eskimo Affairs Branch, Department of Indian Affairs, May 25, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 472).

[194] H.T. Vergette, Acting Chief, Lands Division, Economic Development Branch, Department of Indian Affairs, Ottawa, to C.T.W. Hyslop, Acting Director, Indian and Eskimo Economic Development Branch, Department of Indian Affairs, June 2, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 473).

[195] J.H. MacAdam, Adminstrator of Lands, Indian Affairs Branch, Department of Indian Affairs, Ottawa, to P.A. MacNutt, Solicitor, Department of Justice, Fredericton, NB, June 8, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, pp. 474-75).

On July 7, 1970, MacNutt responded to MacAdam's letter of June 8 in which he proposed to transfer the lands to be flooded to the NBWA by letters patent. MacNutt indicated that if the IAB intended to proceed under the authority of section 35(3) of the *Indian Act*, his interpretation of that provision was that "if a provincial authority has powers of expropriation that the Governor in Council may in lieu of authorizing the expropriation authorize the transfer or the making of a grant of such lands to the provincial authority subject to such terms and conditions as may be prescribed by the Governor in Council."[196] Since the *Expropriation Act* conferred powers of expropriation on Ministers of the provincial government, MacNutt suggested that the grant of lands be made to Her Majesty the Queen in right of the Province of New Brunswick as represented by the Minister of Natural Resources.

On July 22, 1970, the Assistant Deputy Minister of Indian Affairs, J.B. Bergevin, issued a letter-permit under section 28(2) of the *Indian Act* to R.L. Bishop, the Deputy Minister of the Department of Natural Resources, authorizing "the Department of Natural Resources, Province of New Brunswick, its successors and assigns to enter upon and use those parts of Eel River Indian Reserve Number 3, more particularly described hereunder, for as long as required for the purposes outlined: 1. For a pumping station and pipeline right of way; [land description for Lot 60A] . . . 2.43 acres, more or less. 2. For an access road; [land description for Lot 61A] . . . 2.28 acres more or less."[197] The permit was granted subject to the proviso that the NBWA could not assign or sublet its rights without the written authority of the Minister of Indian Affairs. This letter-permit was registered with the Indian Land Registry in August 1970.

By Order in Council PC 1970-1526 dated September 9, 1970, the federal government transferred administration and control of Lots 59, 60, and 61, containing a total of 61.57 acres of land, at Eel River Indian Reserve to the Province of New Brunswick for headpond purposes, pursuant to section 35 of the *Indian Act*. The Order in Council provided that the transfer of

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[196] P.A. MacNutt, Solicitor, Department of Justice, Fredericton, NB, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, pp. 488-89).

[197] J.B. Bergevin, Assistant Deputy Minister, Department of Indian Affairs, to R.L. Bishop, Deputy Minister, Department of Natural Resources, Fredericton, NB, July 22, 1970 (ICC Documents, pp. 490-91).

administration and control to the province was for "so long as the said lands are being used for head-pond purposes and that, upon the lands ceasing to be so used the administration and control thereof shall revert to Her Majesty in right of Canada for the use and benefit of the Eel River Band of Indians."[198] The Order in Council was registered with the Indian Land Registry on September 25, 1970.

In accordance with the agreement, the NBWA made full payment for moneys owed to the Band in the amount of $49,591.12. The money was received at the Miramichi office of Indian Affairs on July 8, 1970, and deposited to the revenue account of the Eel River Band on the same day.[199]

Effect of the Dam on the Eel River Bar First Nation

As previously noted, in 1963 the parties agreed to retain the services of Dr Medcof to survey the clam flats in Eel River Cove before the construction of the dam and in the years following to determine whether there was any impact on the Band's clam fishery. Prior to conducting these surveys, the value of the clam fishery was unclear, with differing estimates being offered by the Band and by the Fisheries Research Branch.

The first survey was actually conducted by Dr MacPhail, who noted that clams were abundant in Eel River Cove in July 1963.[200] The second survey of the same area was also conducted by Dr MacPhail during July 1964, after the dam had been constructed. This survey was inconclusive as to the effects on the clam stocks caused by damming the estuary of Eel River, as the various factors affecting the clam population had not been in operation for very long.[201]

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198 Governor General in Council, Government of Canada, Privy Council Office, Ottawa, Order in Council, September 9, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, pp. 503-04).

199 D.G. Greyeyes, Regional Director, Maritime Regional Headquarters, Department of Indian Affairs, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, October 1, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 510).

200 J.S. MacPhail, Fisheries Research Board of Canada, Biological Station, St Andrews, NB, "Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya Arenaria) Population," January 9, 1964 (ICC Exhibit 2, vol. 1, tab 18).

201 J.S. MacPhail, Fisheries Research Board of Canada, Biological Station, St Andrews, NB, "Second Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya Arenaria) Population," September 1, 1964 (ICC Exhibit 2, vol. 1, tab 19).

The third and final survey was conducted by Dr Medcof in August 1967. In 1968, he reported that, between 1963 and 1967, the average annual landings for the Band had decreased by 56 per cent, from an estimated 2062 pails before damming to 911 after damming (a difference of 1151 pails). Because of the unusual increase in clam landings immediately following the damming of the river, Dr Medcof stressed that it was extremely unlikely that landings would be maintained at this level. It was much more likely that long-term future average annual landings would be maintained at the 1967 Indian landings, which amounted to 620 pails. In his view, the fairest settlement would be compensation for the 70 per cent decrease from pre-dam average annual landings by Indians (2062 pails) to the 1967 Indian landings (620 pails).[202]

In a 1980 memorandum pertaining to environmental damage arising from the construction of the dam and erosion of the shoreline, it was recorded that Gordon LaBillois stated the resulting losses to be $55,000 per year; because fishing had been closed down since 1972, that loss multiplied by eight years equalled $440,000 in losses by 1980. LaBillois had also pointed out that social assistance had been cut off to the First Nation when the compensation of $25,000 was paid.[203]

It is evident that both the subsistence and the commercial economy of the First Nation suffered from the erection of the dam. When asked how the community felt about the dam being built, Marion LaBillois responded:

> Oh, my God. Really sorry. Sorry they did that. They put the dam there and we were to make our living after that, we don't anymore. Don't even get the animals anymore. They ruined the fishing, ruined everything. No more eels, no more smelts, no more trout. Salmon used to go up there, they don't no more.[204]

Aside from the damages caused to the First Nation's economy, the damming of the Eel River profoundly altered this community's way of life. The strong family and community ties forged by

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[202] J.C. Medcof, Fisheries Research Board of Canada, Biological Station, St Andrews, NB, "Third Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya Arenaria) Population," November 1967 (ICC Exhibit 2, vol. 1, tab 20, p. 41).

[203] [Author not identified], [Eel River- Environment Problem], January 1, 1980, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, pp. 597-98).

[204] ICC Transcript, April 23, 1996, p. 34 (Marion LaBillois).

generations of harvesting activities in and around the Eel River have unquestionably played a key role in the sense of identity and the collective health of this community. As many elders stated at the community session, the people of Eel River Bar experienced a quality of life that was unique and rewarding. Community members spoke of pride, continuity with traditions and values, and the fact that clam gathering represented an important social function for the community.[205]

However, the contamination of the fishery and resources of the Eel River dramatically changed both the way of life and the outlook of the First Nation. As explained by Wallace LaBillois:

> To be truthful with you, this drove me to the point, when everything was all said and done – I moved my people – my family out of the community to get away from this creature, if you want to put it that way, that was plaguing my people. Whether it was a demon, or whatever you wanted to call it, it was a curse to our people because we had to take our people and we had to change their whole philosophy and their whole way of life right around.[206]

When asked whether the compensation provided for the losses had been adequate, Wallace LaBillois replied:

> Even the monies that they are getting today, I really and truly don't think it is adequate because money is not the solution. The dignity to be able to go to work and to leave your home and take your lunch can and go to work, this is the important thing. It is not the money. To be able to go and earn your living. To be able to have your kids put up their shoulders and say, "There goes my dad going to work." It is not the money part, no, no. Heck, no.[207]

By early 1980, additional scrutiny was brought to bear on the environmental problems caused by the dam. In July 1980, Indian Affairs requested a progress report on studies that had been commissioned from Environment Canada pertaining to oceanographic problems associated with the construction of the dam and erosion of the shoreline at Eel River. These studies were probably

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[205] ICC Transcript, April 23, 1996, p. 92 (Gordon LaBillois).

[206] ICC Examination of Wallace LaBillois Transcript, July 11, 1996, p. 49.

[207] ICC Examination of Wallace LaBillois Transcript, July 11, 1996, p. 66.

initiated, at least partly, as a result of a Chiefs' conference in October 1979 where the problem of contamination was raised. The memorandum from Indian Affairs notes that Gordon LaBillois expressed concerns that the clam beds were being contaminated by waste from the surrounding industries.[208]

In November 1982, the Eel River Bar First Nation passed a Band Council Resolution requesting that Indian Affairs provide the Band Council with $30,000 to carry out a land use study, to allow the First Nation to evaluate the environmental impact of the damming of the Eel River.[209] Although the First Nation's request appears to have been declined, in July 1983 Gordon LaBillois requested that Indian Affairs provide the First Nation with all correspondence regarding the damming of the Eel River and with a copy of the earlier study done to determine the value of the resources before the construction of the dam.[210] While still awaiting the requested information, the Eel River Bar First Nation passed a Band Council Resolution in August 1983 resolving that Indian Affairs take action to rectify the problems affecting the community's way of life. The problems enumerated were as follows: (1) pollution of the Eel River and resulting contamination of the clam beds and an annual $60,000 revenue loss; and (2) the flooding of land caused by the International Paper Company pipeline. The First Nation called for a study of the 1970 agreement to determine its validity, and for a study of the negative environmental effects caused by the erection of the dam, particularly in relation to land erosion and loss of fish and wildlife.[211]

Following receipt of this Band Council Resolution, the 1970 agreement was referred to the Department of Justice for an opinion as to its validity. The issues raised by the resolution were

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[208] [Author not identified] [Eel River - Environment Problem] January 1, 1980, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, pp. 597-98).

[209] E. Hulsman, Regional Planner, Band Support Directorate, Atlantic Region, Department of Indian and Inuit Affairs, Amherst, NS, to District Manager, New Brunswick District, NB, December 20, 1982, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 603).

[210] Gordon LaBillois, Councillor, Eel River Band, to R.D. Campbell, Director, Reserves & Trusts, Atlantic Region, Indian and Inuit Affairs, Amherst, NS, July 21, 1983, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 604).

[211] Eel River Band Council, Band Council Resolution, August 25, 1983, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 607).

substantiated by an Airphoto Interpretation Study of Eel River Bar, which noted that the watermain leaked over its entire length within the reserve's boundaries, causing an extensive wet area. This surface water deprived the reserve of approximately 6 hectares of land that was otherwise capable of development and it eliminated the possibility of an access road to land areas suitable for development in the eastern section of the reserve. It was subsequently recommended that this watermain should be repaired or replaced, the latter being preferably underground. [212]

In May 1984, the First Nation passed another Band Council Resolution requesting that Indian Affairs report on the 1970 agreement and the resulting permit to the province of New Brunswick.[213] Subsequently, the International Paper Company responded to Indian Affairs about the problems with leakage, stating that although it had no present plans to replace the pipe, it would meet with and discuss the matter with all concerned parties.[214] It appears that neither this response nor that received from Indian Affairs was sufficient to address the First Nation's concerns. At this point, the First Nation began the historical and legal research required to substantiate a claim against the Crown in an attempt to resolve this grievance through the Specific Claims process.

RENEGOTIATION OF TERMS IN THE 1970 AGREEMENT (1995)

Despite the First Nation's concerns with the original agreement reached in 1970, on April 10, 1995, the Government of New Brunswick and the First Nation renegotiated section 3 of the 1970 agreement relating to pumping fees. The parties agreed that the First Nation would receive $265,000 as payment for the period since the expiry of the original compensation clause on May 14, 1990. On signing the agreement, the First Nation would receive the sum of $105,000 as compensation for the period between July 31, 1994, to July 31, 1995, with an acknowledgment that Canada Industries

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212 E. Hulsman, Regional Planner, Band Support, Atlantic Region, Department of Indian and Inuit Affairs, to R.D. Campbell, Director, Reserves & Trusts, Atlantic Regional Office, February 7, 1984, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 610).

213 Eel River Bar First Nation, Eel River, NB, Band Council Resolution, May 31, 1984, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 611).

214 D.J. Tremblay, Plant Engineer, NBIP, to R.W. Landry, Superintendent, Reserves & Trusts, New Brunswick District, February 22, 1985, DIAND file E-5661-3-06013-D2, vol. 1 (ICC Documents, p. 620).

Limited had been paid an additional sum of $99,660.77 by the province. Furthermore, it was agreed that the First Nation would receive, in advance, a flat rate of $204,660.77 per year, commencing on July 31, 1995, until July 31, 1998. The agreement reached on non-monetary compensation included a lease to a parcel of Crown land adjacent to Murray Lake, as well as an undeveloped portion of Chaleur Park, at an annual rate of one dollar ($1.00) per year, along with a provision that this lease would be subject to separate negotiations with the Department of Natural Resources and Energy. The First Nation received the "sole" option to purchase the leased lands at a price not to exceed $64,000 for the lands at Chaleur Park and $41,000 for the parcel of Crown land adjacent to Murray Lake.[215]

[215] DIAND Indian Land Registry, Agreement between the Council of the Eel River Band and the Province of New Brunswick, April 10, 1995. Instrument No. 236161 for Eel River, IR 3, NB, registered on October 12, 1995.

PART III

ISSUES

Counsel for the First Nation and for Canada agreed that the Commission should address the following issues in this inquiry:

Was the Eel River Bar First Nation claim in respect of the Eel River dam properly rejected under the Specific Claims Policy set out in *Outstanding Business*, based upon the evidence and submissions to the Minister of Indian Affairs? Did the claim disclose a breach of a "lawful obligation" by the Crown, and, in particular:

1. **What was the nature and extent of the breach of the Treaty of 1779?**

2. **Did the federal Crown breach the Order in Council dated February 24, 1807, establishing the Eel River Bar reserve?**

3. **Did the federal Crown breach the 1958 federal-provincial agreement by which New Brunswick transferred to the federal government lands reserved for Indians?**

4. **Did the Eel River Bar First Nation have riparian rights to the Eel River, and were those rights breached by the federal Crown?**

5. **Did the federal Crown breach sections 18, 28, 35, or 37 to 41 of the *Indian Act*, RSC 1952, c. 149?**

6. **Did the Eel River Bar First Nation receive equitable and fair compensation for the losses suffered as a result of the establishment of the Eel River dam?**

7. **Did the federal Crown have a fiduciary duty to negotiate the compensation agreement of May 1970 on behalf of the Eel River Bar First Nation directly with third parties? If so, did the federal Crown breach that fiduciary duty?**

8. **Did the federal Crown have a fiduciary duty to provide independent legal advice during the negotiations that led to the execution of the compensation agreement of May 1970? If so, did the federal Crown breach that fiduciary duty?**

In the course of this inquiry, the Commission received and considered a considerable body of historical documentation, the oral testimony of elders from the Eel River Bar First Nation, and comprehensive written and oral submissions on the facts and law presented by legal counsel on behalf of the parties. In short, a wealth of information has been provided to the Commission to assist us in our deliberations.

Part IV of this report sets out our analysis and findings by addressing the issues under three main sections. The first section deals with the nature and extent of the First Nation's fishing rights and whether construction of the dam infringed upon those rights. The second part of our analysis considers whether the Crown breached its statutory obligations under the *Indian Act* by granting a letter-permit and by consenting to the expropriation of Eel River reserve lands in 1970. Finally, we considered the nature and extent of the Crown's fiduciary obligations on the facts of this case.

PART IV

ANALYSIS

ISSUE 1 NATURE AND EXTENT OF FISHING RIGHTS

What was the nature and extent of the breach of the Treaty of 1779?

Did the federal Crown breach the Order in Council dated February 24, 1807, establishing the Eel River Bar reserve?

Did the federal Crown breach the 1958 federal-provincial agreement by which New Brunswick transferred to the federal government lands reserved for Indians?

Did the Eel River Bar First Nation have riparian rights to the Eel River, and were those rights breached by the federal Crown?

The First Nation submits that the Treaty of 1779 and the 1807 Order in Council establishing the Eel River Bar reserve guarantee the First Nation's right to fish in the area around the reserve and that the "Federal Government's participation and acquiescence in the Dam project was a breach of the First Nation members' personal and commercial fishing rights."[216]

The Treaty of 1779 stated that the Micmac Indians of New Brunswick from Cape Tormentine to the Baie des Chaleurs "shall remain Quiet and Free from any molestation of any of His Majesty's Troops or other his good Subjects in their Hunting and Fishing." The New Brunswick Court of Appeal in *R. v. Paul* interpreted this clause to mean that the pre-existing hunting and fishing rights of the Micmacs, which they had exercised from time immemorial, were recognized and confirmed in the Treaty of 1779.[217] Although there was no evidence before the court as to what area constituted the "Districts" referred to in the treaty, Chief Justice Hughes stated:

> In these circumstances, I would interpret it to mean the Micmac Indian Reserves between Cape Tormentine and Bay De Chaleurs . . . and the Indians having the right

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[216] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 27, para 75.

[217] *R. v. Paul*, [1981] 2 CNLR 83 (NBCA).

> to live on those reserves. Consequently, I would hold the right of hunting and fishing for such Indians is restricted to those reserves.[218]

The First Nation further argued that the 1807 Order in Council which established the Eel River Bar reserve also confirms the existence of its traditional fishing rights. The Order in Council states:

> . . . the vacant tract of land on Eel River commencing at Lot No. 6 north of the mouth of the Eel River and extending to Lot no. 1 at the extremity of the Sand Beach which forms the entrance of the River – including the Eel Fishery, be reserved for the use of the Indians – with the exception of the Sand Beach formerly reserved for the public Fishery.

The First Nation submitted that it is necessary to consider the purpose for which the Indian reserve was set aside in order to determine the nature and scope of a First Nation's rights in waters adjacent to a reserve. In *Pasco v. Canadian National Railway Co.,* the British Columbia Supreme Court granted an interim injunction sought by an Indian Band preventing railway construction along a river on the grounds that it could affect the Band's riparian and fishing rights. Although it did not decide the point, the Court stated that the Band's claim to proprietary rights in the river was strengthened because,

> [i]n this province, Indian reserves were reduced in size on the grounds that the Indian people did not rely on agriculture, and that so long as their fisheries were preserved their need for land was minimal.[219]

This view is supported by Richard Bartlett in his study *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights.* Bartlett concluded that in reserves such as Eel River Bar which are established by Order in Council instead of by treaty or agreement, the "Indian interest in waters appurtenant to reserves set apart by executive action is accordingly to be

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[218] *R. v. Paul*, [1981] 2 CNLR 83 at 90 (NBCA).

[219] *Pasco v. Canadian National Railway Co.*, [1986] 1 CNLR 34 (BCCA), affirming [1986] 1 CNLR 35 at 41 (BCSC).

determined by examination of the circumstances and instruments whereby the lands were set apart."[220]

Counsel for the First Nation argued that the Eel River Bar First Nation has a right of access to the adjacent fishery to maintain its livelihood because the reserve set aside for the First Nation was small and its soil was not suitable for agriculture. Based on this reasoning, counsel argued that the First Nation's fishing rights were "non-exclusive rights of non-interference with the personal and commercial fishery."[221]

Canada did not dispute that the Treaty of 1779 protects the First Nation's right to fish in and around the Eel River Bar reserve, but contended that the essential questions were whether there was valid authority to construct the Eel River dam and whether the First Nation received adequate compensation for losses suffered as a result of the dam's construction.[222] Canada submits that if the dam breached the First Nation's rights under the Treaty of 1779, such breach was compensated for in the 1970 agreement.

After considering all the evidence and arguments presented by counsel on this subject, we felt that there was insufficient information before us to make any definitive conclusions regarding the nature and extent of the First Nation's treaty rights. We can, however, offer the following comments on the nature of these treaty rights, subject to the caution that they not be considered conclusive. First, although there was no evidence before the Commission on the historical context and intentions of the parties to the treaty of 1779, it has not been disputed that the First Nation is entitled to exercise fishing rights pursuant to the treaty because the reserve is located between Cape Tormentine and the Baie des Chaleurs. Second, since the reserve was not suitable for agriculture, it is reasonable to conclude that it was set aside to enable the First Nation to maintain a livelihood

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220 Richard H. Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary: University of Calgary, 1988), 37. Bartlett relies on the following three decisions for this conclusion: *Burrard Power Co. v. The King*, [1911] AC 87 (PC); *Attorney General for Quebec v. Attorney General for Canada [subnom. Star Chrome Mining]*, [1921] 1 AC 401 (PC); *Davey v. Isaac*, [1977] 77 DLR (3d) 481(SCC).

221 Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 30.

222 Submissions on Behalf of the Government of Canada, February 14, 1997, p. 31.

by harvesting marine resources on and adjacent to the reserve.[223] Third, the 1807 Order in Council reserved "the Eel Fishery" for the exclusive use of the First Nation, but the "Sand Beach" was intended to be used as a public fishery. We note that the careful use of capital letters to refer to specific places suggests that the Order in Council was intended to reserve the "Eel River" fishery, and not the "eel" fishery, to the Micmac Indians. Without further evidence and argument, however, it is difficult to determine whether the public fishery on the "Sand Beach" was intended to refer to the clam flats at the entrance of the Eel River and whether the Order in Council effectively limited the First Nation's treaty fishing rights on the clam flats.

We are also of the view that the treaty right to harvest fish and clams "[f]ree from any molestation" on the part of the British Crown and its subjects cannot be interpreted to mean that it was an inviolate right when the dam was constructed in the 1960s. Before the enactment of section 35 of the *Constitution Act, 1982*, which recognized and affirmed the "existing aboriginal and treaty rights" of First Nations in Canada, the Crown could infringe upon or extinguish treaty rights providing that it expressed a "clear and plain intention" to do so.[224] Although counsel for the First Nation is correct in saying that, after 1982, treaty rights could not be extinguished or infringed upon unless the Crown met the strict test of justification set out by the Supreme Court in *Sparrow v. The Queen*,[225] the rights in question here were infringed upon by construction of the dam in the 1960s and would have been subject to the state of the law that existed at the time. Furthermore, as indicated by counsel for the First Nation, it is always open to a First Nation to negotiate a settlement to compensate for a breach or infringement of treaty rights.[226]

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223 It will be recalled that in 1938 the Inspector of Indian Agencies commented that the reserve was not suitable for farming, because of the marshy land, and that a "worse place could not have been chosen for a reserve": Jude Thibault, Inspector of Indian Agencies, to Indian Affairs Branch, Ottawa, September 16, 1938, DIAND file 271/30-13-3, vol. 1 (ICC Documents, p. 58).

224 *R. v. Sparrow*, [1990] 1 SCR.

225 *R. v. Sparrow*, [1990] 1 SCR.

226 ICC Transcript, February 20, 1997, p. 45 (Murray Klippenstein).

In summary, we conclude that the rights conferred by the Treaty of 1779 were infringed upon by the construction of the dam because it interfered with the Micmac Indians' rights to fish free from any interference on the part of the Crown.[227] We acknowledge and agree with the First Nation's submissions on the significance of its hunting and fishing rights, and we accept that the Treaty was intended to protect a livelihood that had sustained the First Nation since time immemorial. Ample evidence was given at the community session by members of the Eel River Bar First Nation on the significance of the clam fishery to the First Nation's culture and livelihood. The question though is whether the Crown had the lawful authority, either by statute or with the agreement of the Eel River Bar First Nation, to construct the dam in 1963. In either case, the First Nation's traditional practices and reliance on the fishery were protected by the Treaty of 1779, and it is our view that the First Nation was entitled to compensation for the infringement upon its treaty rights and for the damages caused to its source of livelihood.

Although it is questionable whether Indian Affairs was aware that the First Nation had treaty fishing rights in and around the reserve when construction of the dam was first proposed in 1962, it is clear that all parties involved in the negotiations considered that the First Nation was entitled to compensation for the economic losses it would sustain as a result of the dam. The Treaty of 1779 is not mentioned anywhere in the negotiations leading up to the 1970 agreement, but the IAB was clearly alive to the fact that the main reason that compensation had to be secured for the First Nation was for economic loss for damage to the fishery, particularly the Band's clam harvest. At the outset of the discussions about the potential dam, McKinnon stated that "erection of a dam will mean the flooding of a fairly large flat which at the moment provides approximately 50% of the clam

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[227] On this point, we agree with counsel for the First Nation that the facts in *Claxton v. Saanichton Marina Ltd.*, [1989] 3 CNLR 46 (BCCA), are strikingly similar because the treaty in that case guaranteed the First Nation's right to carry on its fisheries "as formerly." The *Claxton* case does, however, differ from the present case in two significant ways. First, the treaty rights in that case were protected by section 35(1) of the *Constitution Act, 1982*, which requires that the Crown meet a strict justificatory standard where there is a *prima facie* infringement on unextinguished treaty rights: *R. v. Sparrow*, [1990] 1 SCR 1075. Second, the First Nation in that case did not enter into any agreements authorizing the infringement on its fishing rights.

production. It is therefore quite valuable to the Indians."[228] In 1970, the First Nation entered into an agreement, and compensation was paid for damages caused by the dam, described in the recitals of the agreement as follows: "[T]he Authority recognizes that the construction of the dam and the reservoir has diminished the quantities of fish, shellfish, waterfowl, and other natural resources which were traditionally available to the Indians."[229]

Subject to our comments below with respect to whether lawful authority was obtained by the Town of Dalhousie and the Province of New Brunswick to construct the dam on reserve lands and whether adequate compensation was paid to the Eel River Bar First Nation, it is our view that the infringement on the First Nation's treaty rights caused by the dam is not sufficient, in and of itself, to establish an outstanding lawful obligation on the part of the federal Crown.

In view of our findings above, it is not necessary for the Commission to determine whether the First Nation had any riparian rights in addition to its treaty rights to fish in the waters adjacent to the reserve or whether Canada breached the 1958 federal-provincial agreement which transferred administration and control of Indian reserve lands from the Province of New Brunswick to the federal government. In our view, the First Nation's claim will ultimately turn on whether sufficient authority was provided for construction of the dam and whether adequate compensation was paid to the First Nation for damages caused to its beneficial use of the fisheries.

ISSUE 2 AUTHORITY FOR PERMIT AND EXPROPRIATION OF EEL RIVER RESERVE LAND

Did the federal Crown breach sections 18, 28, 35, or 37 to 41 of the *Indian Act*, RSC 1952, c. 149?

For easy reference, the relevant provisions of the *Indian Act,* RSC 1952, c. 149*,* have been reproduced in Appendix D to this report.

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[228] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Indian Affairs Branch, February 27, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 126).

[229] *Agreement*, between the Eel River Band Council, New Brunswick Water Authority, and Her Majesty the Queen in Right of Canada, May 14, 1970 (ICC Documents, p. 463).

Section 18

Section 18(1) of the *Indian Act* reads as follows:

> 18.(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

The First Nation submitted that section 18(1) of the *Indian Act*, which requires that the federal Crown hold reserve lands for the use and benefit of the band for whom it was set aside, was breached when part of its reserve was disposed of for construction of the Eel River dam "to promote the general interests of the Town and the industry users rather than the First Nation."[230] The First Nation contended that another violation of section 18(1) occurred when the Crown allowed the Town of Dalhousie to trespass on the reserve from 1962, when a preliminary survey on the clam harvest was conducted by Dr Medcof, until at least 1970, when an agreement was entered into by the NBWA which purported to authorize the use and occupation of reserve land. Moreover, the First Nation argued that if the 1970 agreement was void, the province was in continuous trespass until 1990.[231]

The leading case on section 18(1) is *Guerin v. The Queen,* a case involving the surrender of 162 acres of reserve land by the Musqueam Band for lease to the Shaughnessy Golf Club on the understanding that the lease would contain certain terms and conditions agreed to by the Band Council. The surrender document required the Crown to lease the land on such terms as it deemed most conducive to the welfare of the Band. The Band later discovered, however, that the Crown agreed to lease the land on terms that were less favourable than those agreed to by the Band.

All eight members of the Court found that the Crown owed a legal duty to the Band in relation to the surrender and that this duty had been breached. There were, however, three separate reasons for judgment rendered by the Court, each disclosing different characterizations of the nature of the Crown's duty under the circumstances. On behalf of the majority of the Court, Dickson J (as

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230 Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 33.

231 Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 33.

he then was) examined the statutory regime governing the disposition of Indian interests in land and made the following comments on the obligations of the Crown:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.[232]

Mr Justice Dickson stated that the Crown first took on a responsibility to act on behalf of Indians with respect to the sale or lease of their lands through the *Royal Proclamation of 1763*, which prohibited Indian bands from directly transferring their interests in land to third parties without first surrendering those interests to the Crown.[233] This surrender requirement is still a key part of the *Indian Act* today and, as Justice Dickson stated, it is the responsibility entailed in these provisions which provides the source of a distinct fiduciary obligation on the part of the Crown:

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests

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[232] *Guerin v. The Queen*, [1984] 2 SCR 335, [1984] 6 WWR 481, 13 DLR (4th) 321, 53 NR 161, [1985] 1 CNLR 120 at 131.

[233] The *Royal Proclamation of 1763*, RSC 1970, App. II, which entrenched and formalized the process whereby only the Crown could obtain Indian lands through agreement or purchase from the Indians, states:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie. . . .

> in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the *Act*.
>
> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. . . [W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[234]

Dickson J noted that "[t]he discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case," and that section 18(1) itself provides that such discretion can be narrowed by the terms of any treaty, surrender, or other provisions of the *Indian Act*.[235]

> Madam Justice Wilson, concurring in the result, stated that section 18(1)
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> is the acknowledgment of a historical reality, namely that Indian bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect their interest and make sure that any purpose to which reserve land is put will not interfere with it. . . . The bands do not have the fee in their lands; their interest is a limited one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree.[236]

Although Justice Wilson recognized that the Crown has a fiduciary responsibility with respect to the management of Indian reserve land, she also recognized that an Indian band may effectively "pre-empt" the Crown's authority where it has agreed to surrender its land for a specific purpose.[237]

Therefore, the scope of the Crown's fiduciary duties will always depend on the nature of the relationship between the Crown and the band involved in any given situation. It is also clear that in

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234 *Guerin v. The Queen*, [1984] 2 SCR 335 at 383, [1985] 1 CNLR 120 at 137.

235 *Guerin v. The Queen*, [1984] 2 SCR 335 at 387, [1985] 1 CNLR 120 at 139.

236 *Guerin v. The Queen*, [1984] 2 SCR 335 at 349, [1985] 1 CNLR 120 at 152.

237 *Guerin v. The Queen*, [1984] 2 SCR 335 at 352, [1985] 1 CNLR 120 at 154.

cases like the present one, where we are dealing with the disposition of interests in reserve lands, the scope of these duties may also depend on the relevant statutory provisions governing the disposition of or the use and occupation of reserve land. Depending on the context, the Crown's discretion may be narrowed where the band has retained some measure of decision-making autonomy vis-à-vis the Crown. Whether the Crown owes a specific fiduciary duty, as well as the extent of that duty, must depend on the nature of the relationship between the Crown and the band. The band's consent to a surrender or to a limited disposition of reserve land may be a relevant factor, depending on the context. This view was affirmed by Mr Justice Iacobucci in *Quebec (Attorney-General) v. Canada (National Energy Board)*, where he states:

> It is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal people of Canada: *Guerin v. Canada* . . . None the less, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd*. (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.[238]

Since section 18 is but one manifestation of the Crown's fiduciary duty in the context of Indian lands, we will come back to this point later in this report. It is nevertheless important to bear in mind the principles enunciated by the court in *Guerin*, as well as the underlying policy of the *Indian Act*, while interpreting the various provisions of the *Indian Act* dealing with surrender, expropriation, and the use and occupation of reserve land. Whether the Crown had the legal authority under the provisions of section 28(2) and section 35 of the *Indian Act* to flood the headpond and to maintain the Eel River water supply system on reserve lands will be dealt with in the following sections. Those sections of the Act will be addressed in turn.

Section 28(2) and the 1970 Letter-Permit

Section 28 of the *Indian Act* states:

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[238] *Quebec (Attorney-General) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at 183, 112 DLR (4th) 129 at 147.

> 28.(1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

When construction of the dam commenced in 1963, the Band and Indian Affairs allowed work to proceed despite the absence of any formal agreement or arrangement pursuant to the *Indian Act* authorizing the town to use and occupy reserve land for the purposes of flooding. No permit was issued in 1963 under section 28(2) of the *Indian Act* authorizing the use and occupation of reserve lands, nor had there been any surrender or expropriation of reserve land for this purpose. In 1968 and in 1970, the Minister of Indian Affairs issued permits under the authority of section 28(2) to allow the NBWA to use and occupy reserve land for the purpose of establishing and maintaining an access road, a pumping station, and a second pipeline to transport water from the dam into the Town of Dalhousie. The first permit, in September 1968, was issued for a period of one year, pending final settlement between the town and the Band. The 1970 letter-permit authorized the Department of Natural Resources to "enter upon and use" 2.43 acres for a pumping station and pipeline right of way, and 2.28 acres for an access road "for as long as required for the purposes outlined." In this section, we intend to address only whether the 1970 letter-permit provided the NBWA with lawful authority to use and occupy reserve land. Later in this report, we will consider whether the town and the NBWA trespassed on Eel River reserve lands from 1963 until 1970, when permits were issued under section 28(2) for rights of way with respect to the access road, the pipeline, and the pumphouse, and when lands were expropriated for the headpond under section 35.

Counsel for the First Nation submitted that the 1970 letter-permit should not have been issued by Canada because permits under section 28(2) should only be granted for a limited term. Furthermore, because the permit effectively granted an interest in land, the proper procedure would have been to obtain a surrender by the Band in accordance with the procedures set out in sections 37 to 41 of the *Indian Act*. In support of its contention that the permit granted an interest in land

which was akin to a lease, the First Nation referred to guidelines with respect to the issuance of permits set out in the *Land Management and Procedures Manual* prepared by the Department of Indian Affairs in 1988. Counsel submitted:

> According to Government Guidelines, s. 28(2) does not allow for the granting of leases in the guise of permits. Permits are meant to provide personal, rather than proprietary rights. They tend not to be exclusive to one party and are usually granted for short periods of time. The permit, which was offered to the Province pursuant to the 1970 agreement, was invalid as it created a right which ran with land since the Dam is now a permanent fixture.[239]

The manual referred to above suggests that it would be appropriate to use a permit to grant the non-exclusive use of a road or right of way, or to allow utilities such as telephone and hydro lines to service an Indian reserve exclusively.[240] While section 28(2) had been used in the past to provide rights of way for utilities crossing through reserves to service non-reserve lands, the manual states that permits should not be granted for "permanent installations such as roads, pipelines, electric and telephone cables and surface support structures" attached to reserve lands unless "the sole purpose of the utility is to service reserve lands and the exclusive use of those lands is not required by the subject utility."[241] Before drawing any definite conclusions, however, it is important that the Commission first examine the relevant case law to determine whether these guidelines reflect the judicial interpretation of section 28(2) and the circumstances in which a permit can be issued by the Department of Indian Affairs.

Counsel for Canada relied on *Opetchesaht Indian Band* v. *Canada*,[242] a decision of the British Columbia Court of Appeal, in support of its argument that the 1970 agreement was valid because "the 1956 amendment of ss. 28(2) created a general and unlimited power to grant rights of occupation and use of reserve lands to third parties without a surrender."[243] Providing that the grant

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239 Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 34.

240 DIAND, *Land Management Procedures Manual* (1988), ICC Exhibit 2, vol. 1, tab 26, p. 3.

241 DIAND, *Land Management Procedures Manual* (1988), ICC Exhibit 2, vol. 1, tab 26, p. 4.

242 *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161.

243 Submissions on Behalf of the Government of Canada, February 14, 1997, p. 40.

of rights in a reserve is limited to what would be regarded in common law as a "licence" rather than an "interest in land," a permit under section 28(2) must be considered valid. Since the 1970 letter-permit did not involve a transfer of title or a grant of ownership to the province of New Brunswick, Canada contends that it was not required to obtain rights in the reserve pursuant to the expropriation or surrender provisions of the *Indian Act*. Finally, Canada stated that the Court of Appeal found that section 28(2) authorized the "grant of rights either for a period having a predetermined termination date or until the happening of a future event the date of which cannot be known at the commencement of the term."[244] Therefore, Canada submitted that the permits granted to the Province of New Brunswick were valid, based on the state of the law as it existed when the parties made their submissions. The First Nation submitted that *Opetchesaht* had been wrongly decided by the Court of Appeal and that it was distinguishable from the facts in this case.

Following the parties' submissions on these issues, the Supreme Court of Canada rendered its decision in the appeal of *Opetchesaht*[245] and upheld the ruling of the Court of Appeal. Since this decision represents the current state of the law, we shall carefully consider the reasoning of the Court to determine whether it applies equally to the circumstances before us in relation to the Eel River Bar First Nation.

The facts in *Opetchesaht* are as follows. In 1959 the Minister of Indian Affairs granted, with the consent of the Opetchesaht Band Council, a right of way for an electric power transmission line across the Band's reserve to convey electricity to consumers off the reserve. Between February and July 1958, there were negotiations between the Band, the Crown, and the British Columbia Hydro and Power Authority (Hydro) to acquire the right of way. Negotiations were protracted, with several proposals being made by each side, including yearly rental payments for 20 years, free electricity for the Band, various offers on the value of the land, and expropriation under section 35 of the *Indian Act*. An agreement was concluded between the Crown and Hydro, with the consent of the Band Council, for a right of way 150 feet wide over 7.87 acres of the reserve (approximately 2.5 per cent of the reserve land base). Total consideration paid to the Band was a single payment of $125 per acre

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244 Submissions on Behalf of the Government of Canada, February 14, 1997, p. 41.

245 *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161.

for the land covered by the right of way. There was no evidence that the Band was paid less than fair market value.

A permit was issued under the authority of section 28(2), which provided, in part, that Hydro had the right to construct, operate, and maintain the power line. It also had the exclusive right to occupy the portions of the surface of the reserve where poles were erected, and that part of the air space where the wires ran. The Band retained the right to use and occupy the balance of the right of way area, subject to certain restrictions related to the operation and maintenance of the structures. The permit specified that the rights granted to Hydro could be exercised "for such a period of time as the said right of way is required for the purpose of an electric power transmission line."[246] Hydro could not assign its rights without the consent of the Crown.

In the late 1980s, the Band decided to build a private road, reservoir access road, and drainage ditch within the right of way. When agreement could not be reached between Hydro and the Band over the proposed development, the Band applied to the Supreme Court of British Columbia in 1992 for a declaration that the permit was void and unenforceable, for an order for possession of the lands, and for damages for trespass. The Band's claim was based on the assertion that section 28(2) did not authorize the grant of a right of way for an indefinite period of time. The trial judge allowed the application and declared that the permit was not authorized by section 28(2). However, the BC Court of Appeal set aside the declaration, concluding that although the period was indefinite, it was nonetheless determinable.

The Supreme Court of Canada dismissed the appeal, but split 7–2 on the question of whether the permit was properly issued under section 28(2). Major J, writing for the majority, concluded that a permit may be issued under section 28(2) for an indefinite period of time with the consent of the Band Council, providing that the period is capable of ascertainment and does not constitute a grant in perpetuity. For the minority, McLachlin J reasoned that the grant of an easement or right of way for an indefinite period of time falls outside the intended scope of section 28(2) because it has the potential to continue in perpetuity. Such an interest in the reserve land can be alienated only by surrender with the consent of the entire band membership, pursuant to section 37 or by the formal process of expropriation under section 35 of the *Indian Act*.

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246 *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161.

On behalf of the majority, Justice Major stated that three issues are raised in determining whether section 28(2) authorized the permit granted:

> First, it is necessary to identify the nature and scope of the rights granted by the permit; second, whether the termination of the permit is defined by the happening of a reasonably ascertainable event; and finally, whether the permit constitutes a "sale, alienation, lease or other disposition" under s. 37 of the *Indian Act* rather than a grant of rights under s. 28(2).[247]

Following this analytical framework, Major J concluded that the nature of the right of way granted by the permit was statutory in origin and analogous to an easement over the reserve that was subject to termination when it was no longer required for a power transmission line. Further, Hydro's rights were not exclusive, since Band members retained the right to use the right of way and their "ability to use the land is restricted only in that they cannot erect buildings on it or interfere with the respondent Hydro's easement. Both Hydro and the Band share use of the right of way."[248]

On the question of whether the permit was for an ascertainable period, Major J concluded that the statutory easement was granted for an indeterminate period since it was not known exactly when the right of way would terminate. Nevertheless, because the easement would terminate when it was no longer required for a transmission line, this constituted "a period whose end is readily ascertainable."[249] Furthermore, Major J disagreed that Hydro controlled the duration of the permit such that the permit could be characterized as perpetual. Whether the transmission was "required" by Hydro was a justiciable issue that could be objectively determined by the courts.

With respect to whether the words "any longer period" in section 28(2) were intended to limit permits to a fixed number of years, Major J held that a period can be measured either by dates or events:

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247 *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 4 (per Major J).

248 *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 10 (per Major J).

249 *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 11 (per Major J).

> The end point of a permit need not be defined in terms of a specific calendar date as long as it is ascertainable. The only requirement is that the end of the period be capable of ascertainment so that it does not constitute a grant in perpetuity.[250]

Major J, however, cautioned that, depending on the facts in each case, there may be instances where there is a grant for a perpetual duration, although it has been disguised to look like a defined period. For instance, he suggested that the grant of a right of way for "as long as the sun shall shine and the rivers flow" would be suspicious because the "terminable event is so remote and uncertain that the period is, in fact perpetual."[251] In other words, one must look at the facts of each case to determine whether the event is reasonably ascertainable.

The Opetchesaht Band argued that, because of its potentially lengthy duration, the right of way should have been effected by way of surrender to the Crown pursuant to section 37 of the *Indian Act*. To answer this argument, Major J examined the nature of Indian title in reserve land and the interplay between the surrender provisions of the *Indian Act* in sections 37 to 41 on one hand and section 28(2) permits on the other. Section 37 states:

> 37. Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.

Section 38 goes on to provide that surrenders may be absolute or qualified and they may be conditional or unconditional. In *Smith v. The Queen*, the Supreme Court of Canada held that where a band provides an absolute and unconditional surrender of reserve land, the Indian interest in the land disappears.[252] It is also true, however, that a surrender can be qualified so that it only partially or temporarily releases the interest of the band. Accordingly, Major J stated that "surrenders are required as a general rule not only when the Indian band is releasing all its interest in the reserve

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250 *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 14 (per Major J).

251 *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 14 (per Major J).

252 *Smith v. The Queen*, [1983] 1 SCR 554.

forever, but whenever any interest is given up for any duration of time."[253] Furthermore, section 37 is not limited to the sale or complete alienation of reserve land, and a surrender is required for leases and other dispositions of reserve lands. Major J also noted that the same analysis applies equally to section 35, which specifies that the expropriation power may be exercised "in relation to lands in a reserve or any interest therein."

While the general rule requires that sales, leases, and other dispositions of Indian interests in reserve land should be effected by way of a surrender, Major J states that section 37 must be read in conjunction with other provisions of the Act:

> Also apparent on the face of s. 37 from the qualification at the beginning of s. 37 is the legislative intention that it operate *in conjunction with and subject to* other provisions of the *Indian Act*. There is in this qualification an express recognition that other provisions of the *Indian Act* also deal with sales, alienations, leases or other dispositions of lands in a reserve.
>
> . . .
>
> The practice of the Minister demonstrates that in his view, some sections of the *Indian Act* could be used interchangeably depending on the circumstances. . . . the practice which occurred in Canada after the 1956 amendments to the *Indian Act* was to grant power line rights of way across reserve lands both by way of surrender and conveyance (s. 37), expropriation (s. 35) and by permit (s. 28(2)).
>
> . . .
>
> *The question is whether the permit was properly granted under s. 28(2). Perhaps the easement in the permit could have been granted under s. 37, but that section must be read subject to other provisions in the Indian Act. The proper question is to decide the circumstances in which s. 28(2) could not apply, the default provision being the general rule in s. 37 against alienation without a surrender.*
>
> *In my view, s. 28(2) cannot apply any time a portion of the Indian interest in any portion of reserve land is permanently disposed of. . . .*
>
> In the instant case, the respondent Hydro was accorded limited rights of occupation and use *for an indeterminate but determinable and ascertainable period of time. There was no permanent disposition of any Indian interest. Furthermore, the Band and Hydro were obligated to share the rights of use and occupation of the land, with the limited exceptions of the area of ground giving support to the poles and the air space occupied by the poles.* Consequently, the surrender requirement of s. 37 does not apply to the present permit and more importantly, no rights exceeding those

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[253] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 16 (per Major J). In support of this point, Major J cited *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] SCR 211 at 219 (per Rand J).

> authorized by s. 28(2) were granted. The indeterminate easement granted on the face of this permit is a disposition of a limited interest in land that does not last forever.
>
> Surely it was intended that the band council could at least have the right to grant that type of easement. Surrender involves a serious abdication of the Indian interest in land and gives rise to both a broad discretion and an equally onerous fiduciary obligation on the Crown to deal with the Indian lands thus surrendered.[254]

The Court also commented on whether the grant of rights for an indeterminate period ran contrary to the underlying policy of the *Indian Act*:

> The remaining question is whether the grant of rights for an indeterminate period conflicts with the policy of prohibiting use of reserve land by third parties absent approval of the Minister and the band. This leads to a consideration of the policy behind the rule of general inalienability. Both the common law and the *Indian Act* guard against the erosion of the native land base through conveyances by individual band members or by any group of members. Government approval, either by way of the Governor in Council (surrender) or that of the Minister, is required to guard against exploitation: *Blueberry River Indian Band, supra*, at p. 370, *per* McLachlin J.
>
> On the other hand, the *Indian Act* also seeks to allow bands a degree of autonomy in managing band resources for commercial advantage in the general interest of the band. Collective consent of the Indians, either in the form of a vote by the band membership (surrender) or by a resolution of the band council, is required to ensure that those affected by the transfer assent to it. *The extent to which individual band members participate in the approval process depends on the extent to which the proposed disposition affects individual or communal interests.* In the case of sales, dispositions and long-term leases or alienations permanently disposing of any Indian interest in reserve land, surrender is required, involving the vote of all members of the band. On the other hand in the case of rights of use, occupation or residence for a period of longer than one year, only band council approval is required.
>
> It is important that the band's interest be protected but on the other hand the autonomy of the band in decision making affecting its land and resources must be promoted and respected. These sometimes conflicting values were identified by McLachlin J. in *Blueberry River Indian Band, supra*, at p. 370:
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> > My view is that the *Indian Act*'s provisions for surrender of band reserves strikes [sic] a balance between the two extremes of autonomy and protection.

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[254] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, pp. 17-20 (per Major J). Emphasis added.

Gonthier J. at p. 358, speaking for the majority, accepted this principle:

> As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured.
>
> With the twin policies of autonomy and protection in mind, s. 37 and s. 28(2) reflect that, depending on the nature of the rights granted, different levels of autonomy and protection are accorded. Section 37 demonstrates a high degree of protection, in that the approval of the Governor in Council and the vote of all of the members of the band are required. *This indicates that s. 37 applies where significant rights, usually permanent and/or total rights in reserve lands are being transferred*. On the other hand, under s. 28(2), lesser dispositions are contemplated and the interest transferred must be temporary. It is evident from a review of this permit that it does not violate the balance between autonomy and protection struck by the *Indian Act*. This is not a case where surrender, with all of its administrative and legal impositions was required in terms of the overall policy of the *Indian Act*.[255]

Based on this reasoning, Major J concluded that the permit was authorized by section 28(2) of the *Indian Act*. He also noted that the Band Council had provided its consent to the permit after protracted negotiations between the parties. Since the proceedings before the Court were based on a motion for summary judgment, no claim of unfairness or uneven bargain had been made, and the Court declined to make any findings on other factual and legal issues, such as undue influence and breach of fiduciary duty, which would require evidence and argument in a trial.[256]

For the minority, McLachlin J also looked at the interplay among the surrender provisions, the expropriation power, and section 28(2) permits in light of the general rule of inalienability that is inherent in the underlying policy of the *Indian Act*. McLachlin J acknowledged that the term in the permit was not perpetual in the sense of being entirely within Hydro's control, but she also felt that the length of the term and the nature of the alienated interest were sufficiently important to take the permit beyond the scope of section 28(2):

> [I]t must be acknowledged that the easement has the *potential* to continue forever (or at least until the world ends and its continuance becomes academic). In terms

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[255] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, pp. 21-22 (per Major J). Emphasis added.

[256] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 23 (per Major J).

> relevant to the concerns of the Opetchesaht people, it shows every promise of binding not only the current generation which never agreed to it, but many generations to come. The permit may without exaggeration be characterized as an alienation of reserve lands for an indefinite period, a period which has the potential to extend to future generations of the Opetchesaht people for as far forward as we can see. Is this, we must ask, the type of disposition Parliament intended to allow under the summary procedures of s. 28(2) of the *Indian Act* upon agreement between the Minister and the current band council? Or is it the sort of alienation of interest in land which Parliament sought to safeguard by the surrender and transfer provisions of s. 37 of the Act?[257]

Since McLachlin considered the phrase "or any longer period" in subsection 28(2) of the *Indian Act* to be ambiguous, she relied on the principles governing the interpretation of statutes relating to Indians as set out in *Nowegijick v. The Queen*[258] and *Mitchell v. Peguis Indian Band*,[259] which provide that statutory provisions aimed at maintaining Indian rights should be broadly interpreted, whereas provisions aimed at limiting or abrogating such rights should be narrowly construed. Having regard for the balance between the two extremes of autonomy and protection that run through various provisions of the *Indian Act*, McLachlin J concluded:

> Section 28 was never intended to deal with major long-term alienations of Indian interests in their reserve lands. It was aimed rather at the short-term, non-exclusive occupant – the itinerant worker, service provider or agricultural lessee. The phrase "any longer period", consistent with this interpretation, is best understood as a period defined in relatively short terms of months and years. This makes sense in textual terms as well. The phrase "any longer period" relates to the earlier phrase "a period not exceeding one year". This suggests that what Parliament intended by "any longer period" was also a term capable of being expressed in finite calendar terms.
>
> The question arises: how long is the short or temporary use contemplated by s. 28(2)? For the purposes of this case, it is unnecessary to decide this issue; certainly an alienation which has the potential to go on as long as anyone can foresee falls outside the scope of s. 28(2). However, for purposes of guidance in other cases, I would suggest that commitments longer than the two-year mandate of band councils should not be transacted through s. 28(2).

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257 *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, pp. 6-7 (per McLachlin J). Emphasis added.

258 *Nowegijick v. The Queen*, [1983] 1 SCR 29.

259 *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85.

> This interpretation is consistent with the policy of the *Royal Proclamation of 1763*, and the principle that the long-term alienation of interests in Indian lands may be effected only through surrender to the Crown and consent of the band membership as a whole. To accept the views of the respondents in this case is to accept that parties seeking to obtain long-term or indefinite interests in reserve lands short of outright ownership could use the s. 28 permit provisions to circumvent the surrender requirements of the *Indian Act* and proceed to dispose of long-term interests in land with only the consent of the band council. It would be to attribute to Parliament the intention to establish two alternative and inconsistent ways for alienation of major interests in reserve lands – one strictly limited and regulated under s. 37, the other requiring only the approval of the Minister and the band council. Finally, it would attribute to Parliament the intention to accord the entire band membership the right to decide on alienation under s. 37, while depriving the membership of that power for transfers that may represent equally serious alienations under s. 28(2), and this despite the fact that s. 37 establishes consent of the band members as a condition of alienation not only of outright transfers of land, but of "leases" or other "dispositions". I cannot accept that these were Parliament's intentions.[260]

In view of the majority and minority decisions in *Opetchesaht*, it is clear that there are two factors which must be taken into account in determining whether a section 28(2) permit can authorize a particular use and occupation of reserve land. The first relates to the length of the term in the permit and whether its duration is reasonably ascertainable. The second relates to the nature and extent of the interest granted. Whether a section 28(2) permit can be used to authorize the use and occupation of reserve land or whether the general rule should apply – namely, that a surrender under section 37 is required to grant the interest in question – will depend on the facts of each case.

In summary, the Court in *Opetchesaht* took particular note of the fact that the section 28(2) permit did not grant exclusive rights to Hydro. The permit was granted for the purposes of a power transmission line, which meant that, with the exception of the land and air space occupied by the poles and transmission lines, the Band shared the use of the land covered by the right of way. In concluding that the permit fell within the scope of section 28(2), the Court considered whether the permit was intended to be permanent as well as the extent of the rights being granted, since "s. 37 applies where significant rights, usually permanent and/or total rights in reserve lands are being

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[260] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, pp. 15-17 (per McLachlin J).

transferred."[261] In so concluding, the Court held, in our view, that the appropriateness of a section 28(2) permit – as opposed to a section 37 surrender (or a section 35 expropriation) – is a question of degree rather than an absolute test. The degree is to be measured, in our view, by reference to two sliding scales: one *temporal*, relating to the length of the term and the ascertainability of its termination, and the other *substantive*, relating to the content of the interest granted.

Applying the principles of the *Opetchesaht* decision to the facts before us in the case of the Eel River Bar First Nation, we consider the following factors to be relevant in determining whether the use and occupation of reserve land for the pipeline, access road, and pumping house were properly authorized by the 1970 letter-permit issued under section 28(2) of the *Indian Act*:

1 The interests granted in the 1970 letter-permit are statutory in origin and are analogous to an easement over the Band's reserve lands which terminates when the land is no longer required for the purposes of a pumping station, pipeline right of way, and an access road.

2. The NBWA's rights to the access road are not exclusive, since both the Band and the NBWA have the right to use the access road.

3. Although the nature of the NBWA's rights to use 2.43 acres of the reserve land for the purposes of a pumping station and a pipeline right of way are essentially exclusive, since the pipeline runs above the ground and precludes the Band from sharing the use of this portion of the reserve, the extent of the interest granted is not substantial. The amount of land granted in the permit is approximately 0.66 per cent of the total reserve base left after the expropriation and easements are granted.[262]

4. The right of way is granted for an indeterminate period. Although it could not be known exactly when the NBWA's rights would terminate, the permit is for a period whose end is readily ascertainable and does not amount to a grant in perpetuity. Whether the land is required by the NBWA for the purposes outlined in the permit is a justiciable issue that does not lie within the sole discretion of the NBWA.

5. The grant of an easement to the NBWA was specifically intended *not* to be a "permanent and/or total" disposition of land. The original intention of the parties, as evidenced by the 1963 Band Council Resolution and by subsequent correspondence, was to provide for a

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[261] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 22 (per Major J).

[262] The air photo interpretation study, in which the leakage problems were detailed, indicated that approximately 6 hectares (or approximately 15 acres) were unusable as a result of the leakage. At that time, this area would have amounted to approximately 1 per cent of the total reserve area.

taking of the land by the Province, pursuant to section 35 of the Act. Ultimately, the land required for headpond purposes was expropriated. The option of the section 28(2) permit was championed by McKinnon as a way to protect the Band from the NBWA later claiming that the agreement was invalid and that compensation was not payable to the First Nation because it did not have rights to the riverbed or to the fishery. As a result of the representations made by Indian Affairs, a lesser interest was to be granted to the NBWA to use and occupy the land for specific purposes and for a determinable period of time. The grant of a limited permit was intended to give the Band and Indian Affairs some leverage to ensure that the NBWA fulfilled its part of the agreement with respect to the annual payments for water pumped out of the headpond.

6. With respect to the "substantive" branch of the Supreme Court's analysis in *Opetchesaht*, there is no evidence before us in this case that the pumping station and the pipeline right of way substantially interfere with the First Nation's use of its reserve land. Although there is evidence in the record relating to problems of leakage from the pipeline and the effect of this leakage on the First Nation and on the reserve land,[263] these issues relate to the NBWA's obligation to maintain the pipeline, rather than to Canada's role in the granting of the permit. Indeed, if the land required for the pumping station and the pipeline had been granted to the NBWA pursuant to a surrender or an expropriation, problems with leakage would still have arisen.

We find that considering these factors in light of the temporal and substantive branches of the *Opetchesaht* analysis leads us to a conclusion that the permit was properly granted under section 28(2) of the Act. The permit was for an indefinite but clearly ascertainable and justiciable period of time. The interest in the land granted did not amount to a permanent disposition of an interest in land such that it required the consent of the Band membership as a whole pursuant to a surrender under section 37.

We also must have regard to the Supreme Court's view in *Opetchesaht* of the policy underlying the Act as a whole, and whether the permit in the present case struck a proper "balance between autonomy and protection." We deal with this issue in more detail below in considering Canada's fiduciary duties in relation to the construction of the dam and the negotiations leading up to the 1970 agreement. Based on the reasoning above, however, we find that the section 28(2) permit

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[263] E. Hulsman, Regional Planner, Band Support, Atlantic Region, Department of Indian and Inuit Affairs, to R.D. Campbell, Director, Reserves & Trusts, Atlantic Regional Office, February 7, 1984, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 610).

granting rights to use and occupy reserve land for the purpose of an access road, a pipeline, and a pumping station was given under valid authority.

Section 35 Expropriation of the Headpond

The First Nation submits that the expropriation of 61.57 acres of reserve land for the headpond in 1970 was invalid, based on the following arguments. First, neither the federal nor the provincial Crown could exercise the expropriation powers under section 35 of the *Indian Act* or provincial legislation because those powers are exercisable only in the event that agreement cannot be reached with the owner. In this case, the Band consented to the use of the land for the purposes of the dam, so the powers were not exercisable. Second, Canada failed to represent the Band's interests by allowing the expropriation, since the "dominant intent was not to benefit the best interests of the members of the First Nation but the actual purpose was to enhance certain corporate interests."[264] Third, the expropriation procedures set out in the New Brunswick *Expropriation Act*[265] were not complied with. Therefore, the First Nation submits that the Crown was required to obtain a surrender for the disposition of these lands.

In response, Canada submits that the statutory provisions of the provincial *Expropriation Act* and the *Indian Act* were complied with, because the Governor in Council consented to the taking of the reserve lands for public purposes. The fact that the Band consented to the use of expropriation powers does not alter the non-consensual nature of the taking of the reserve lands, so a surrender was not required. Moreover, the 1970 agreement was valid and does not invalidate the expropriation.

Before considering the merits of the parties' submissions, it is necessary to refer to the wording of section 35, which states:

> 35.(1) Where by an Act of the Parliament of Canada or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to

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[264] Submission and Clarification of the Evidence and Supporting Legal Arguments in respect of the Eel River Bar First Nation Land Claim, February 14, 1995 (ICC Exhibit 8, p. 26).

[265] *Expropriation Act*, RSNB 1952, c. 77, as amended.

> any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.
>
> (2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) shall be governed by the statute by which the powers are conferred.
>
> (3) Whenever the Governor in Council has consented to the exercise by a province, authority or corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without consent of the owner, authorize a transfer or grant of such lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.
>
> (4) Any amount that is agreed upon or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General of Canada for the use and benefit of the Band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

Section 35 provides two methods by which the Province of New Brunswick could have obtained the Indian interest in reserve lands for the establishment of a headpond. Section 35(1) states that where a province is "*empowered* to take or to use lands . . . without the consent of the owner," the Governor in Council may consent to the exercise of the province's expropriation powers for the compulsory taking of reserve land. Where the Governor in Council consents to the actual exercise of such expropriation powers under subsection (1), section 35(2) stipulates that all matters respecting the compulsory taking of land shall be governed by the constating legislation of the expropriating authority, unless the Governor in Council otherwise directs. The second method is set out in section 35(3), which provides that the Governor in Council may "in lieu of the province . . . taking or using the lands without consent of the owner, authorize a transfer or grant of such lands to the province . . . subject to any terms that may be prescribed by the Governor in Council." Section 35(3), therefore, provides the Governor in Council with the discretion to transfer reserve lands to the expropriating authority without triggering the procedural requirements of the constating legislation that would otherwise govern the compulsory taking of reserve land.

There is a significant difference between the two methods of expropriating reserve lands. If the Governor in Council provided its consent for the taking under section 35(1), the province would

have been required to exercise its expropriation powers in accordance with the procedures set out in the provincial *Expropriation Act*. If, however, authority was provided under section 35(3), the procedures of the provincial legislation would not necessarily apply because the Governor in Council has a broad discretion to prescribe the terms for the transfer of reserve land in lieu of an actual taking of land by the province. Whether the expropriation power is exercised under the authority of subsection (1) or (3), it is necessary in both instances to demonstrate that the expropriating authority is "empowered" to take lands without the consent of the owner.

Sections 35(1) and (3), therefore, contemplate that Indian reserve land could be expropriated either with or without the band's consent providing that the Governor in Council provides its consent as required by the Act. In situations where the expropriating authority cannot reach agreement with the band on the compensation to be paid for land required for a public work, the Governor in Council may consent to the taking under section 35(1), subject to the requirement that the expropriation procedures of the statute which confers such powers be followed to the letter. In the present case, if the Governor in Council had consented to the taking of land on the Eel River reserve for the headpond under section 35(1), the province would have been required to comply strictly with the expropriation procedures of the New Brunswick *Expropriation Act*.[266] The method of expropriation set out in section 3 of the *Expropriation Act* requires that the following conditions be met before the Crown enters into possession, use, or enjoyment of the expropriated land: (1) that the Lieutenant Governor in Council pass an Order in Council describing the land to be expropriated; (2) that the Order in Council and plan of the land be filed in the Registry Office; (3) that notice of the Order in Council and a description of the land be published in a local newspaper; and (4) that the owner be compensated for the expropriated land. Sections 5-11 provide that where the expropriating authority and the owner fail to agree on the amount of compensation to be paid, the matter may be referred to the Land Compensation Board for a determination of the fair value of the land, damages, and costs to be paid to the owner. Therefore, where the owner and the expropriating authority are unable to reach agreement on compensation, the procedures set out in sections 5 to 11 provide a measure of protection to land owners to ensure that they obtain fair compensation for expropriated land.

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[266] *Expropriation Act*, RSNB 1952, c. 77, as amended.

If, however, the expropriating authority is able to reach agreement with a band on the compensation to be paid for expropriated land, section 35(3) of the *Indian Act* gives the Governor in Council the discretion to consent to the transfer of the reserve land, *in lieu of the land being taken without the band's consent*, subject to any terms that may be prescribed by the Governor in Council. Therefore, if the band consents to the expropriation of reserve land subject to the payment of compensation agreed to between the band and the expropriating authority, there is no need to trigger the procedural requirements of the provincial legislation, since the land can be transferred pursuant to section 35(3).

Although the wording of the 1970 Order in Council did not specify which provision was used to authorize the transfer, it is our view that there was a valid taking of reserve lands for the headpond under section 35(3) of the *Indian Act*. The wording of the Order in Council and the surrounding circumstances support a finding that the Governor in Council authorized the transfer of administration of the reserve land to the Province of New Brunswick under section 35(3), in lieu of the province having to take the lands without the consent of the band pursuant to the procedures of the *Expropriation Act*.

This finding is based on three main considerations. First, on July 7, 1970, shortly after the execution of the 1970 agreement, the solicitor for the NBWA, P.A. MacNutt, wrote to J.H. MacAdam, the administrator of lands for the IAB, to finalize the documentation required to transfer administration and control of the lands to the province. In his letter, MacNutt discussed the authority under which the lands would be transferred:

> I presume you are proposing to proceed under the authority of subsection (3) of section 35 of the *Indian Act*, chapter 149, R.S.C. 1952. It is my interpretation of subsection (3) of section 35 that if a provincial authority has powers of expropriation that the Governor in Council may in lieu of authorizing the expropriation authorize the transfer or the making of a grant of such lands to the provincial authority subject to such terms and conditions as may be prescribed by the Governor in Council. I might point out in this context that the New Brunswick Water Authority does not have powers of expropriation under the *Expropriation Act* of the Province of New Brunswick nor does it have such powers under the Act under which it was incorporated. However, the Minister of Natural Resources of the Province of New Brunswick has powers of expropriation. I enclose herewith a copy of the *Expropriation Act* of the Province of New Brunswick. You will note that the

> definition of "Minister" is sufficiently broad to include the Minister of Natural Resources to expropriate such lands under the *Expropriation Act* and convey same to the New Brunswick Water Authority. I might add that all land acquired from private landowners in the headpond area has been in the name of Her Majesty the Queen in right of the Province of New Brunswick as represented by the Minister of Natural Resources. Once this land is fully assembled it will then be conveyed to the New Brunswick Water Authority for administration. You will note that the agreement entered into between the New Brunswick Water Authority and the Council of the Eel River Band and Her Majesty the Queen in right of Canada provides in section 1 that upon payment by the Authority Canada will arrange for the transfer of the administration and control of the lands in question to her Majesty the Queen in right of the Province of New Brunswick as represented by the Minister of Natural Resources.[267]

On July 23, 1970, MacAdam responded to MacNutt's letter as follows:

> Since you advise that control and management of the lands to be inundated shown as Lots 59, 60, and 61 on C.L.S.R. Plan 55628 is to be transferred to the Minister of Natural Resources, concurrently with this letter I have made a submission to the Governor in Council for authority under section 35 of the *Indian Act* to effect the transfer.[268]

Accordingly, it would appear that MacAdam agreed with MacNutt's suggestion that section 35(3) provided sufficient authority for the Governor in Council to transfer the lands for the headpond to the provincial Minister of Natural Resources. Furthermore, the wording of the Order in Council confirms that the Governor in Council consented to the transfer of reserve land, subject to the payment of compensation, in lieu of the province being required to exercise its expropriation powers under the *Expropriation Act*. Given that the Band had agreed to compensation for the land and its damages, it was not necessary for the Governor in Council to authorize a compulsory taking under

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[267] P.A. MacNutt, Solicitor, Department of Justice, Fredericton, NB, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, July 7, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, pp. 488-89).

[268] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Department of Indian Affairs, Ottawa, to P.A. MacNutt, Solicitor, Department of Justice, Fredericton, NB, July 23, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, pp. 493-94).

section 35(1) and the procedures of the *Expropriation Act*, which would otherwise govern a taking of land without consent of the owner.

Second, it is clear that the province was "empowered" to expropriate the land in question. Section 2 of the *Expropriation Act* provides that the "Lieutenant Governor in Council may at any time purchase or expropriate any land that may be deemed necessary or desirable for carrying out any public work or enterprise, or other public purpose, or for carrying out any work or enterprise deemed to be in the public interest." The definition of a "work," "public work," or "enterprise" set out in section 1(e) of the *Expropriation Act* is broadly worded and includes such works as "dams," "hydraulic works," and "hydraulic privileges." Construction of the dam and the creation of a headpond to supply water to the Town of Dalhousie satisfy the definition of a "public work."

Third, we are also satisfied that the construction of the dam and the headpond was considered to be in the public interest. Counsel for the First Nation submitted that "the dominant intent was not to benefit the best interests of the members of the First Nation but the actual purpose was to enhance certain corporate interests. It was reported that in the interest of the Town and the industry users, Section 35 expropriation powers would be used because it would be too difficult to use the surrender provisions."[269] In *Kruger*, a similar argument was raised by the claimant and rejected by the court, which concluded that its authority to review the exercise of a statutory power to expropriate is limited to situations where there is "evidence that the 'predominant purpose' of the expropriation was in furtherance of a 'tortious conspiracy to injure the owner of the land.'"[270] In our view, the exercise of the discretion to consent to the expropriation of land in this case is beyond question, because the dominant purpose of the work was to promote economic activity and job creation in the general public interest. On this point, we concur with Canada's written submissions:

> The lands were taken for public purposes. The evidence discloses that the impetus for the construction of the dam was that the Town of Dalhousie wanted to secure a good water supply as to attract an industry to their community. . . Canadian

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[269] Eel River Bar First Nation, Submission and Clarification of the Evidence and Supporting Legal Arguments in Respect of the Eel River Bar First Nation Land Claim, February 15, 1995 (ICC Exhibit 8, p. 26.).

[270] *Kruger v. The Queen*, [1985] 3 CNLR 15 at 37. The decision of *Warne v. Province of Nova Scotia et al.* (1969), 1 NSR (2d) 150 at 152-53, was cited in support of the test to be met for the courts to review the exercise of the discretion to expropriate land.

> Industries Limited was proposing to commence operations in Dalhousie, and would have needed an adequate water supply in order to do so. This water supply was assured by the Provincial Government . . . Also it was anticipated that the New Brunswick International Paper Plant would be increasing its capacity in the next few years and that this would also require an additional volume of water . . . While the immediate attention for constructing the dam appears to have been only for the benefit of two plants, it can be appreciated that the increasing operations of two plants would have significant employment opportunities for the Town as a whole as well as the north shore of New Brunswick.[271]

We find that the dominant purpose of the dam was to benefit the community generally by increasing the fresh water supply and by potentially enhancing industrial concentration in the area. Although other sources for the water supply were considered by the town, the site chosen was the most suitable location for the establishment of the dam. In short, there is no evidence that the predominant purpose of the dam was "in furtherance of a tortious conspiracy to injure the owner of the land," and the Band itself was interested in the job prospects that would come to the area as a result of the dam's construction. Therefore, it is our view that the expropriation of reserve land for the dam and headpond was for a valid public purpose.

Since this was an expropriation under section 35(3), it was not necessary for the federal or the provincial Crown to comply with the procedures for a compulsory taking, as set out in the *Expropriation Act*, because that Act not apply in this case. Even if it did apply, we are not convinced that there was any failure to comply with its provisions. Under the *Expropriation Act*, a power existed for the province to apply to a court of competent jurisdiction for an order authorizing the taking of possession of property. However, this specific provincial power is not required to be exercised unless a person resists, opposes, or disputes the taking. Not every statutory stricture under the *Expropriation Act* must be fulfilled where the owner of land that is subject to expropriation has agreed and consented to the expropriation and to the quantum offered for the expropriated land. Often it is up to the owner who is contesting the expropriation, or more typically the compensation, to use procedures under the *Expropriation Act* or other expropriation statutes to challenge the compulsory taking or the quantum of compensation offered by the expropriating authority. The

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[271] Submissions on Behalf of the Government of Canada, February 14, 1997, p. 34.

Expropriation Act is typical in that it allows compulsory takings by the provincial Crown, subject to the statutory right to compensation. It also provides a process by which compensation may be determined by a Land Compensation Board.[272] Implicit in this ability to have compensation determined by a provincial tribunal, however, is the power for the parties involved to consent to and agree on compensation for the expropriation. The Eel River Bar First Nation clearly consented to and settled for compensation to the compulsory taking.

This brings us to the First Nation's second main argument: that neither the provincial nor the federal Crown could exercise its expropriation powers because such powers can be exercised only where agreement cannot be reached with the band. In this case, the Band Council Resolution of April 9, 1963, requested that the Governor in Council allow the Town of Dalhousie to expropriate reserve land under section 35 of the Act. On April 16, 1963, a general band meeting was held to discuss the proposed construction of the dam. Although it was not a formal surrender meeting, 24 out of the 25 eligible voters who attended were in support of the proposal to construct the dam, subject to the agreed terms set out in the Band Council Resolution. The Band Council requested that the land be expropriated because there was an urgency to proceed with the project. If a surrender vote was required, the Band and the IAB were of the view that at least two surrender meetings would be necessary since only 38 eligible voters lived on the reserve out of a total of 87 eligible voters.

When the IAB sought legal advice on the proposed expropriation, however, it was advised by the departmental Legal Advisor that the expropriation powers of the town under the *Towns Act*[273] "are exercisable by the Town only in the event that an agreement is not or cannot be reached with the land owner. The Council Resolution, provided the terms thereof are acceptable to the Town, is tantamount to an agreement and therefore the expropriation powers are not exercisable."[274] The Legal

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272 *Expropriation Act*, RSNB 1952, c. 77, as amended, ss. 4B, 5, 6, 7, 11, 12, and 13.

273 *Towns Act*, SNB 1961-62, c. 70, section 132, states: "A council may proceed to acquire by expropriation proceedings lands, buildings and other structures, including any interest therein, whenever a public necessity exists therefor and whenever the council cannot agree with the owner or owners of such property on terms of purchase or settlement . . ."

274 Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Ottawa, to Regional Supervisor, Maritimes, Indian Affairs Branch, August 19, 1963, DIAND file E-5661-3-06013-D2, vol. 1 (ICC Documents, p. 220).

Advisor, therefore, recommended that an interim permit be granted to the town under section 28 (2) of the *Indian Act*, pending a formal surrender by the Band. Accordingly, the First Nation submits that Canada failed to follow its own legal advice by proceeding to expropriate in the face of the Band's consent.

None of this advice, however, applied to the power of the Province of New Brunswick to expropriate pursuant to the *Expropriation Act*, which is the applicable legislation in this case. Even if the First Nation is correct in its assertion that the powers of expropriation under the *Towns Act* were not exerciseable in cases where the owner had consented to the taking, we are not aware of any similar restrictions in the provisions of the *Expropriation Act* or section 35 of the *Indian Act*. Section 35 refers only to whether an entity is *empowered* to take or use land without the owner's consent, not whether there is actual consent in a particular case. Furthermore, for the reasons stated above, it is our view that section 35(3) of the *Indian Act* conferred on the Governor in Council a broad discretion to consent to the transfer of reserve land to the province, *in lieu of the land being taken without the band's consent*, subject to the terms contained in the 1970 agreement between the NBWA, the Band Council, and IAB. Because the Band consented to the expropriation of reserve land, subject to the payment of compensation agreed to between the Band and the NBWA, the transfer of land was authorized by the Governor in Council under section 35(3) rather than section 35(1), and there was no need to trigger the procedural requirements of the *Expropriation Act*.

Furthermore, even though the Band Council consented to the use of expropriation powers under section 35 of the *Indian Act* and agreed to a negotiated settlement on compensation for the land taken, the transfer was still, essentially, a compulsory taking of land. The concept of expropriation is described as follows in the *The Law of Expropriation and Compensation in Canada*:

> In general terms "expropriation" is the compulsory (i.e. against the wishes of the owner), acquisition of property, usually real property, by the Crown or by one of its authorized agencies. The power of expropriation is generally recognized as a necessary adjunct of modern government, but its exercise nearly always results in a traumatic experience for the affected property owner.[275]

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[275] Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1992), 1.

The fact that land owners often enter into negotiated settlements with the expropriating authority does not necessarily make the expropriation any less of a compulsory taking of land without the owner's consent, as the Law Reform Commission of British Columbia stated in its 1971 *Report on Expropriation*:

> Where expropriating powers exist, negotiated settlements generally cannot be regarded as voluntary on the part of the vendors. True, in some cases, they may be glad to sell and, in others, although they may have been reluctant to sell initially, the vendors may be happy with the price they bargained for. *But the fact of the matter is that, unless the owners agree to sell, the expropriation powers will be exercised. No doubt most expropriating authorities will at some stage warn the owner that, if agreement cannot be reached, expropriation proceedings will be commenced.*[276]

In this case, the town officials were informed in 1963 that "there was no certainty that the Governor-in-Council would grant permission [under section 35 of the *Indian Act*] in the face of complete opposition from the Band Council."[277] Although it was the policy of the IAB to seek the Band's consent to an expropriation before seeking the Governor in Council's consent to take reserve land, the Governor in Council nevertheless had a broad discretion to consent to the exercise of the Province's expropriation powers in this case if the public interest was important enough to justify a compulsory taking. There can be no doubt that the Band and the IAB must have considered the expropriation of reserve land to be a distinct possibility, given the importance of promoting industry and creating jobs in the Dalhousie area in the 1960s. The reality of the situation, therefore, is that negotiations on compensation proceeded between the Band, the town, and the NBWA in the shadow of a possible expropriation of the land without the Band's consent.

Under section 35(3) of the *Indian Act*, the Governor in Council had the discretion to consent to the province "taking or using" the land in question, in lieu of the province exercising its powers under an act "of the provincial legislature" to take or to use lands without the consent of the owner. Clearly, there was negotiation, agreement, and consent of the Band as to the quantum of

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[276] Law Reform Commission of British Columbia, *Report on Expropriation* (Victoria: Queens Printer, 1971), 37. Emphasis added.

[277] F.B. McKinnon, Supervisor, Maritime Regional Office, to Indian Affairs Branch, January 21, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 172-73). Emphasis added.

compensation to be paid by the NBWA. This agreement, together with the consent of the Governor in Council, obviated the need to engage in many of the formal expropriation procedures provided under the *Expropriation Act*. To argue that section 35(3) required the province to engage in the formal, mechanical, and procedural requirements of the provincial *Expropriation Act* is to ignore the power of the Governor in Council under section 35(3) to authorize a transfer of reserve land to the province in lieu of a compulsory taking. This argument would also result in the practical effect of there being no distinction between section 35(1) and (3). That is, there would be no difference between the two provisions and subsection (2), which stipulates that the legislation of the expropriating authority shall apply to compulsory takings under section 35(1), would be rendered meaningless and redundant because the logical extension of this argument would require both section 35(1) and (3) expropriations to adhere to provincial expropriation procedures. In our view, this could not have been the intent of Parliament.

In conclusion, if the Governor in Council provided its consent for the taking under section 35(1), the province would have been required to exercise its expropriation powers in accordance with the procedures set out in the provincial *Expropriation Act*. However, where authority was provided under section 35(3) and there was consent to the terms of the expropriation, many of the procedures of the provincial legislation would not apply, because the Governor in Council had the authority to prescribe the terms for the transfer of reserve land in lieu of an actual taking of land by the province under provincial legislation.

Also implicit in the First Nation's submissions is the argument that the Crown ought to have sought a surrender, rather than authorizing an expropriation of reserve land for the headpond. In *Opetchesaht*, Major J confirmed that, although the general rule requires that sales, leases, and other dispositions of Indian interests in reserve land should be effected by way of a surrender, section 37 must be read in conjunction with and subject to other provisions of the Act, including section 35 which provides for the compulsory taking of reserve land without the band's consent. In the case of a section 28(2) permit, the Court stated that the question to be asked is whether the permit was properly granted under that section. If section 28(2) did not apply, then the default provision requiring a surrender under section 37 would be triggered. Similarly, it is our view that the question is whether there was a proper disposition of reserve land under section 37 such that it did not trigger

the general rule requiring a surrender. A similar argument was raised by the claimant and rejected by the Federal Court of Appeal in the *Kruger* case, which was considered in the Commission's report on the Sumas Inquiry into the expropriation of a railway right of way. As the Commission stated in that report:

> We cannot agree, however, that the Crown breached its fiduciary duty in failing to obtain a surrender before the land was alienated to third parties. As discussed above, a surrender and a taking are different processes. Furthermore, the surrender provisions in the *Indian Act* [of 1906], section 48, provides that "except as in this part otherwise provided" no reserve shall be alienated, etc., without a surrender. What is included "in this part" is the expropriation provision, section 46. In *Kruger*, the Court undertook this same analysis and all three judges concluded that compliance with the surrender provisions of the *Indian Act* is not required when reserve lands are expropriated under the equivalent to section 46.[278]

For the reasons stated above, we conclude that there was a valid exercise of the expropriation power under section 35. Therefore, it was not necessary for Canada to seek a surrender of the land required for the headpond from the Eel River Band. Having said that, we do intend to address whether the Crown owed any fiduciary obligations with respect to the exercise of its discretion under section 35 under Issue 3 below. We will also address the implications of the First Nation's argument that the Band was not represented by independent legal counsel throughout these negotiations. Before turning to this matter, however, we wish to deal with the question of the authority to use the land from 1963 to 1970.

Trespass and Delay from 1963 to 1970

In 1963, the Town of Dalhousie built the dam on the Eel River reserve and flooded additional lands without any specific authority to do so until 1970, when the headpond was expropriated and a letter-permit was granted to the NBWA for the pumping station, the pipeline right of way, and the access road to maintain the Eel River water supply system. No compensation was paid for the use and occupation of reserve land until 1970, when the agreement was entered into with the Band. The First

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[278] Indian Claims Commission, *Sumas Inquiry: Report on Indian Reserve No. 6 Railway Right of Way Claim* (Ottawa, February 1995), 47-48, repr. (1996) 4 ICCP 40-41.

Nation submits that Canada permitted a trespass on the land by allowing construction of the dam to proceed without proper authority, and therefore violated section 18(1) of the Act.

Canada submits that there was no trespass within the meaning of the *Indian Act* because the Band and the Band Council consented to the town entering on the reserve in 1963 to build the dam. Canada contends that the April 9, 1963, Band Council Resolution granted permission to the town to enter on the reserve and build the dam, and that it recommended that the Governor in Council expropriate the land required under section 35 of the *Indian Act*. Since the Band Council Resolution provided for the payment of compensation before the end of 1963 for lands to be flooded, and later in September 1967 after losses to the clam harvest had been determined, the town proceeded on the basis of this authority while negotiations continued. Canada contends that while the parties could not have anticipated that it would take seven years to finalize an agreement on compensation and the use of the land, members of the Band "would have been estopped from pressing a trespass suit because they had agreed to allow the Town to enter on the reserve and carry out the work necessary for the completion of the dam and the dyke, as evidenced by the vote at the general meeting and the BCR of April 9, 1963."[279] Even if the Band was not estopped from raising a claim of trespass, Canada submits that the Band suffered no damages, since the 1970 agreement paid compensation to the Band for all damages and losses suffered as a result of the dam's construction and any alleged trespass.

After considering the arguments of counsel, we conclude that there was a trespass on the reserve from 1963 until 1970. Whether the Band suffered any damages for which it was not compensated is a separate question that will be considered later in this report.

In our view, the sections of the *Indian Act* governing the use and occupation of reserve land or its disposition to non-Indians must be interpreted in such a way as to balance a band's autonomy against the Crown's supervisory and protective role. The Supreme Court of Canada in the *Apsassin*[280] and *Opetchesaht* decisions held that the purpose of the requirement of the Crown's approval in the case of a surrender under section 37 or a section 28(2) permit is to ensure that, in addition to the

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279 Submissions on Behalf of the Government of Canada, February 14, 1997, p. 43.

280 The *Apsassin* decision is cited as *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25.

approval of the band, the proposed transaction or use must also be approved by the Minister or the Governor in Council, as the case may be, to prevent the band from being exploited. The protective responsibility of the Minister of Indian Affairs with respect to the use and occupation of reserve land is made abundantly clear in the wording of section 28 of the *Indian Act,* which states:

> 28. (1) *Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind,* whether written or oral, *by which a band* or a member of a band *purports to permit a person other than a member of that band to occupy or use a reserve* or to reside or otherwise exercise any rights on a reserve *is void.*
>
> (2) *The Minister may by permit in writing authorize* any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve. [Emphasis added.]

If use and occupation of reserve lands through means other than those specified in the *Indian Act*, including uses allowed solely by the Band, were sanctioned, the Crown would be released from its protective responsibility, contrary to the intent of the *Indian Act* and the policy that underlies it. Accordingly, unless the use and occupation has been authorized by the Crown in one of the forms contemplated by the Act – surrender, expropriation, or permit – the use and occupation of reserve land is contrary to the Act.

Based on the facts before us, it is clear that the 1963 Band Council Resolution could not provide sufficient authorization to the town to enter on and use reserve land for flooding purposes. Section 28(1) states in no uncertain terms that the Band's agreement is void unless the Minister authorizes the use of the reserve land by issuing a permit in writing. Therefore, the consent or agreement of the Band, as expressed in the 1963 Band Council Resolution, is void because no permit was issued by the Minister under section 28(2) as required. This state of affairs remained the same until September 1968, when then Minister of Indian Affairs Jean Chrétien issued a one-year permit allowing the NBWA access to the land to "carry out certain works in connection with a dam, water lines and allied works."[281] At this point, the NBWA had the proper authority to use and occupy the

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[281] Eel River Band Council - Miramichi Agency, Eel River, New Brunswick, August 20, 1968, Band Council Resolution (ICC Documents, pp. 356-62).

land for these purposes. The reserve lands flooded by the headpond, however, continued to be in a state of trespass until they were expropriated in 1970.

We find, therefore, that there was a trespass on reserve land from 1963 to 1970, the extent of which was narrowed by the 1968 permit. As we set out below, however, we are unable to conclude that any outstanding legal obligation necessarily flows from this trespass because the 1970 agreement was intended to compensate the Eel River Band for its losses and damages arising from the construction of the dam. Whether the Crown fulfilled its fiduciary duties to the Eel River Band during the negotiations leading up to the 1970 agreement, and whether the Band received fair and equitable compensation for its losses, are considered in the next section of this report.

ISSUE 3 FIDUCIARY OBLIGATIONS OF THE CROWN

Did the Eel River Bar First Nation receive equitable and fair compensation for the losses suffered as a result of the establishment of the Eel River dam?

Did the federal Crown have a fiduciary duty to negotiate the compensation agreement of May 1970 on behalf of the Eel River Bar First Nation directly with third parties? If so, did the federal Crown breach that fiduciary duty?

Did the federal Crown have a fiduciary duty to provide independent legal advice during the negotiations that led to the execution of the compensation agreement of May 1970? If so, did the federal Crown breach that fiduciary duty?

In its written submission, the First Nation argued that Canada violated its fiduciary obligations by failing to provide independent legal advice when the various agreements were negotiated with the Band Council, by "failing to negotiate on behalf of the First Nation, or by failing to aid the First Nation in those negotiations."[282] These submissions were amplified in the First Nation's oral argument by the assertion that Canada failed to act prudently when it approved the 1970 agreement by order in council. In support of this assertion, the First Nation relied in particular on the following assertions:

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[282] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 37.

- Canada did not conduct itself *prudently*, because some decisions were made with respect to the dam project in the absence of IAB officials, and Canada did not put a stop to the project on that basis;[283]

- in 1966, the Band asked for a lawyer, and none was ever provided to it;[284]

- when Wallace LaBillois appeared to have settled the matter on his own with the NBWA representatives, Canada did not stop to consider whether this was an appropriate way to settle the matter;[285] and

- the Governor in Council should not have approved the deal: it was "foolish, improvident and exploitative," since the amounts provided to the Band in the 1970 agreement were insufficient.

Canada, in response, relied on the *Kruger* decision as authority for the proposition that Indian Affairs did have a fiduciary obligation which arose when the NBWA first proposed to take Eel River reserve lands to construct the dam in 1962. Based on the reasoning of Mr Justice Urie in *Kruger*, Canada submitted that the "precise obligation in this case was to ensure that the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians . . ." and that the Crown had a duty to exercise its discretion "honestly, prudently and for the benefit of the Band" in negotiating the Band's position in the dam project. Since Indian Affairs took steps to ensure that the Band had the necessary technical and legal advice to make a reasoned decision and that the compensation ultimately paid to the Band was fair, the Crown discharged its fiduciary obligations.[286]

In our view, any determination of the nature and scope of the Crown's fiduciary duties in relation to the protection of reserve lands requires a careful examination of the statutory provisions that apply to the proposed transaction, the nature of the relationship between the Band and the Crown, and the extent to which the Band exercises its own autonomy over decisions affecting its interests. In analysing Canada's fiduciary obligation in the context of the present case, we make

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283 ICC Transcript, February 20, 1997, p. 61 (Murray Klippenstein).

284 ICC Transcript, February 20, 1997, pp. 67-68 (Murray Klippenstein).

285 ICC Transcript, February 20, 1997, p. 69 (Murray Klippenstein).

286 Submissions on Behalf of the Government of Canada, February 14, 1997, p. 56.

reference to our previous reports on the Kahkewistehaw and Moosomin surrenders. In those reports, we analysed the leading Supreme Court of Canada decisions in *Guerin* and *Apsassin* because they offer guidance in identifying and describing the Crown's fiduciary obligations in the context of transactions involving Indian reserve land. We will not repeat at length our analysis of those cases. The following excerpt from the Moosomin report, however, provides a short summary of the Court's findings in *Apsassin* on the the nature and scope of Canada's fiduciary obligations in relation to a surrender of reserve land:

> The Court's comments on the question of pre-surrender fiduciary obligation may be divided into those touching on the *context* of the surrender and those concerning the substantive *result* of the surrender. The former concern whether the context and process involved in obtaining the surrender allowed the Band to consent properly to the surrender under s. 49(1) and whether its understanding of the dealings was adequate. In the following analysis, we will first address whether the Crown's dealings with the Band were "tainted" and, if so, whether the Band's understanding and consent were affected. We will then consider whether the Band effectively ceded or abnegated its autonomy and decision-making power to or in favour of the Crown.
>
> The substantive aspects of the Supreme Court's comments relate to whether, given the facts and results of the surrender itself, the Governor in Council ought to have withheld its consent to the surrender under section 49(4) because the surrender transaction was foolish, improvident or otherwise exploitative.[287]

With respect to the first branch of this analysis, the Moosomin report states that:

> At the heart of Justice Gonthier's reasons is the notion that "the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured."[288] In so holding, he emphasized the fact that the Band had considerable autonomy in deciding whether or not to surrender its land, and that, in making its decision, it had been provided with all the information it needed concerning the nature and consequences of the surrender. Accordingly, in Justice Gonthier's view, a band's decision to surrender its land should be allowed to stand unless the band's understanding of the terms was inadequate or because there were tainted dealings

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[287] Indian Claims Commission, *Moosomin First Nation Report on 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), p. 110. Emphasis in original.

[288] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 200.

> involving the Crown which make it unsafe to rely upon the band's decision as an expression of its true understanding and intention.[289]

Also in relation to the first branch of this analysis, the Commission's report in Kahkewistehaw took note of McLachlin J's finding in *Apsassin* that "a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second 'peculiarly vulnerable' person . . . [t]he person who has ceded power *trusts* the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation."[290] For the purposes of this inquiry, we adopt the analysis set out in the Kahkewistahaw report:

> On the facts in *Apsassin*, McLachlin J found that "the evidence supports the view that *the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender* of the Fort St. John reserve and the acquisition of new reserves which would better suit its life of trapping and hunting. *It does not support the contention that the band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown*." Because the Band had not abnegated or entrusted its decision-making power over the surrender to the Crown, McLachlin J held that "the evidence [did] not support the existence of a fiduciary duty on the Crown prior to the surrender of the reserve by the Band."
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> Justice McLachlin's analysis on what constitutes a cession or abnegation of decision-making power is very brief, no doubt because the facts before her demonstrated that the Beaver Indian Band had made a fully informed decision to surrender its reserve lands and that, at the time, the decision appeared eminently reasonable. In our view, it is not clear from her reasons whether she merely reached an evidentiary conclusion when she found that the Band had not ceded or abnegated its decision-making power to or in favour of the Crown, or whether she intended to state that, as a principle of law, a fiduciary obligation arises only when a band actually takes no part in the decision-making process at all.[291]

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[289] Indian Claims Commission, *Moosomin First Nation Report on 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), p. 111.

[290] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 209.

[291] Indian Claims Commission, *Kahkewistahaw First Nation Report on 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), p. 112. Footnotes deleted. Emphasis in original.

After considering further jurisprudence from the Supreme Court of Canada on the question of what is required to cede or abnegate decision-making power to or in favour of a fiduciary, we continued:

> Both *Norberg*[292] and *Hodgkinson*[293] suggest that decision-making authority may be ceded or abnegated even where, in a strictly technical sense, the beneficiary makes the decision. Neither case deals with the fiduciary relationship between the federal government and an Indian band, however, and therefore *Apsassin* must be considered the leading authority on the question of the Crown's pre-surrender fiduciary obligations. In reviewing that case, we cannot imagine that McLachlin J intended to say that the mere fact that a vote has been conducted in accordance with the surrender provisions of the *Indian Act* precludes a finding that a band has ceded or abnegated its decision-making power. If that is the test, it is difficult to conceive of any circumstances in which a cession or abnegation might be found to exist.
>
> We conclude that, when considering the Crown's fiduciary obligations to a band, it is necessary to go behind the surrender decision to determine whether decision-making power has been ceded to or abnegated in favour of the Crown. In our view, a surrender decision which, on its face, has been made by a band may nevertheless be said to have been ceded or abnegated. The mere fact that the band has technically "ratified" what was, in effect, the Crown's decision by voting in favour of it at a properly constituted surrender meeting should not change the conclusion that the decision was, in reality, made by the Crown. Unless the upshot of Justice McLachlin's analysis is that the power to make a decision is ceded or abnegated *only* when a band has completely relinquished that power in *form* as well as in *substance*, we do not consider the fact of a band's majority vote in favour of a surrender as being determinative of whether a cession or abnegation has occurred. Moreover, if the test is anything *less* than complete relinquishment in form and substance, it is our view that the test has been met on the facts of this case – the Band's decision-making power with regard to the surrender was, in effect, ceded to or abnegated in favour of the Crown.[294]

Although we are not dealing with the surrender of reserve land in this case, the Supreme Court of Canada decision in *Opetchesaht* confirms that these principles also apply by analogy to the exercise of the Crown's discretion in the granting of a permit under section 28(2) of the *Indian Act*. This is clear from the following statement of Mr Justice Major in *Opetchesaht*:

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[292] *Norberg* v. *Wynrib*, [1992] 4 WWR 577 at 622-23 (SCC), McLachlin J.

[293] *Hodgkinson* v. *Simms*, [1994] 9 WWR 609 at 645 (SCC), La Forest J.

[294] Indian Claims Commission, *Kahkewistahaw First Nation Report on 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), pp. 114-15. Emphasis in original.

> It is important that the band's interest be protected but on the other hand the autonomy of the band in decision making affecting its land and resources must be promoted and respected . . . With the twin policies of autonomy and protection in mind, s. 37 and s. 28(2) reflect that, depending on the nature of the rights granted, different levels of autonomy and protection are accorded. Section 37 demonstrates a high degree of protection, in that the approval of the Governor in Council and the vote of all of the members of the band are required. This indicates that s. 37 applies where significant rights, usually permanent and/or total rights in reserve lands are being transferred. On the other hand, under s. 28(2), lesser dispositions are contemplated and the interest transferred must be temporary.[295]

In her minority decision in *Opetchesaht*, Justice McLachlin expressed the view, in *obiter,* that the Crown also has a fiduciary duty in the context of an expropriation of reserve land:

> The only other way [aside from a surrender under section 37] Indian interests in reserve land can be permanently disposed of under the *Indian Act* is by expropriation. *Where the greater public good so requires, interests in reserve land may be expropriated: s. 35. The procedure is strictly regulated and subject to consent of the Governor in Council, exercised by Cabinet, which owes the Indians a fiduciary duty to act in their best interests.* The process is politically sensitive and open to public scrutiny.[296]

Furthermore, as counsel for Canada and the First Nation observed in their submissions, Mr Justice Urie confirmed in the *Kruger* decision that the Crown owes a fiduciary duty to a band where its reserve land is expropriated under the *Indian Act*:

> . . . it is clear that what was said by Dickson J., in the *Guerin* case was related to a fiduciary relationship in the context of that case, i.e., where there was a surrender of Indian lands to the Crown on certain terms, which terms were changed by the Crown without consultation with or approval by the Indians. . . . Nevertheless, for the purposes of this appeal I am prepared to accept that the principle propounded by Dickson J., applies. When the Crown expropriated reserve lands . . . there would appear to have been created the same kind of fiduciary obligation, *vis-à-vis* the Indians, as would have been created if their lands had been surrendered. *The precise*

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[295] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, pp. 21-22 (per Major J).

[296] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 13 (per McLachlin J).

> *obligation in this case was to ensure that the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians*, just as in the *Guerin* case, the obligation was to ensure that the terms of the lease were those agreed to by the Indians as part of the general obligation to them to ensure that the surrendered lands be dealt with for their use and benefit. *How they ensured that lies within the Crown's discretion as a fiduciary and so long as the discretion is exercised honestly, prudently and for the benefit of the Indians there can be no breach of duty.*[297]

Applying this reasoning to the case before us, it is our view that the Crown's fiduciary obligations in relation to the surrender of reserve land also apply by analogy to the present situation because the same twin principles of autonomy and protection are inherent in sections 28(2) and 35 of the *Indian Act*. Thus, in the case of the section 28(2) permit, the 1970 agreement could not have any legal effect without the consent of the Minister and the issuance of the permit. In a similar vien, consent of the Governor in Council was also required for the expropriation under section 35 before lands could be transferred in accordance with the terms agreed to between the NBWA and the Band Council. Under the circumstances, the Crown had a fiduciary duty to protect the Band from being exploited in the process leading up to the 1970 agreement and in the exercise of its discretion to consent to a section 28(2) letter-permit and expropriation of reserve land under section 35.

Based on the foregoing, our analysis of Canada's fiduciary obligations in this case must answer the following three questions:

1 Was the Eel River Band's understanding of the terms of the 1970 agreement inadequate or did the conduct of the Crown taint the dealings in a manner which would make it unsafe to rely on the Band's understanding and intention?

2 Did the Eel River Band effectively cede or abnegate its power to make decisions with respect to the use or disposition of its reserve land?

3 Was the 1970 agreement "foolish, improvident or exploitative" such that the Minister of Indian Affairs and the Governor in Council should not have consented to the letter-permit and expropriation?

We will address each of these questions in turn.

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[297] *Kruger v. The Queen*, [1985] 3 CNLR 15 (Fed. CA per Urie J) at 41. Emphasis added.

Where a Band's Understanding Is Inadequate or the Dealings Are Tainted

It was submitted on behalf of the First Nation that the Crown breached its fiduciary duty because it did not negotiate on behalf of the Band and failed to assist it by interposing itself between the Band and third parties as is required by a fiduciary. Furthermore, the Crown failed to provide independent legal advice to the Band which impugns the 1970 agreement because "some knowledge of one's legal rights is a prerequisite to a valid and fair acquiescence in an important and legally binding transaction such as the disposal of reserve land."[298]

We accept that if it can be found that the Band Council did not understand the nature or import of the negotiations, or was not kept informed of what was going on, a breach of Canada's fiduciary obligation might be the result. We are unable, however, to find that the Band's representatives in these negotiations did not understand the nature and foreseeable consequences of entering into the 1970 agreement. The 1970 agreement was the culmination of over seven years of protracted negotiations between the Band and the Indian Affairs Branch, on one hand, and the Town of Dalhousie and the NBWA, on the other. The documentary record provides ample evidence that the Band's representatives were involved at every stage of the negotiations and that they had a full and adequate understanding of the terms of the 1970 agreement.

At the outset, although the Band expressed opposition to the dam project on the grounds that it would have an adverse effect on the Band's fisheries and therefore its livelihood, the Band's representatives also viewed the project as having a potential benefit for the Band. As McKinnon reported in 1963, the Band was interested in the possibility of employment in industries related to the dam because they would be year-round rather than seasonal, and because they could be more secure than the income provided by the fluctuating clam stocks. The Band also sought to influence the site at which the dam was developed, since it believed that the upriver site would result in less damage to the clam stocks than the site at the mouth of the river.[299] None of this is to suggest that the Band was an ardent advocate of the dam, but rather that it saw some potential benefit to the

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[298] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 38.

[299] J.H. Sheane, Superintendent, Miramichi Indian Agency, to Maritime Regional Office, November 26, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 157).

project and attempted to influence the means by which it was established and the benefits that would flow to its members from its construction.

From the time that the dam was first proposed, representatives of the Band actively participated in negotiations to allow construction to proceed. The record also shows that, from the very start, the Band was crystal clear in its understanding that construction of the dam would have a potentially devastating effect on the clam fishery. It was the Band that brought this aspect of the proposal to the attention of the IAB to ensure that it was taken into consideration in the compensation negotiations. The Band asserted this view despite the opinions of various government authorities, including Dr Medcof in 1963, that the dam's effect on the fisheries was either uncertain or would be negligible.[300] The Band also participated in developing the strategy by which it would resist Site no. 2 as the location for the dam, through the use of expert opinion and by refusing to allow the authorities onto reserve land to conduct preliminary surveys.[301]

The Band continued to be an active participant in the negotiations for the settlement of the dam project. It addressed its concerns directly to the town, and later the NBWA, and to the IAB to deal with those concerns on its behalf. The Band's participation in the negotiations is indicated by, among other things, the following:

- The Band took the initial position of opposing the dam's establishment at Site no. 2, which either coincidentally or indirectly resulted in the town opting to develop the dam at Site no. 1.
- The Band made its views clear at several meetings over the course of the negotiations, some of which were convened by the Band and held without the presence of IAB officials.[302] On

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[300] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Acting Chief, Reserves & Trusts, Indian Affairs Branch, February 27, 1962, DIAND file 271/31-5-3-1, vol. 1 (ICC Documents, p. 146).

[301] J.M. Sheane, Superintendent, Miramichi Indian Agency, to V.J. Caissie, Assistant Regional Supervisor, Maritime Regional Office, September 24, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 146).

[302] Meeting of January 21, 1963 (Town, IAB, Band); of March 28, 1963 (Town, Band); of April 9, 1963, at which the Band Council Resolution was passed (Town, IAB, Band membership); meeting to deal with problems with the work currently being done (Sheane's letter of June 4, 1963) (Town, IAB, Band); meeting to discuss the lack of jobs being produced pursuant to the 1963 Band Council Resolution, requested by the Band and held on April 23, 1964 (Town, IAB, Band); meeting of April 5, 1966 (Town, IAB, Band Councillor); meeting of May 18, 1966 (Town, IAB, Band); see also ICC Exhibit 3, being minutes from various meetings with the Town and/or the IAB; ICC Documents, p. 363, relates a conversation between Wallace LaBillois and the NBWA; ICC Documents, p. 384, is McNutt's letter indicating that the memorandum "was based on negotiations directly with the Band"; J.H. MacAdam, Administrator of Lands, to

none of these occasions, as we describe below, could the Band's representatives be said to be expressing anything other than the Band's position and advocating in the Band's interests. Nor is there any indication from these discussions that the Band was not capable of representing its own interests.

- The Band was instrumental in assessing and advancing its views on the appropriate level of compensation, in making several proposals and estimates, and in proposing or agreeing to the use of a third-party expert to make the final assessment.[303]
- The Band also participated in the dispute resolution process with the town and the NBWA once good faith began to break down on the question of jobs, making further suggestions about how to deal with this problem, and also taking a hard line with the town.[304]

In our view, the Band's representatives were well aware of the nature of the dealings surrounding the dam and the implications of the transaction. At its worst, the construction of the dam meant the total destruction of the Band's livelihood drawn from the fisheries in Eel River Cove. At the same time, the potential was there for enhanced employment opportunities in the industries in and around the Town of Dalhousie, and the Band Council sought to capitalize on this possibility in the negotiations. The evidence is abundant that, for whatever reason, be it lack of effort, systemic discrimination, or conditions totally beyond the control of the parties to the contract, employment for Band members was never obtained in any meaningful way despite the commitments made by the Town of Dalhousie in 1963. Nevertheless, protracted negotiations between the Band, Canada, and the NBWA culminated in the 1970 agreement, which provided for payment of a substantial amount of compensation to the Band. In lieu of employment, it is significant that the Band obtained a commitment from the NBWA that it would pay an annual fee for water pumped to a maximum of $27,375 per year, and that this agreement would be subject to renegotiation after 20 years. Under the

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P. MacNutt, Solicitor, Department of Justice, Fredericton, New Brunswick, January 9, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 393), indicates that the final agreement had been submitted for approval by the Band.

[303] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, to Indian Affairs Branch, April 1, 1963 (ICC Documents, pp. 186-91). Report on his meeting with the Band to determine fair compensation

[304] F.B. McKinnon, Regional Director of Indian Affairs, Maritime Regional Office, to Indian Affairs Branch, April 27, 1964, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 258-59). McKinnon wrote letters to various parties at the suggestion of the Band; also meetings convened on April 5, 1966, and May 18, 1966, to discuss the problems; also ICC Documents, p. 292, Minutes of May 1, 1968, meeting indicate that "the Indians and Indian Affairs officials" had both been speaking with the mill's management to address employment issues (ICC Exhibit 3, p. 2).

circumstances, therefore, we cannot find that the Band did not understand the nature and consequences of this transaction in such a way that we should deny its effectiveness.

In so concluding, we must also have regard for the evidence adduced at the community session that, among other things, it was never clear to the Band at the time what the effect on the fishery would be;[305] no independent legal advice was provided to them;[306] and various members of the Band were not aware of the nature of the negotiations surrounding the dam. As we have indicated above, none of the parties, including Dr Medcof, were entirely sure of what the effect on the fishery would be. The Band agreed, however, to allow construction of the dam to proceed at Site no. 2 on the understanding that Dr Medcof and the Fisheries Research Board would determine the extent of the Band's losses with respect to the clam and smelt harvests for the purposes of determining compensation. Since the Band was primarily interested in creating employment opportunities, it was agreed that the town would be entitled to a 5 per cent reduction from the compensation payable to the Band for every male Band member hired by the town or local industry. We intend to come back to the second point dealing with the issue of independent legal advice later in the report. Finally, we are not convinced that knowledge and understanding of the issues surrounding the dam was limited to the Band Council since there was a general band meeting in 1963 which resulted in 24 out of 25 eligible voters supporting the terms of the 1963 Band Council Resolution. Furthermore, given the protracted nature of these negotiations, it is fair to assume that this subject would have been informally discussed by members of the Band on numerous occasions. Even if we were to accept that many Band members were not aware of the details of the 1970 agreement, it is not our place to question the authority of those nominated by the Band to represent it in these negotiations, nor have we specifically been asked to question such authority. We therefore decline to do so.

Having concluded that the Band Council had a full and adequate understanding of the terms of the 1970 agreement, it still remains to be considered whether the conduct of the Crown's agents tainted the dealings in such a way that it would be unsafe to rely on the agreement as an expression of the understanding and intention. In considering this question, we note that in our reports on

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[305] ICC Transcript, April 23, 1997, p. 67 (Peter Simonson); ICC Transcript, April 23, 1997, p. 77 (Alfred Narvie).

[306] ICC Transcript, April 23, 1997, p. 67 (Alfred Narvie).

Kahkewistehaw and Moosomin the dealings between Canada and the bands were rife with improper motivations on Canada's part. These dealings were "tainted," in particular, by the fact that Canada had a significant and overpowering political interest in securing the surrenders of the reserve land that had been set aside for the claimant Bands in those cases. Given this significant conflict of interest between the interest of the Band and the interests of third parties, and given that Canada had utterly failed to achieve any sort of balance among those competing interests, we were compelled to find that Canada's fiduciary obligations had not been properly discharged.

The present case is quite different. Unlike the circumstances in Kahkewistehaw and Moosomin, the dealings in this case were initiated not by the Band or by Canada, but by the Province of New Brunswick and by the Town of Dalhousie. Nor is there any evidence that the federal Crown was operating under any conflict of interest or pressure to champion the cause of the province or the town. Instead, both the Band and Canada were in a position to adequately respond to the actions taken by the province and by the town, who were acting in their own self-interest without regard to the effect that this project might have on the Band.

From the time that construction of the dam was first proposed in 1962 until the negotiations culminated in the signing of the 1970 agreement, Indian Affairs officials acted consistently and persistently to protect the Band's interests. Throughout these protracted negotiations, Indian Affairs officials acted as articulate and forceful advocates on behalf of the Band. We find further that, to the extent permitted by its duty to the Canadian public as a whole, it acted *solely* in the interests of the Band.

At the outset, when the province and the town were at the stage of casting about for ways to fulfil Premier Robichaud's promise to provide 300,000 more gallons of fresh water per day to the Town of Dalhousie, the IAB spoke out on behalf of the Band to ensure that those parties responsible for planning this project would take the Band's interests into account.[307] Although at the time the Fisheries Research Board suggested that the clam flats at risk were not of much value, the Band said

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[307] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Acting Chief, Reserves and Trusts, Indian Affairs Branch, February 27, 1962, DIAND file 271/31-5-13-1, vol. 1 (ICC Documents, p. 126).

that it obtained 50 per cent of its clam production from these flats. The IAB accepted the Band's position and acted, from the start, as a steadfast advocate of the Band's interests.

It is also important to reiterate that the Band Council viewed the dam project as potentially beneficial because the project might result in enhanced employment opportunities for members of the Band. Accordingly, at the outset, the Band did not completely oppose the dam project, although it did oppose construction at Site no. 2, but rather sought to find a way to minimize the dam's potential impact on the fisheries, while at the same time maximizing its potential benefit to the Band.

Canada and its agents, and in particular McKinnon and Sheane and their successors, advocated on behalf of the Band by, among other means:

- obtaining, in consultation with the Band, expert advice to help persuade the province and the town of the negative impact that the dam would have on the Band if it was situated at the mouth of the cove;[308]
- continuing to advocate for the Band's preference for the upriver site in the face of expert evidence concluding that there would be no significant difference between the two sites;[309]
- cultivating in the NBWA and the town a responsibility for compensating the Band's potential losses resulting from the dam project, although it was unclear whether the Band had any legal claim to such compensation since it was not clear what the nature and scope of the Band's treaty and riparian rights were;[310]
- forwarding in a reasonable and responsible fashion the Band's assessment of its potential losses and retaining an expert third party to determine its actual losses to the clam harvest as a result of the dam;
- forwarding in a reasonable and responsible fashion the Band's goals with respect to compensation – namely, that the compensation should take the form of permanent employment for Band members;

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[308] J.M. Sheane, Superintendent, Miramichi Indian Agency, to V.J. Caissie, Assistant Regional Supervisor, Maritime Regional Office, September 24, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 146).

[309] J.H. Sheane, Superintendent, Miramichi Indian Agency, to Maritime Regional Office, November 26, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 157).

[310] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to Regional Supervisor, Maritimes, December 18, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 162-63).

- attempting to negotiate with and/or pressure the town, local employers and unions, and the NBWA to make efforts to find employment for the Band's members to aid the town in fulfilling its undertaking to do so; and
- negotiating on the Band's behalf to attempt to achieve a fair settlement, and seeking amendments to various provisions of the agreement to protect the Band's interests.

There is no question, in our view, that the negotiations surrounding the dam were very difficult. The protracted nature of these negotiations resulted in great hardship for the Band as it waited for the town and for the NBWA, respectively, to fulfil the obligations they had undertaken in good faith at the commencement of the negotiations, particularly with respect to employment for the Band's members. These hardships, however, were not the result of any dereliction of duty on the part of the Indian Affairs Branch or its agents. We find that, throughout the course of negotiations, the IAB and its agents conducted themselves properly, acted in the sole interests of the Band, and did not allow themselves to be compromised in any way.

In arriving at this conclusion, we are fully aware that it may ring hollow simply to find that it was "not Canada's fault" that other parties failed to fulfil their responsibilities and undertakings. The hallmark of a fiduciary analysis, however, is, as the Band pointed out, not to hold the fiduciary to a standard of perfection measured with 20/20 hindsight. Therefore, even though it could be argued that the Crown ought not to have allowed construction of the dam to proceed in the absence of a binding agreement on compensation in the form of employment for members of the Band, we must consider what was reasonable at the time. In our view, it was not unreasonable for Canada to allow construction to proceed on the basis of the 1963 Band Council Resolution because it appeared that the parties involved had an intention, in good faith, to meet the obligations they had undertaken. It was also agreed that the extent of the dam's effect on the Band's fishery could only be determined after a number of surveys were completed between 1963 and 1967. Although the promises of the town and the NBWA with respect to compensation and employment remained unfulfilled until at least 1970, there is no evidence that the conduct of Indian Affairs officials constituted a dereliction of duty for which Canada must now be held responsible.

We stated at the outset that we could not conclude that Canada had an interest in forwarding the dam project; it was pursued by the province and by the town. Accordingly, we find that there was no conflict of interest between Canada and the Band. It is true, as the First Nation contended, that

in 1966 the Band requested a meeting with a lawyer when relations with the town surrounding the employment issue began to deteriorate.[311] What was sought, however, was a meeting with a "legal officer of the branch," not independent counsel, to discuss the status of the agreement with the town and what legal recourse was available to the Band. For reasons that are unclear, there is no evidence that this meeting ever occurred. Shortly afterwards, however, Dr Medcof completed his third and final survey on clam populations, and Indian Affairs continued to press for the payment of fair compensation to the Band. The evidence also discloses that the Band intended to meet with experts of its own choosing to assess its position with respect to the dam.[312] Again, there is no evidence that any such meeting occurred, but it is clear that the Band did not view itself as unable to seek advice independent of that provided by Canada. Based on the entirety of the evidence before us, we find that there was no duty on Canada to provide independent legal advice.

Since there is no evidence of an actual conflict of interest between Canada and the Band on the facts before us, Canada was under no obligation to provide independent legal advice to the Band to ensure that the latter's interests were properly represented. Canada's obligation was to advise and inform the Band of the nature and foreseeable consequences of the transaction. To fulfil this obligation, Indian Affairs sought and obtained legal and technical advice on behalf of the Band and acted in a responsible and prudent manner throughout the negotiations. Moreover, the Band was aware that it could seek independent legal advice, but chose not to for reasons which are not entirely clear from the record.

With regard to the terms of the 1970 agreement, we find the following words of Urie JA in *Kruger v. The Queen* to be apt:

> In essence, however unhappy [the members of the Band] were with the payments made, they accepted them. The payments were for sums which could be substantiated by the independent valuations received by both parties and which were determined after extensive negotiations and forceful representations on the Indians' behalf by the Indian Agent and other high officials of the Indian Affairs Branch. *If the submissions*

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311 Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 28.

312 R.M.J.J. Guillas, Superintendent, Miramichi Indian Agency, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Department of Indian Affairs, Ottawa, Ontario, January 23, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 446).

> *advanced by the appellants were to prevail, the only way that the Crown could successfully escape a charge of breach of fiduciary duty in such circumstances would have been, in each case, to have acceded in full to their demands or to withdraw from the transactions entirely. The competing obligations on the Crown could not permit such a result.* The Crown was in the position that it was obliged to ensure that the best interests of all for whom its officials had responsibility were protected. The Governor in Council became the final arbiter. *In the final analysis, however, if the appellants were so dissatisfied with the expropriations and the Crown's offers, they could have utilized the Exchequer Court to determine the issues.* For whatever reasons, they elected not to make these choices. They accepted the Crown's offers and, at least *in the case of Parcel B, the offer was at the figure which they had suggested*. I fail to see, then, how they could now successfully attack, after so many years, the settlements to which they agreed.[313]

Kruger was clearly decided in the context of an expropriation in which the federal Crown was also the expropriating authority. In the present case, Justice Urie's reasons are even more compelling because Canada was not required to balance competing interests as it was in *Kruger*. It was merely required to discharge its duties as fiduciary, and it did so by acting in the best interests of the Band throughout the entire negotiation process.

In summary, we conclude that there is simply no evidence that the IAB pursued any interest other than that of the Band. Moreover, we have no hesitation in finding that, in this case, Canada's representatives acted honestly, prudently, and for the benefit of the Eel River Band. Accordingly, although the Band suffered hardships in the course of achieving a settlement, these were not the product of a breach of fiduciary duty or an abdication of the Crown's responsibilities. We find that Canada's conduct in the course of these negotiations was in no way "tainted," as contemplated in *Apsassin*, such that it would be unsafe to rely on the 1970 agreement as an expression of the Band's true understanding and intention. Therefore, in the absence of compelling evidence that the Band did not fully understand the nature of the 1970 agreement or that the Crown's conduct somehow tainted the dealings, the intention-based approach enunciated by Gonthier J in *Apsassin* must prevail because

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313 *Kruger v. The Queen*, [1985] 3 CNLR 15 at 51 (Fed. CA per Urie JA). Emphasis added.

"the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured."[314]

Where a Band Has Ceded or Abnegated Its Power to Decide

In *Apsassin*, McLachlin J, in arriving at her conclusion that the appellant bands had not abnegated their power to decide whether to surrender reserve land, took note of the following facts, as found by the trial judge:

> 2. That they had discussed the matter previously on at least three formal meetings [sic] where representatives of the Department were present;
> . . .
> 4. That, at the surrender meeting itself, the matter was fully discussed both between the Indians and with the departmental representatives previous to the signing of the actual surrender;
> 5. That [Crown representatives had not] attempted to influence the plaintiffs either previously or during the surrender meeting but that, on the contrary, the matter seems to have been dealt with most conscientiously by the departmental representatives concerned;
> 6. That Mr. Grew [the local Indian agent] fully explained to the Indians the consequences of a surrender . . .[315]

Accordingly, in McLachlin J's view, the balance between the Band's autonomy and the Crown's protective obligation did not demand that Canada *make a decision* on behalf of the Band. Rather, Canada was required to provide the Band with the necessary tools and information to make the decision itself. Based on the facts before the trial judge, McLachlin J found that the Crown had discharged this obligation.

We find that, on the facts before us, we must arrive at the same conclusion. There is no evidence that the Band Council was in a position that rendered it unable to make a decision about the dam project. Instead, as already described above, we find that the Council was a capable and

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[314] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 31 (SCC).

[315] *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344.

persistent advocate of its own rights and interests. Any decisions made were genuinely its own, even though they were made with the assistance of the IAB and others. Therefore, we conclude that the Band did not cede or abnegate its power to make decisions with respect to the use or disposition of its reserve land.

Duty of the Crown to Prevent an Improvident or Exploitative Transaction

We have previously considered the Band's position as a negotiator and a party with regard to the *procedural* aspects of the transaction. The final ground which we must consider is the *substantive* result of the settlement. As described above, the Governor in Council has an obligation to reject a deal that is "foolish, improvident or exploitative," regardless of any consent given to it by a Band. In essence, this obligation, arising from the Crown's protective role towards Indian Bands, requires the Minister of Indian Affairs or the Governor in Council, as the case may be, to refuse consent to a deal that is foolish, improvident, or otherwise exploitative.

To determine whether consent was properly given to this transaction, we must determine whether, given the circumstances, the consideration flowing to the Band as a result of the 1970 agreement was inadequate when viewed from the perspective of the Band at the time. The First Nation has submitted that it was inadequate, and relies on two grounds: first, that employment was not a term of the 1970 agreement, and, second, that compensation was limited in the 1963 Band Council Resolution to seven years' losses. The First Nation has also pointed to the terms of the 1995 agreement as evidence that the 1970 agreement was inadequate.

For its part, Canada submits that the compensation ultimately provided in the 1970 agreement was adequate to compensate the Band for the losses to its fishery and for the use of the land, and that no evidence has been advanced that the amounts agreed to were unreasonable.

To assess these positions, we find it necessary to compare the various proposals. In doing so in Table 1, we also take note of the fact that these negotiations never contemplated a straight cash settlement, but instead consisted of various proposals of land exchange, employment, development opportunities, cash, and reversionary interests in land.

It is clear that the 1970 agreement resulted in a far higher cash settlement to the Band than that contemplated by the 1963 Band Council Resolution. As submitted by the First Nation, the fact that a higher amount was ultimately paid to the Band under the terms of the 1970 agreement is not necessarily conclusive evidence that the amounts agreed to by the Band were not exploitative. This question, however, can be determined by considering Dr Medcof's analysis of the losses to the fishery as a solid basis for comparison.

Table 1
Comparison of Terms in the 1963 Band Council Resolution and the 1970 Agreement

Terms	1963 Band Council Resolution	1970 Agreement
Land	$4000 for ± 49 acres (±$81/acre)	$15,000 for ±115 acres (±130.00/acre)
Compensation for Damages	Loss of clams to be compensated at the rate of $1.50 per pail reduction in total clam harvest x 7 (years) x ½ (representing the Band's ½ interest in the total clam fishery), to a maximum of $50,000	$25,000 for damage, injury, and losses caused by erection and operation of dam, water supply system, and Eel River headpond
Pumpage fee	None	One-time payment of $9,591.12 plus annual payment for water pumped of at least $10,000, but not to exceed $27,375, for 20 years ($200,000 to $547,500)
Type of transfer	Expropriation	Section 28(2) permit for pipeline, pumphouse, and access road and expropriation of headpond (reversionary interest to all land)
Employment provisions	For every male Indian who obtained full-time permanent employment, the compensation for damage to the fishery would be reduced by 5 per cent	None
Other	Feasibility study to create trout fishing pool to attract tourists	Band retains right to erect and maintain a commercial marina on reserve lands adjacent to headpond
Total cash	Maximum of $54,000; no reversionary interest in any land	$249,591.12 to 597,091.12, with reversionary interest to all of the land

In 1963, the parties agreed that it was necessary to have the Band's actual losses assessed by an expert in the field because it was unclear whether the dam would affect the fishery or, if it did, in what way. Accordingly, it would have been imprudent for the parties to tie themselves down to a figure without an assessment of the actual losses. For this reason, it was agreed that Dr Medcof, with the assistance of his staff, would conduct this assessment. Although it has been submitted that Dr Medcof "angered" the Band by some of his initial assumptions,[316] it has not been argued before us that Dr Medcof was anything other than an objective expert in the field. Indeed, given the personal comments he added to his final survey, on which the Band relies, we find that Dr Medcof was solely

[316] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 28.

motivated to provide a report that fairly and fully recognized the Band's real losses. The adequacy of compensation provided for in the 1970 agreement can, at least to some extent, be assessed by reference to his surveys, on which the parties relied.

In the surveys submitted by Dr Medcof, he wrote that he had been asked to make two findings: whether any reduction in the clam harvest was the direct result of the damming of the Eel River, and "the fairest assessment" of the losses sustained by the Indian fishery.[317] He concluded that the losses he identified were the direct result of the dam. In providing an answer to the second question, he noted that there were four possible ways to calculate the Band's losses, ranging from 742 pails to 10,094 pails (both figures including the seven-year factor). The last figure, in his view, was the fairest because, rather than starting from the pre-dam presumption that Indians constituted half of the users of the fishery, it embodied the actual losses suffered by the Band. Because of a number of factors, including the increase in non-Indian fishers in the area, this loss was, in fact, approximately 70 per cent of the pre-dam landings taken by the Band, a loss represented by the 10,094 pails.

A quick calculation shows that 10,094 pails at $1.50 per pail is $15,141.00. The 1970 agreement provides for $25,000. On the face of it, the 1970 agreement exceeds the amount that would have been arrived at following Dr Medcof's calculations. Even if it were assumed that the average pre-dam annual income was *totally* lost (which was not Dr Medcof's projection, since he viewed it as likely that landings would continue at an average of 620 pails per year), the figure would be $21,651.

The Band has submitted, however, that the lack of fairness and equity in the compensation provided for in the 1970 agreement is "best articulated" by Dr Medcof's confidential comments attached to his final clam survey.[318] It will be recalled that Dr Medcof was of the opinion that the 1963 Band Council Resolution favoured the interests of the town over the Band's in three ways:

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317 J.C. Medcof, Fisheries Research Board, Biological Station, St Andrews, NB, "Third Survey of Eel River Cove, N.B., Soft-Shell Clam (*Mya arenaria*) Population," November 1967 (ICC Exhibit 2, tab 20), p. 41.

318 Submssions on Behalf of the Eel River Bar First Nation, February 13, 1987, p. 36.

> (1) The town was to get an advantage and benefit; the Indian Band was to get only conditional compensation for possible losses. (2) The town's benefit was to be indefinitely continuing; the Indians' compensation was to be partial and was to cover only seven years' possible losses. (3) The dollar value of the town's investment in the dam would be expected to increase when dollar values of real estate increased, whereas the per-pail price for clams ($1.50) was fixed in the terms of the contract.[319]

Starting with the last concern first, we note that, by the time Dr Medcof conducted his survey, the per-pail price of clams had risen 50 per cent to $2.25. The value of 10,094 pails at $2.25 per pail is $22,711.50. As noted above, the 1970 agreement provided for $25,000 in compensation.

Second, Dr Medcof considered it to be unfair that the Band was receiving compensation for only seven years' losses, while the town would receive an indefinitely continuing benefit. The aspiration of the parties at the time was to substitute permanent industrial employment for male members of the Band for the income derived from the clam fishery. Whether as a result of systemic discrimination, high unemployment, or any of the other factors we have referred to above, jobs were not provided for Band members. This fact by itself does not mean that Canada's fiduciary obligation was not discharged. What it did mean, however, was that the Band was left with a significantly reduced fishery and no jobs to replace it. Having said that, it was not patently unreasonable for the parties to limit compensation for lost income to seven years because they likely assumed that it would take up to seven years for members of the Band to find alternative sources of employment to replace their lost income from the fishery. In any event, it is not reasonable to expect compensation for lost income to continue indefinitely because such an arrangement would provide little or no incentive for individuals to mitigate their damages by seeking alternative sources of employment.

In the final analysis, Dr Medcof's concerns about the inequities of the 1963 Band Council Resolution were effectively accounted for in the 1970 agreement. In addition to the $25,000 lump sum, the 1970 agreement provides for a yearly pumpage fee of between $10,000 and $27,375, depending on the amount of water pumped out of the reservoir. That is, the Band received a lasting benefit that was directly tied to the benefit that would enure to the town in the form of water pumped

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[319] J.C. Medcof, Assistant Director, Fisheries Research Board, Biological Station, St Andrews, NB, to F.B. McKinnon, Regional Supervisor, Indian Affairs Branch, Amherst, NS, December 27, 1967, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 323).

from the Eel River headpond.[320] In so concluding, we do not rely on the "improvements" as between the 1970 agreement and the 1963 Band Council Resolution as demonstrating that the 1970 agreement was not exploitative. Instead, we rely on the yardstick provided by the objective determination of the Fisheries Research Board through Dr Medcof.

The First Nation has submitted that, because the 1970 agreement did not provide for any employment for its members, it was exploitative. We cannot agree. In our view, the historical record makes it clear that, by the end of the difficult negotiations, neither the Band nor Canada was inclined to rely on either the town or the province to provide any employment for members of the Band. Their experience with the town was bitter and eventually prompted a desire on the part of the Band to "seek full compensation for their losses." We do not find anything exploitative in this approach. Indeed, it appears to have been a reasonable and prudent response to the intractability of the town.

Although our comments in this section focus on the substance of the deal struck in 1970, we also must comment briefly on the process immediately preceding the conclusion of the agreement. The First Nation has submitted that, when Canada discovered, on January 23, 1970, Wallace LaBillois's direct communication with the Chairman of the NBWA that the Band wished to have no further negotiations, but wished, instead, to conclude the transaction immediately, Canada should have been alert to the possibility of exploitation.[321] In our view, it was. In their review of the proposed agreement, Canada's representatives identified three concerns: the adequacy of the release clause; the nature of the access to reserve land that would be permitted to the NBWA's workers to maintain the pipeline; and the fact that, although water had already been pumped out of the reservoir, the Band was not going to receive compensation under the annual pumpage fee clause.

Although the Band was no doubt exasperated with the process and anxious to conclude the agreement so it could receive some compensation after so many years, Canada was not prepared to accept the agreement without resolving these concerns. It is also true that the NBWA was bargaining hard and proved unwilling to accept some of the changes sought by Canada. Canada, as a fiduciary faced with a situation where its beneficiary sought immediately to sign the agreement, and where the

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[320] The notes of the meeting held on June 21, 1968, also suggest that the pumpage fee was intended to be linked to the loss of annual income: "clams fish etc." is written next to "0.5 per thousand gal" (ICC, Exhibit 3, p. 10).

[321] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 58.

other party was proving difficult, slowed the process down and sought to resolve its own concerns before accepting the agreement. We find that this conduct was prudent and reasonable on Canada's part.

After a thorough review of the circumstances leading up to the signing of the 1970 agreement, we conclude that the compensation package negotiated and received by the Band did not constitute an improvident or exploitative transaction. The negotiations were protracted and various proposals for compensation were put forward by all parties, including the Band. All apparent heads of damage were considered during the course of negotiations and, although compensation was not provided to the Band in the form of employment, the annual pumping fee provided a substantial and lasting benefit to the Band. At the end of the day, the Band Council decided to sign the 1970 agreement after a mature consideration of its options, and it was not for the Crown to substitute its own decision for that of the Band's unless the deal was considered to be exploitative. For the reasons stated above, we conclude that the terms of the 1970 agreement were not foolish, improvident, or otherwise exploitative.

PART V

CONCLUSIONS AND RECOMMENDATION

CONCLUSIONS

The Commission has been asked to inquire into and report on whether the Government of Canada properly rejected the specific claim submitted by the Eel River Bar First Nation. To determine whether or not the claim discloses an outstanding lawful obligation owed by Canada to the First Nation, we addressed the issues under three sections. The first dealt with the nature and extent of the First Nation's fishing rights and whether construction of the dam infringed upon those rights. The second considered whether the Crown breached its statutory obligations under the *Indian Act* by granting a letter-permit and by consenting to the expropriation of the Eel River reserve lands in 1970. Finally, we considered the nature and extent of the Crown's fiduciary obligations on the facts of this case.

Our findings are summarized below.

ISSUE 1 NATURE AND EXTENT OF FISHING RIGHTS

The Treaty of 1779 guaranteed that the Micmac Indians would have the right to remain "Quiet and Free from any molestation of any of His Majesty's Troops or other his good Subjects in their Hunting and Fishing." It was not disputed that members of the First Nation were entitled to exercise fishing rights in and around the Eel River Bar Reserve as their ancestors have since time immemorial. Without further evidence and submissions on the historical context of the Treaty of 1779, however, the Commission cannot make any definitive findings on the nature and scope of the First Nation's treaty rights, or on whether the 1807 Order in Council establishing the reserve modified or placed any limitations upon the exercise of these rights. Nevertheless, the evidence supports a finding that the First Nation's treaty fishing rights were infringed upon by the construction of the dam on the Eel River in 1963 because it interfered with the right to fish free from any interference on the part of the Crown.

We acknowledge and agree with the First Nation's submissions on the significance of its hunting and fishing rights and accept that the treaty was intended to protect a livelihood that had sustained the First Nation since time immemorial. The First Nation's traditional practices and

reliance on the fishery were protected by the Treaty of 1779, and it is our view that it was entitled to compensation for the infringement upon its treaty rights and damages caused to its source of livelihood.

In 1970, the Band Council entered into an agreement that provided compensation for "damages and losses suffered by the Indians as a result of the erection of the dam and creation of the headpond by the Town of Dalhousie." This compensation was in recognition of the fact that "construction of the dam and reservoir diminished the quantities of fish, shellfish, waterfowl, and other natural resources which were traditionally available to the Indians." There is no basis in law for the Commission to conclude that the First Nation's treaty rights were inviolate and, in any event, it is always open to a First Nation to negotiate a settlement to compensate it for a breach or infringement of treaty fishing rights. Although the First Nation did not receive any compensation for the infringement of its treaty rights until 1970, the agreement entered into with the New Brunswick Water Authority was intended to compensate it for the damages caused to its fishery.

Therefore, we conclude that there is no outstanding lawful obligation owed by Canada to the First Nation on the basis of a breach of treaty. In view of these findings, it is not necessary for the Commission to determine whether the First Nation had any riparian rights in addition to its treaty rights to fish in the waters adjacent to the reserve.

ISSUE 2 AUTHORITY FOR PERMIT AND EXPROPRIATION OF EEL RIVER RESERVE LAND

Section 28(2) and 1970 Letter-Permit

In light of a recent decision of the Supreme Court of Canada, we find that the 1970 letter-permit granting the use and occupation of 4.71 acres of reserve land for the purposes of a pumping station, pipeline right of way, and access road was properly issued by the Minister of Indian Affairs under the authority of section 28(2) of the *Indian Act*. The permit was for an indefinite but clearly ascertainable and justiciable period of time. The interest in land granted was not of such a nature that it required the consent of the entire Band membership in accordance with the surrender provisions of the Act.

Section 35 Expropriation of the Headpond

With respect to the expropriation of 61.57 acres of reserve land for the headpond in 1970, the wording of the Order in Council and the surrounding circumstances support a finding that the Governor in Council authorized the transfer of administration of reserve land to the Province of New Brunswick under section 35(3) in lieu of the province having to take the lands without the consent of the Band pursuant to the procedures of the New Brunswick *Expropriation Act*. The province was "empowered" to expropriate the land in question because it fell within the definition of a "public work," and the dominant purpose of the work was to promote economic activity and job creation in the general public interest. Since this was a taking pursuant to section 35(3), it was not necessary for the federal or the provincial Crown to comply with the procedures for a compulsory taking as set out in the *Expropriation Act*.

We do not accept the assertion that, because the Band consented to the expropriation, neither the provincial nor the federal Crown could exercise their expropriation powers. Section 35(3) of the *Indian Act* conferred on the Governor in Council a broad discretion to consent to the transfer of reserve land to the province in lieu of the land being taken without the Band's consent subject to the terms contained in the 1970 agreement. Because the Band consented to the expropriation of reserve land subject to the payment of compensation agreed to between the Band and the NBWA, the transfer of land was authorized by the Governor in Council under section 35(3) rather than section 35(1), and there was no need to trigger the procedural requirements of the *Expropriation Act*. Furthermore, even though the Band Council consented to the use of expropriation powers under section 35 and agreed to a negotiated settlement on compensation for the land taken, this does not alter the fact that this was essentially a compulsory taking of land. There was always the possibility that the Governor in Council might consent to the expropriation under section 35(1) if the Band did not reach an agreement with the town or the NBWA. The reality of the situation was that the negotiations proceeded in the shadow of a possible expropriation of the land if the Band did not consent to the construction of the dam. Finally, compliance with the surrender provisions of the *Indian Act* is not required when reserve lands are expropriated under section 35, because the surrender provision under section 37 must be read in conjunction with and subject to other provisions of the *Indian Act*.

Trespass and Delay from 1963 to 1970

In 1963, the Town of Dalhousie built the dam on the Eel River reserve and flooded additional lands without any specific authority to do so until 1970, when the headpond was expropriated and a letter-permit was granted to the NBWA for the pumping station, pipeline right of way, and access road to maintain the Eel River water supply system. No compensation was paid for the use and occupation of the reserve land until 1970.

In our view, the sections of the *Indian Act* governing the use and occupation of reserve land or its disposition to non-Indians must be interpreted in such a way as to balance a band's autonomy against the Crown's supervisory and protective role. According to recent decisions of the Supreme Court of Canada, the purpose of the requirement of the Crown's approval in the case of a surrender under section 37 or a section 28(2) permit is to ensure that all transactions involving reserve land are approved by the band *and* the Minister or the Governor in Council, as the case may be, to prevent the band from being exploited. If use and occupation of reserve lands through means other than those specified in the *Indian Act*, including uses allowed solely by the band, were sanctioned, the Crown would be released from its protective responsibility contrary to the intent of the *Indian Act* and the policy that underlies it. Accordingly, unless the use and occupation has been authorized by the Crown in one of the forms contemplated by the Act – surrender, expropriation, or permit – the use and occupation of reserve land is contrary to the Act.

Therefore, the consent or agreement of the Eel River Band, as expressed in the 1963 Band Council, is void because no permit was issued by the Minister under section 28(2) as required. This state of affairs remained the same until September 1968, when the Minister of Indian Affairs issued a one-year permit allowing the NBWA access to the land to carry out certain works in relation to the dam and water supply system. At this point, the NBWA had the proper authority to use and occupy the land for these purposes. The reserve lands flooded by the headpond, however, continued to be in a state of trespass until they were expropriated in 1970.

We find, therefore, that there was a trespass on reserve land from 1963 to 1970, the extent of which was narrowed by the 1968 permit. We are, however, unable to conclude that any outstanding lawful obligation necessarily flows from this trespass because the 1970 agreement was intended to compensate the Eel River Band for its losses and damages arising from the construction

of the dam. Whether the Crown fulfilled its fiduciary duties to the Eel River Band during the negotiations leading up to the 1970 agreement, and whether the Band received fair and equitable compensation for its losses, are separate questions.

ISSUE 3 FIDUCIARY OBLIGATIONS OF THE CROWN

Recent decisions of the Supreme Court of Canada state that regard must be had to the twin principles of autonomy and protection when dealing with the disposition of Indian interests in reserve land. Although the Crown has a statutory and fiduciary duty to protect Indian bands from the unlawful alienation and disposition of reserve land, the relative autonomy of the band to make decisions with respect to its land and resources must also be promoted and respected. Depending on the nature of the rights granted, different levels of autonomy and protection will apply between the Crown and the band involved in the proposed transaction.

On the facts of this case, we conclude that Canada properly discharged its fiduciary obligations to the Eel River Band for the following reasons. First, the Band Council was well aware of the nature of the dealings surrounding the dam and the implications of the transaction. When the town first proposed to construct the dam near the mouth of the Eel River, the Band opposed the selection of that site on the grounds that this location would damage the clam beds and reduce the income of Band members who relied on the clam harvest to make a living. When a site further upstream was selected, however, the Band Council indicated that it would agree to the construction of the dam if the town and local industries provided employment opportunities for its members to replace the lost income that would result from the reduction in clam harvests. There is ample evidence that, for whatever reason, whether it was a lack of effort, systemic discrimination, or conditions totally beyond the control of the parties to the contract, employment for Band members was never obtained in any meaningful way, despite the commitments made by the Town of Dalhousie in 1963. Nevertheless, protracted negotiations between the Band, Canada, and the NBWA culminated in the 1970 agreement, which provided for payment of a substantial amount of compensation to the Band. In lieu of employment opportunities, it is significant that the Band obtained a commitment from the NBWA that it would pay an annual fee for water pumped and that the agreement would be subject to renegotiation after 20 years.

Second, there is no evidence that Indian Affairs officials tainted the dealings in such a manner that it would be unsafe to rely on the Band's understanding and intention. The dealings in this case were initiated not by the Band or by Canada, but by the Province of New Brunswick and by the Town of Dalhousie. From the time that construction of the dam was first proposed in 1962 until the negotiations culminated in the signing of the 1970 agreement, Indian Affairs officials acted consistently and persistently to protect the Band's interests. Throughout these protracted negotiations, Indian Affairs officials acted as articulate and forceful advocates on behalf of the Band. Since there is no evidence of an actual conflict of interest between Canada and the Band on the facts before us, Canada was under no obligation to provide independent legal advice to the Band to ensure that the latter's interests were properly represented. Canada's obligation was to advise and inform the Band of the nature and foreseeable consequences of the transaction. To fulfil this obligation, Indian Affairs sought and obtained legal and technical advice on behalf of the Band and acted in a responsible and prudent manner throughout the negotiations. Moreover, the Band was aware that it could seek independent legal advice, but chose not to for reasons that are not entirely clear from the record.

Third, there is no evidence that the Band effectively abnegated or ceded its power to make decisions with respect to the dam project and the compensation offered by the town and the NBWA. Although Indian Affairs was involved in various aspects of the negotiations and did retain independent technical assistance to determine the effect of the dam on the clam harvest and the extent of the Band's losses, the evidence demonstrates that the Band's representatives were capable and persistent advocates of its own rights and interests. Since the Band made its own decisions, albeit with the assistance of the Indian Affairs Branch and others, the Commission must uphold the guiding principle that the autonomous decisions of the Band are to be honoured and respected.

Fourth, there is no evidence that the 1970 agreement represented a foolish, improvident, or exploitative transaction which should not have been approved by the Minister of Indian Affairs and the Governor in Council. The compensation negotiations never contemplated a straight cash settlement, but instead consisted of various proposals of land exchange, employment, development opportunities, cash, and reversionary interests in land. In arriving at a final settlement in 1970, the parties relied to a large extent on the expert advice of Dr Medcof, who was solely motivated to

provide a report that fairly and fully recognized the Band's losses. Using Dr Medcof's surveys as a measure of the adequacy of compensation provided for in the 1970 agreement, the Commission concludes that the agreement was not exploitative. Given the town's unwillingness to provide employment to members of the Band, it was not unreasonable for the Band and Canada to focus their efforts on other forms of compensation, such as the pumping fee, as an alternative means of compensating the Band for its losses. Finally, in the days just before the deal was closed, even though the Band sought immediately to sign the agreement, Indian Affairs slowed the process down and indicated that it would not approve the final deal until concerns it had over certain aspects of the draft agreement had been resolved.

In conclusion, we have found that the Band fully understood the nature and consequences of the establishment of the dam and the provisions of the 1970 agreement, and that there was no evidence of any tainted dealings on the part of Canada's officials during the negotiations. We have also found that there was no aspect of the relationship between Canada and the Band to support the argument that the Band ceded or abnegated its power to decide at any stage of the negotiations. Finally, we have concluded that the settlement reached in the 1970 agreement cannot be characterized as foolish, improvident, or exploitative such that the Minister of Indian Affairs and the Governor in Council should not have approved the transaction and authorized the section 28(2) permit and the expropriation of the headpond under section 35. Accordingly, we find that the Crown discharged its fiduciary obligations to the Eel River Bar First Nation.

Having said that, there is no question in our minds that the negotiations surrounding the dam were very difficult. The protracted nature of these negotiations resulted in great hardship for many members of the First Nation who relied on the clams for food and as a means of supplementing their incomes. In 1963, the Band agreed to allow construction of the dam to proceed in good faith on the assumption that the town and the NBWA would fulfil their respective obligations, particularly with regard to employment for members of the Band. Although the dam did have an adverse effect on the clams, as anticipated by the Band, the town and the NBWA did not fulfil their promises and no compensation was paid to the Band for its losses or the use of its lands until 1970. These hardships, however, were not the result of any dereliction of duty on the part of the Indian Affairs Branch or its agents. We find that, throughout the course of negotiations, the IAB and its agents conducted

themselves properly, acted as articulate and forceful spokespersons on behalf of the Band, and did not allow themselves to be compromised in any way.

RECOMMENDATION

Based on a thorough consideration of the facts and law in relation to this claim, we find that the evidence before us does not support a finding that Canada owes an outstanding lawful obligation to the Eel River Bar First Nation. Accordingly, we recommend:

> **That the Eel River Bar First Nation's claim not be accepted for negotiation under Canada's Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde	Roger Augustine	Aurélien Gill
Commission Co-Chair	Commissioner	Commissioner

Dated this 18th day of December, 1997

APPENDIX A

EEL RIVER BAR FIRST NATION INQUIRY

1	Request that Commission conduct inquiry	September 19, 1995
2	Planning conferences (2)	December 14, 1995, and February 27, 1996
3	Community sessions (2)	April 23, 1996, and July 11, 1996

Two community sessions were held. At the first, held on April 23, 1996, the Commission heard from Chief Everett Martin, Elders Margaret LaBillois, Marion LaBillois, Richard Simonson, Hubert LaBillois, Peter Simonson, Earl LaBillois, Mary McBain, Afred Narvie, Leonard LaBillois, Gordon LaBillois, Rebecca LaBillois, and Howard LaBillois. The second session was held on July 11, 1996, at which time the Commission heard from Wallace LaBillois.

4	Oral Session	February 20, 1997

5 Content of the formal record

The formal record for the Eel River Bar First Nation Inquiry into the Eel River Dam Claim consists of the following materials:

- 23 exhibits tendered during the inquiry, including the documentary record (3 volumes of documents with annotated index)
- written submissions from counsel for the Eel River Bar First Nation and counsel for Canada
- transcripts from community sessions and oral submissions (3 volumes)

The Report of the Commission and letters of transmittal to the parties will complete the formal record of this Inquiry.

APPENDIX B

Treaty Entered into with - the Indians of Nova Scotia
from Cape Tormentine to the Bay de Chaleurs, 22 Sept. 1779

Whereas in May and July last a number of Indians at the Instigation of the Kings disaffected Subjects did Plunder and Rob Wm. John Cort and several other of the English Inhabitants at Mirimichy of the principal part of their Effects in Which transaction, we the undersigned Indians had no conscience, but nevertheless do blame ourselves, for not having exerted our Abilitys more Effectually than We did to prevent it, being now greatly distressed and at a loss for the necessary supplys to keep us from the Inclemancy of the approaching Winter and to Enable us to Subsist our familys. And Whereas Captaine Augustus Gervey commander of His Majesty's Sloop Viper did in July last (to prevent further mischief) seize upon the Mirimichy River, Sixteen of the said Indians one of which was killed, Three released and Twelve of the most Atrocious have been carried to Quebec, to be dealt with, as His Majesty's Government of this Province, shall in future Direct, which measures We hope will tend to restore Peace and good order in that Neighbourhood.

Be it Known to all Men That we John Julien, Chief; Antoine Arueau Captain, Francis Julien and Thomas Dewagonisde Councillors of Mirimichy, and also Representatives of, and Authorized by, the Indians of Pagumske and Restigousche, Michael Chief, Louis Augustine Cobaise, Francis Joseph Aruiph, Captains, Antoines and Guiassance Gabalier Councillors of Richebouctou, and Thomas Tauros Lose and Representatives of the Chief of Jedyac, do for ourselves and in behalf on the several Tribes of Mickmack Indians before mentioned and all others residing between Cape Tormentine and the Bay De Chaleurs in the Gulph of St. Lawrence inclusive, Solemnly Promise and engage to and with - Michael Francklin Esq. The Kings Superintendant of Indian Affairs in Nova Scotia.

That we will behave Quietly and Peaceably towards all his Majesty King George's good Subjects treating these upon every occasion in an honest friendly and Brotherly manner.

That we will at the Hazard of our Lives defend and Protect to the utmost of our power, the Traders and Inhabitants and their merchandize and Effects who are or may be settled on the Rivers Bays and Sea Coasts within the forementioned District against all the Enemys of His Majesty King George Whether French, Rebells or Indians.

That We will wherever it shall be required apprehend and deliver into the Hands of the said Mr. V. Francklin, to be dealt with according to his Deserts, any Indian or other person who shall attempt to Disturb the Peace and Tranquility of the said District.

That we will not hold any correspondence or Intercourse with John Allan, or any other Rebell or Enemy to King George, let his nation or Country be what it will.

That we will use our best Endeavours to prevail with all other our Mickmack Brethern throughout the other parts of the Province, to come into the like measures with us for their several Districts.

And We do also by these presents for ourselves, and in behalf of our Several Constituents hereby review, Ratify and Confirm all former Treatys, entered into by us, or any of us or these heretofore with the late Governor Lawrence, and other His Majesty King Georges Governors who have succeeded him in the command of this province.

In consideration of the true performance of the foregoing Articles, on the part of the Indians Affairs doth hereby Promise in behalf of government:

> That the said Indians and their Constituents shall remain in the Districts before mentioned Quiet and Free from any molestation of any of His Majesty's Troops or other his good Subjects in their Hunting and Fishing.
>
> That immediate measures shall be taken to cause Traders to supply them with Ammunition, clothing and other necessary stores in exchange for their Furrs and other commoditys. In

Witness whereof we the above mentioned have interchangeably set our hands and Seals at Windsor in Nova Scotia this Twenty second day of September 1779.

APPENDIX C

APPENDIX C

THIS AGREEMENT made in triplicate this 14th day of May, A.D. 1968.

BETWEEN: NEW BRUNSWICK WATER AUTHORITY, a body corporate under and by virtue of the laws of the Province of New Brunswick, having its head office in the City of Fredericton and Province aforesaid, hereinafter referred to as the "Authority",

OF THE FIRST PART,

AND: THE COUNCIL OF THE EEL RIVER BAND, Eel River Indian Reserve Number 3, at Eel River, New Brunswick, hereinafter referred to as "the Eel River Band",

OF THE SECOND PART,

AND: HER MAJESTY THE QUEEN IN RIGHT OF CANADA, as represented herein by the Minister of Indian Affairs and Northern Development, hereinafter referred to as "Canada",

OF THE THIRD PART.

WHEREAS the Town of Dalhousie, during the years 1963 and 1964, constructed the Eel River dam;

AND WHEREAS the dam was erected in such a manner that it and the resultant headpond encroached upon lands of the Band and the Indians;

AND WHEREAS the Authority proposes to become successor in title and interest to the Town of Dalhousie concerning the operation and maintenance of the dam, headpond and water supply system created by the Town of Dalhousie;

AND WHEREAS the Authority is desirous of raising the level of the headpond to nine feet geodetic elevation which will necessitate the acquisition of all lands of the Eel River Band which will be inundated by the waters of the headpond of the Eel River dam;

AND WHEREAS the Authority wishes to compensate the Eel River Band for damages and losses suffered by the Indians as a result of the erection of the dam and creation of the headpond by the Town of Dalhousie and to further compensate the Eel River Band and Indians for losses and damages that may be suffered as a result of the raising of the water level to nine feet geodetic elevation;

AND WHEREAS the Authority recognizes that the construction of the dam and the reservoir has diminished the quantities of fish, shellfish, waterfowl, and other natural resources which were traditionally available to the Indians;

AND WHEREAS the Authority wishes to acquire from Canada and the Eel River Band all that land which will be flooded to a level of nine feet geodetic elevation by the headpond of the Eel River dam and access over the land occupied by the road leading to the said dam;

AND WHEREAS the Authority also wishes to acquire an easement in a strip of land adjacent to the existing New Brunswick International Paper Company pipeline right-of-way for the purpose of establishing thereon a pipeline and pumphouse;

AND WHEREAS the Eel River Band and Canada have agreed to take the necessary steps to transfer the administration and control of the lands to be subject to flooding and the grant of an easement to the Water Authority.

NOW THEREFORE for and in consideration of the mutual covenants and agreements herein contained the parties hereto covenant and agree as follows:

1. Canada will obtain the necessary approval of the Eel River Band to allow Canada to transfer as expeditiously as possible the administration and control of those lands as shown outlined

in red on Plan A hereto attached to Her Majesty the Queen in right of the Province of New Brunswick as represented by the Minister of Natural Resources.

2. Canada shall make all necessary arrangements to make as expeditiously as possible a grant of easement to the Authority over those lands shown outlined in orange on Plan A hereto attached for the purpose of constructing, maintaining and operating an access road, a water pipeline, and a pumping station.

3. In consideration of the transfer of the administration and control of the lands mentioned in section 1 and the grant of easement mentioned in section 2 the Authority shall make the following payments to Canada on behalf of the Eel River Band of Indians:

(a) the sum of $15,000.00 upon the signing of this agreement;

(b) an annual sum to be determined by reference to the volume of water pumped out of the Eel River dam headpond by the Authority in accordance with the formula established under section 4.

4. It is understood and agreed that the annual payment to be made by the Authority to the Eel River Band in accordance with clause (b) of section 3 is as follows:

(a) one-half cent per 1,000 U.S. gallons pumped from the Eel River headpond and the Eel River by the Authority;

(b) the annual sum calculated in accordance with clause (a) shall be payable on a quarterly basis based on a year which begins with the first day of April and ends with the thirty-first day of March the subsequent year; and

(c) if the amount payable to the Council in any one year is less than $10,000.00 then the Authority shall pay to the Council the amount calculated in accordance with clause (a) and the difference between that amount and

$10,000.00 so that the minimum payment in any one year shall be $10,000.00 except when the volumn of water pumped by the Authority out of the Eel River dam headpond and the Eel River falls below 1,825,000,000 U.S. gallons per year in which case the Authority shall pay to the Council only that amount calculated as payable in accordance with clause (a).

5. It is covenanted and agreed by and between the parties hereto that the amount payable by the Authority in accordance with section 3 and calculated in accordance with section 4 shall be payable at the rate so established for a period of twenty years upon the expiration of which the method of calculating the payment and rate shall be subject to review and negotiation by the parties and shall be subject to review and negotiation every five years thereafter.

6. (1) The parties hereto covenant and agree that where they cannot agree upon new rates in accordance with section 5, any party hereto shall be entitled to give to the other parties notice of such dispute and to request arbitration thereof; and the parties may, with respect to the particular matters then in dispute, agree to submit the same to arbitration in accordance with subsection (2) and the Arbitration Act of New Brunswick.

(2) Upon notice to arbitrate being given under subsection (1) the Eel River Band and the Authority shall name one representative each to act as arbiters and those two arbiters shall jointly select a third person to act as Chairman of the arbitration board.

7. (1) It is understood and agreed by and between the parties hereto that the amount payable under section 3 and calculated in accordance with section 4 shall subject to subsection (2) be based on the gallonage pumped by the Authority from the Eel River headpond

or the Eel River, regardless of the location of the Authority's pumps, from all pumps maintained by the Authority on Eel River headpond and the Eel River but calculation of gallonage for payment purposes shall not begin until the Authority begins normal pumping operations.

(2) Where, during any period beginning with the first day of April and ending with the 31st day of March the subsequent year, the Authority pumps more than (15,000,000 U.S. gallons x 365 days) 5,475,000,000 U.S. gallons, the gallonage in excess thereof shall not be included in the calculation of the amount to be paid to the Eel River Band under sections 3 and 4.

8. The Authority shall pay to the Eel River Band the sum of $25,000.00 in consideration of and compensation for the conveyances to be made under sections 1 and 2 and to cover the cost of all damage, injury and loss to person and property of the Council which may heretofore or hereafter be sustained in consequence of the erection and operation of the Eel River dam, Eel River water supply system and the Eel River headpond and subject to section 11 the repair and maintenance of same.

9. The Authority insofar as it has the authority to do so, shall allow the Eel River Band to erect and maintain a commercial marina on that portion of the Eel River headpond abutting the lands of the Eel River Band and shall allow members of the Eel River Band access to the headpond across the lands to be vested in the Crown in right of the Province provided the Eel River Band compensates the Authority for any damages which may be caused to property of the Authority arising out of the use of such access.

10. The Eel River Band shall have a first option to purchase the land shown outlined in red on plan A hereto attached if at any time after the transfer of the administration and control of the said lands to the Authority those lands cease to be used for the purposes of a water supply system.

11. (1) The parties hereto covenant and agree that the Authority, its agents, servants, workmen, and contractors shall have a right of access for the purposes of crossing and recrossing

the lands of the Eel River Band for the purposes of inspecting, constructing, maintaining, and repairing the Eel River headpond, dam and water supply system.

(2) The Authority undertakes to pay reasonable compensation for damages to the property or growing crops of the Eel River Band which result from the exercise of the right set forth in subsection (1).

IN WITNESS WHEREOF the party of the first part has caused these presents to be executed and its seal affixed by its proper officers and the party of the second part has executed these presents by its proper officers and the party of the third part has executed these presents by its proper officer on the day and year first above written.

SIGNED, SEALED AND DELIVERED in the presence of:

NEW BRUNSWICK WATER AUTHORITY

Chairman

Secretary

COUNCIL OF THE EEL RIVER BAND

Chief Councillor

Councillor

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

for Minister of Indian Affairs and Northern Development

APPENDIX D

RELEVANT PROVISIONS OF *INDIAN ACT,* RSC 1952, C. 149

18.(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

. . .

28.(1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

. . .

35.(1) Where by an Act of the Parliament of Canada or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

(2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) shall be governed by the statute by which the powers are conferred.

(3) Whenever the Governor in Council has consented to the exercise by a province, authority or corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without consent of the owner, authorize a transfer or grant of such lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.

(4) Any amount that is agreed upon or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General of Canada for the use and benefit of the Band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

. . .

37. Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.

38.(1) A band may surrender to Her Majesty any right or interest of the band and its members in a reserve.

(2) A surrender may be absolute or qualified, conditional or unconditional.

39.(1) A surrender is void unless
(a) it is made to Her Majesty,
(b) it is assented to by a majority of the electors of the band at
(i) a general meeting of the band called by the council of the band, or
(ii) a special meeting of the band called by the Minister for the purpose of considering a proposed surrender, and
(c) it is accepted by the Governor in Council.

(2) Where a majority of the electors of a band did not vote at a meeting called pursuant to subsection (1) of this section or pursuant to section 51 of the *Indian Act*, chapter 98 of the Revised Statutes of Canada, 1927, the Minister may, if the proposed surrender was assented to by a majority of the electors who did vote, call another meeting by giving thirty days' notice thereof.

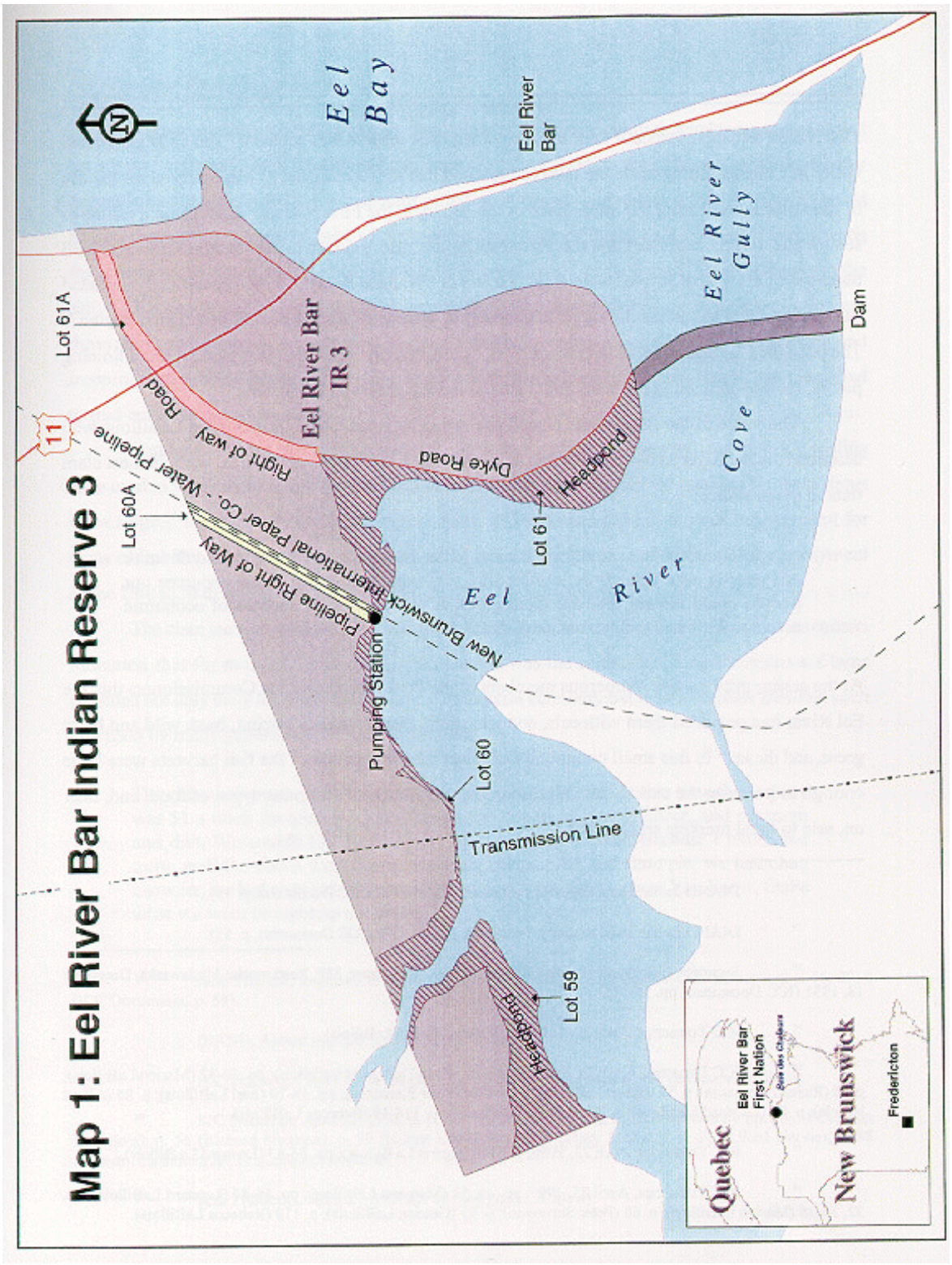
(3) Where a meeting is called pursuant to subsection (2) and the proposed surrender is assented to at the meeting by a majority of the members voting, the surrender shall be deemed, for the purpose of this section, to have been assented to by a majority of the electors of the band.

(4) The Minister may, at the request of the council of the band or whenever he considers it advisable, order that a vote at any meeting under this section shall be by secret ballot.

(5) Every meeting under this section shall be held in the presence of the superintendent or some other officer of the Department designated by the Minister.

40 When a proposed surrender has been assented to by the band in accordance with section 39, it shall be certified on oath by the superintendent or other officer who attended the meeting and by the chief or a member of the council of the band, and shall be submitted to the Governor in Council for acceptance or refusal.

41 A surrender shall be deemed to confer all rights that are necessary to enable Her Majesty to carry out the terms of the surrender.


Map 1: Eel River Bar Indian Reserve 3
Eel Bay
Eel River Bar
Eel River Gully
Dam
Lot 61A
11
Eel River Bar IR 3
Right of way Road
Dyke Road
Headpond
Lot 60A
Pipeline Right of Way
International Paper Co. - Water Pipeline
Lot 61
Cove
Eel River
New Brunswick
Pumping Station
Lot 60
Transmission Line
Headpond
Lot 59
Quebec
Eel River Bar First Nation
New Brunswick
Fredericton