

SCT File No.: SCT-1001-15

**SPECIFIC CLAIMS TRIBUNAL**

B E T W E E N:

EEL RIVER BAR FIRST NATION

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	
November 16, 2015	
Amy Clark	
Ottawa, ON	1

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA  
As represented by the Minister of Indian Affairs and Northern Development

Respondent

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**DECLARATION OF CLAIM**  
**Pursuant to Rule 41 of the**  
***Specific Claims Tribunal Rules of Practice and Procedure***

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This Declaration of Claim is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

November 16, 2015

Amy Clark

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(Registry Officer)

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**I. CLAIMANT (R. 41(A))**

1. The Claimant, the Eel River Bar First Nation (“First Nation”) confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, in the Province of New Brunswick. The First Nation is located adjacent to the Town of Dalhousie, in New Brunswick.

**II. CONDITIONS PRECEDENT (R. 41(C))**

2. The following conditions precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act*, have been fulfilled:

16. (1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and

(a) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part;

3. This claim is for the severe damages suffered by the First Nation as a consequence of the unauthorized and illegal construction of a dam on the First Nation’s Reserve lands and for the subsequent illegal taking of Reserve lands for facilities associated with the dam (e.g. a pumping station, pipe-line and access road).
4. The construction of the dam caused severe damage to the First Nation, including by causing an almost complete collapse of the First Nation’s formerly rich fishery. The damage caused by the dam was a devastating blow to the First Nation’s economy and its social fabric, essentially leaving the First Nation in a state of poverty. The First Nation has never received adequate compensation for the extensive damages caused by the dam.
5. The First Nation brings this Specific Claim on the grounds that, in relation to the construction of the dam and the associated taking of Reserve lands, the Federal Crown violated the First Nation’s treaty, Aboriginal and other rights, breached several provisions of the *Indian Act*, and failed to fulfill its fiduciary and trust-like duties to the First Nation.
6. On February 18, 1987, the Eel River Bar First Nation (“First Nation”) filed this claim with the Minister for processing under the Specific Claims Policy.

7. On December 29, 1988 the Specific Claims Branch notified the First Nation in writing that its claim was not accepted for negotiation, on the grounds that there was no outstanding lawful obligation on the part of the Government of Canada.
8. On February 20, 1992 the First Nation resubmitted a specific claim to the Department of Indian Affairs. This resubmitted specific claim expanded on the issues raised in the specific claim submitted on December 29, 1988. For example, this resubmitted claim asserted that the agreements, permits, and orders-in-councils, which purported to legally allow the Province of New Brunswick (“Province”) to occupy, use, and expropriate portions of the Eel River Bar Indian Reserve for the purposes of establishing the dam and its related works, are void and of no force or effect. Accordingly, by constructing the dam and associated facilities, the Province was trespassing on the First Nation’s Reserve lands.
9. On June 16, 1995 the Specific Claims Branch notified the First Nation in writing that the specific claim submitted on February 20, 1992 was not accepted for negotiation, on the grounds that there was no outstanding lawful obligation on the part of the Government of Canada.
10. On September 19, 1995, the First Nation requested that the Indian Claims Commission conduct an inquiry into the rejection of its claim.
11. On December 19, 1997, the Indian Claims Commission released a report in which it found that that the evidence before it did not support a finding that Canada owes an outstanding lawful obligation to the Eel River Bar First Nation. The Indian Claims Commission recommended that the Eel River Bar First Nation’s claim not be accepted for negotiation under Canada’s Specific Claims Policy. However, the Indian Claims Commission’s recommendation was critically flawed.
12. The recommendation from the Indian Claims Commission was based almost entirely on the erroneous conclusion that an agreement between the parties (signed in 1970) fairly compensated the First Nation for the severe destruction caused by the dam. As is detailed below, this is clearly wrong. The agreement only compensated the First Nation for a

small portion of the extensive damage caused by the dam. Further, the agreement was tainted by, among other things, several serious and direct conflicts of interest, inaccurate and incomplete reports and assessments by the Federal Crown's expert (reports on which the Indian Claims Commission evaluated the fairness of the compensation to the First Nation under the 1970 agreement) and an almost complete absence of support from the First Nation's Band members (for an agreement that purported to settle a vital community claim over the next several decades).

13. In short, the 1970 agreement was improvident and imprudent and the Indian Claims Commission erred in relying on the purported fairness of the compensation provided for in the agreement as the basis for its recommendation to not accept the claim for negotiation under Canada's Specific Claims Policy.

### **III. CLAIM LIMIT (R. 41(F), ACT, S. 20(1)(B))**

14. For the purposes of this claim, the First Nation does not seek compensation in excess of \$150 million.

### **IV. GROUNDS (R. 41(D), ACT, S. 14(1))**

15. The following are the grounds for the specific claim, as provided for in s. 14 of the *Specific Claims Tribunal Act*:

14. (1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:

...

(b) a breach of a legal obligation of the Crown under the Indian Act or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;

(c) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;

(d) an illegal lease or disposition by the Crown of reserve lands;

(e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or

(f) fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.

## **V. ALLEGATIONS OF FACT (R. 41(E))**

### ***Introduction - First Nation's legal rights***

16. The Eel River Bar First Nation has Aboriginal, Treaty and other rights to its historic lands in the region of and including its present Reserve lands. These rights were recognized and reaffirmed by the British Crown's Royal Proclamation of 1763 (the "Proclamation") and by the 1779 Treaty of Peace and Friendship ("Treaty"), to which the Eel River Bar First Nation is signatory.
17. On February 28, 1807, by an executive order of the Province of New Brunswick, the Eel River Bar Indian Reserve was set aside for the use and benefit of the First Nation.
18. The members of Eel River Bar First Nation have always fundamentally relied on the fruits of the rivers and sea on its Reserve and in its area for sustenance and for social, economic and cultural survival and well being. These resources and the access to them, including clams, smelt, gaspereau eel, trout, salmon, herring, ducks, brant and geese (hereinafter referred to as "Maritime Resources") are part of the First Nation's traditional territory and rights. The First Nation's rights to these Maritime Resources is protected by the Treaty of 1779, which guaranteed that the people of the Eel River Bar First Nation 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".

### ***Unauthorized and illegal construction of the dam on Reserve Lands***

19. In 1962 the New Brunswick Water Authority ("NBWA") advised F. B. McKinnon, an Indian and Northern Affairs Canada ("INAC") official, that the Province and the Town of Dalhousie ("Town") wished to construct a dam on the Eel River Bar First Nation's

Reserve lands, in order to create a fresh water reservoir, the purpose of which was to attract industry to the Town.

20. The First Nation opposed construction of the dam on its Reserve because of serious concerns it had about the adverse impact the dam would have on the First Nation's Reserve, Maritime Resources, and traditional way of life.
21. In 1963, notwithstanding the concerns of the First Nation, without any signed agreement in place with the First Nation or any compensation provided to or even committed to the First Nation, and without the formal authorization legally required under the *Indian Act*, the Town and the Province, with the support of the Federal Crown, completed the construction of the dam on the Reserve and flooded a large portion of lands on and around the Reserve.

***Construction of the dam caused severe damage to the First Nation***

22. The construction of the dam had a disastrous effect on the environment and caused a complete collapse of the First Nation's fishery, including the destruction of the First Nation's clam flats and other Maritime Resources.
23. Prior to the construction of the dam, clams were abundant in the tidal flats of the Eel River. The effects of the dam reduced some of the most productive clam flats in all of the Maritimes to yielding only a negligible harvest. Low water levels attributable to the dam similarly affected the First Nation's other Maritime Resources. Erosion and seepage caused by the dam's effects have also negatively affected the way of life of the people of the Eel River Bar First Nation.
24. The First Nation depended to a large extent on these (now destroyed) Maritime Resources in large part because the Reserve land was completely unsuitable for farming or other agriculture. The Inspector of Indian Agencies, Jude Thibault, recognized this reality and, on September 16, 1938, reported that no farming could be expected at the Eel River Bar First Nation's Reserve because of the marshy land, stating:

On August 20<sup>th</sup> last, I made an inspection of the Eel River Reserve, N.B. accompanied by Dr. A. Richard, Agent at Restigouche, Quebec, as this Reserve comes under his jurisdiction.

No farming can ever be expected here. The whole reserve, the exception of a few small elevations is marshy... A worse place could not have been chosen for a reserve, and whoever disposed of this place of practically useless land certainly received more that it was worth, no matter what price he got for it...

25. On the one hand, the dam permanently destroyed the First Nation's essential way of life, which revolved around the unique environment and Maritime Resources of the Eel River Bar. On the other hand, the dam brought industry to the Town, providing vast economic benefits to the Town and Province in the form of employment and other revenue.
26. In short, the Town and the Province utilized the First Nation's resources - the water and lands - to encourage and stimulate non-Indian industrial development, to the severe detriment of the First Nation and with no plan for compensation to the First Nation.
27. Based on the dam's destructive impact on the environment and the First Nation's lands, Maritime Resources and way of life, the First Nation requested compensation for this damage in the form of guaranteed employment for First Nation members in existing or proposed industries (such employment was repeatedly promised but never obtained), and/or other financial compensation.

***Negotiations to compensate the First Nation for damages suffered were fatally flawed***

28. After the dam was constructed, between 1963 and 1970, the First Nation and the Federal Crown engaged in negotiations in an attempt (from the Federal Crown's point of view) to legalize the dam and to grant permission to the Town and the NBWA (on behalf of the Province) to occupy the flooded land. Critically, these negotiations were marred by serious defects and repeated failures on the part of the Federal Crown to fulfill its legal obligations to the First Nation (as is detailed below), to the severe detriment of the First Nation.
29. On May 14, 1970 the Council for the First Nation, the Federal Crown and the NBWA signed an agreement, which purported to compensate the First Nation for the extensive

damage to the First Nation caused by the dam (“1970 Agreement”). However, due to the series of failures on the part of the Federal Crown to fulfill its legal obligations to the First Nation, the 1970 Agreement vastly under-compensated the First Nation for the damage it suffered, and, accordingly, the Federal Crown should have not have consented to the 1970 Agreement because it was imprudent, unfair and improvident.

*First Nation’s negotiation position was considerably weakened by the construction of the dam*

30. As noted above, at the time the dam was constructed, the Province and the Town did not have the legal authority to construct the dam on the Reserve lands. Accordingly, by constructing the dam without legal authority and by subsequently flooding lands on the Reserve, the Province and the Town were trespassing on the First Nation’s Reserve lands.
31. The negotiations to “legalize” the occupation of the Town and Province on these Reserve lands, and to agree on compensation for the First Nation for the damage caused by the dam, did not occur until *after* the dam had been constructed and *after* severe damage had been caused to the First Nation’s formerly rich stock of Maritime Resources.
32. Accordingly, right from the beginning of the negotiations, the First Nation was at a major disadvantage in terms of its negotiation position: the dam had already been built, so the First Nation could not withhold consent to the dam or slow or halt its construction. Further, since the dam caused such extensive damage, the First Nation was essentially in a state of poverty at the time of these negotiations.
33. The Federal Crown owes fiduciary and trust-like duties to the First Nation. The Federal Crown breached these duties by supporting and assisting with the illegal construction of the dam and by failing to challenge - or to assist the First Nation to challenge - the continued illegal trespass on Reserve lands (by the Town and the Province because of the illegal and unauthorized construction of the dam). These failures by the Federal Crown virtually ensured that the First Nation would be negotiating this vital community claim from a very weak bargaining position.

*The Federal Crown Repeatedly misrepresented First Nation's legal rights during negotiations*

34. The Federal Crown further breached its legal obligations to the First Nation by repeatedly misrepresenting the nature and extent of the Treaty and Aboriginal rights of the First Nation. In particular, during the negotiations between 1963 and 1970, the Federal Crown consistently and repeatedly asserted that the First Nation had no legal rights to the clam fishery or any other Maritime Resources in the area, despite the fact that the First Nation's rights to these resources were affirmed and protected by the Royal Proclamation and the Treaty, as detailed above.
35. This failure by the Federal Crown further weakened the First Nation's bargaining position in the negotiations. In addition, the repeated misleading and erroneous statements by the Federal Crown as to the extent of the First Nation's legal rights to the clam flats and other Maritime Resources made it improper and inappropriate to rely on the First Nation's consent to the improvident and imprudent 1970 Agreement.

*The Federal Crown failed to address the several personal and direct conflicts of interest*

36. In addition to the above serious issues, the negotiation process was also tainted by several serious and direct conflicts of interest in which individuals directly involved in the negotiations stood to personally and directly benefit from an agreement to compensate the First Nations for the damages caused by the dam.
37. In particular, the Band Manager and the lead negotiator for the First Nation, Mr. Wallace LaBillois had entered into an agreement with the Band whereby the Band would purchase his home using money obtained as a result of an agreement regarding the dam. Mr. LaBillois' wife, a Band Councilor at the relevant times, was also in a serious and direct conflict of interest because of this agreement.
38. Further, Mr. Lauritz Christensen Raderiis, an Indian and Northern Affairs Canada ("INAC") official, was also in a serious and direct conflict of interest. Mr. Raderiis had entered into an agreement with Mr. LaBillois whereby Mr. LaBillois would use the proceeds from the sale of his home (which the Band was to purchase from Mr. LaBillois

using money obtained from the agreement regarding the dam, as described above) to purchase Mr. Raderiis' Handicraft business in Fredericton, New Brunswick.

39. In fact, Mr. LaBillois did purchase Mr. Raderiis' business in Fredericton on June 15, 1970; only one month after the 1970 Agreement was signed. Mr. LaBillois subsequently left his position as Band Manager and he and his family relocated from Eel River Bar First Nation to Fredericton.
40. The Federal Crown was aware of these serious conflicts of interest during the negotiations. However, the Federal Crown took no steps to address these conflicts of interest. For example, the Federal Crown could have addressed the conflict of interest of its own official (Mr. Raderiis), attempted to halt or slow the negotiations and/or involve other (non-conflicted) Band members directly in the negotiations (other than Mr. LaBillios), or perhaps more critically (and as is further detailed below), the Federal Crown could have attempted to ensure that there was broad support from the Band members for the 1970 Agreement (to mitigate the impact of the conflicted Band members).
41. The Federal Crown breached its legal obligations to the First Nation by failing to take steps to address these serious conflicts of interest and by consenting to and signing the 1970 Agreement, despite the existence of these serious and direct conflicts of interest.

*The Federal Crown failed to fulfill its fiduciary duty to act in the best interests of Band members*

42. As of December of 1969, the positions of the parties still remained far apart. For example, the Federal Crown had expressed concerns about certain terms in the agreement that was most recently proposed by the NBWA.
43. The Federal Crown sought a meeting with the parties to discuss these concerns. However, before the meeting could be held, Mr. LaBillois, who as described above stood to personally benefit from any agreement, informed all parties that he had been in contact with Mr. E. S. Fellow, Chairman of the NBWA, and that between the two of them alone, they had decided that there was no need for further meetings. Instead, Mr. LaBillois

requested the abrupt end to negotiations and urged that the agreement be quickly finalized and signed in its current form.

44. The agreement proposed by the NBWA which was “agreed” to between Mr. E.S. Fellow and Mr. LaBillois was ostensibly presented to the Eel River Band Council, and on March 19, 1970, the Band Council passed a Band Council Resolution (“BCR”) accepting the “proposed terms of the New Brunswick Water Authority land acquisition at Eel River Indian Reserve No 3”, and setting out the terms of the agreement.
45. However, this BCR was fatally flawed. First, only three Band Members signed it: Councilor Mrs. Wallace LaBillois (who, as the wife of Wallace LaBillois, was in a direct conflict of interest as detailed above), Councilor Howard LaBillois, and Chief Alfred Narvie. Second, the BCR was not presented to the Band membership for review or approval. At the time, many of the Band’s members were working in Maine, U.S.A., so they were not present or available to discuss the serious and long-term consequences of this proposed agreement for them and their First Nation. Third, the BCR was not signed at a properly constituted Council meeting. Indeed, Howard LaBillois (the only non-conflicted Band Councilor to sign the BCR) apparently signed this BCR while he was working a shift at the Mill.
46. The Federal Crown was aware of these serious flaws with the BCR at the time it was “passed.” However, the Federal Crown did not take any steps to address these issues with the BCR. Critically, the Federal Crown failed to take any steps to inquire or determine if Band members, other than the three Band members that signed the BCR, were aware of or supported the BCR or the agreement proposed by the NBWA. In this way the Federal Crown failed to fulfill its fiduciary and trust-like duties to the First Nation.
47. The failure on the part of the Federal Crown to take steps to ensure that the other Eel River Bar First Nation Band members were aware of and supported the BCR and the proposed agreement is particularly egregious because the key negotiator for the First Nation (Mr. LaBillios) and one of the two Band Councilors that signed the BCR (Mrs. LaBillios) both stood to personally benefit from the agreement (i.e. they were both in a

conflict of interest with respect to the agreement), and further because the Federal Crown itself had serious concerns about several of the terms in the proposed agreement.

*Failing to properly calculate the nature and extent of the damages suffered by the First Nation*

48. In addition to the numerous failures of the Federal Crown to fulfill its lawful obligations to the First Nation with respect to the negotiation process, the Federal Crown further failed in its legal obligations to the First Nation by relying on irrelevant or inaccurate information and data to evaluate the fairness of the compensation to the First Nation under the 1970 Agreement.
49. A critical aspect of any agreement regarding the construction of the dam was the amount of compensation payable to the First Nation. To assist with determining the damages suffered by the First Nation (and the consequent compensation required under any agreement), the Federal Crown hired an “expert”, Dr. Medcof, to provide a report to the Federal Crown.
50. However, the report of the Federal Crown’s expert failed to accurately, fairly or objectively determine the extent and value of the damage from the construction of the dam and the flooding of the lands on and around the Reserve. In other words, the expert’s report vastly undervalued the damage the dam caused to the First Nation. Consequently, the “expert” also vastly undervalued the amount of compensation that should be payable to the First Nation under any agreement.
51. To highlight the extent to which the 1970 Agreement under-compensated the First Nation, when the terms of the agreement were renewed in 1995 (covering the time period from 1990 to 1999), the compensation payable to the First Nation under the agreement increased by over 10 times (from the 1970 agreement). Importantly, during these 1995 negotiations, the First Nation had access to proper legal and technical advice and was able to accurately evaluate the extent of the damages caused by the dam.
52. Put simply, the expert report did not properly or accurately account for the extensive damages to the First Nation’s clam flats and other Maritime Resources. The Federal

Crown was aware that Dr. Medcof's report failed to account for the full extent of the damages caused to the First Nation but took no steps to address this critical issue. Further, the Federal Crown failed to provide the First Nation with the report or comments of Dr. Medcof so the First Nation was unable to conduct its own evaluation of Dr. Medcof's assessment or his comments.

53. In addition to knowingly and improperly relying on an expert report that vastly undervalued the damages to the First Nation, the Federal Crown also improperly relied on a BCR of the First Nation dated April 9, 1963 as justification for the Federal Crown's consent to, and signing of, the 1970 Agreement.
54. In particular, the April 9, 1963 BCR set out possible compensation terms for the First Nation as a result of the proposed dam. The Federal Crown, in part, justified its consent to the 1970 Agreement because the 1970 Agreement provided more compensation than what was set out in the 1963 BCR. However, this was entirely improper. The compensation outlined in the 1963 BCR was not based on **any** analysis or valid assessment of the possible damage to the First Nation's Maritime Resources from the dam. In short, there was no valid basis for the compensation outlined in the 1963 BCR. Accordingly, it was improper and misleading for the Federal Crown to use the 1963 BCR to support and justify its decision to consent to the improvident 1970 Agreement.
55. In sum, Federal Crown failed to fulfill its lawful obligations to the First Nation by improperly relying on a flawed and biased expert report and a flawed 1963 BCR (both of which fell well short of capturing or identifying the full nature and extent of the damage to the First Nation caused by the dam) as justification and support of its consent to the 1970 Agreement.
56. Overall, the Federal Crown failed to fulfill its legal obligations to the First Nation in numerous ways with respect to the negotiations leading up to, and the signing of, the May 14, 1970 Agreement, which purported to settle a large, longstanding and vital community claim.

***Improper taking of Reserve lands***

57. In addition to the failure of the Federal Crown to fulfill its fiduciary and other lawful obligations to the First Nation during the negotiations of and consent to the 1970 Agreement, this claim is also based on the Federal Crown's improper seizure of vast portions of Reserve lands, seizures which reduced the Reserve from 434.67 acres to 368.39 acres, the loss of over 15% of Reserve lands.
58. By Order in Council dated September 9, 1970, the Federal government purported to take the drastic step of expropriating a total of 61.57 acres from the First Nation and transferring "administration and control" to the Province of New Brunswick "for the purpose of creating head-pond (sic)" pursuant to s. 35 of the *Indian Act*.
59. This transfer of Reserve lands was illegal and improper. Under the 1970 Agreement, the First Nation **consented** to this transfer of lands. Accordingly, the Federal Crown was not permitted to use the provisions in s. 35 of the *Indian Act*, as these provisions are reserved only for situations in which the First Nation does not consent. Therefore, the Federal Crown was required to utilize the more comprehensive surrender procedures in the *Indian Act* to establish whether or not the Band properly approved this transfer of Reserve lands.
60. Further, by permit issued on July 22, 1970, the Federal Crown purported to grant an easement under s. 28 (2) of the *Indian Act* permitting NBWA to use 2.43 acres for facilities associated with the dam including a pumping station and pipeline right-of-way as well as 2.28 acres for an access road. This permit was granted "for as long as required for the purposes outlined".
61. This permit was also improperly issued. The Federal Crown improperly used s. 28(2) of the *Indian Act* to grant this purported permit when this was, in fact, a **transfer** of Reserve lands (rather than a permit to use the lands for a specified time). The 1970 agreement discusses an assignment of these lands and indicates a transfer of lands, rather than a time-limited short-term use, for which a permit issued under s. 28(2), might have been legally appropriate.

62. Further, the interest in land that was conveyed under the purported permit issued under s. 28(2) was essential to the operation of the dam, and was to be used exclusively by the Town and the Province for an indefinite and indeterminable period of time. Accordingly, the Federal Crown was required to use the surrender provisions of the *Indian Act* to complete this transfer. In other words, this interest in land was of such a nature and extent that the Band membership should have had the opportunity to vote on this transfer of land, pursuant to the surrender provisions of the *Indian Act*.
63. The Federal Crown, Province and the Town pushed for these non-surrender provisions of the *Indian Act* to be used to complete these land transfers (rather than the legally required surrender provisions), because they wanted a quick resolution to this situation for the benefit of the industry interests that the dam was serving. It would have taken much longer to complete these transfers of Reserve lands under the (legally required) surrender provisions, as many of the Band members were working in Maine, U.S.A. (and accordingly were not immediately available to vote on the transfer of lands as required under the surrender provisions of the *Indian Act*).
64. By failing to use the proper and legally required surrender provisions in the *Indian Act* the Federal Crown breached its lawful obligations to the First Nation. This breach (i.e. the failure to use the legally required surrender provisions that would have required a vote by the Band members) is particularly egregious because of the fact that many of the Band members were unaware of the 1970 Agreement, and, as is described above, two of the key Band members involved in the negotiations, Mr. LaBillois (the lead negotiator) and Mrs. LaBillois (one of only two Band Councilors that signed the March 19, 1970 BCR that paved the way to the 1970 Agreement) were in a serious and direct conflict of interest as they were in a position to (and did) personally benefit from the 1970 Agreement.

**VI. THE BASIS IN LAW ON WHICH THE CROWN IS SAID TO HAVE FAILED TO MEET OR OTHERWISE BREACHED A LAWFUL OBLIGATION**

65. The 1779 Treaty affirmed and protected the First Nation's right to the Maritime Resources on the First Nation's Reserve and in its traditional territories. The First Nation relied on these Maritime Resources for sustenance, its economy and its way of life. The construction of the dam and the subsequent flooding completely destroyed these Maritime Resources to the severe detriment of the First Nation.
66. The Federal Crown failed to fulfill its legal obligations to the First Nation in connection with the construction of this dam, during the subsequent negotiations to obtain compensation for the damages caused by the dam, by consenting to the unfair and exploitative 1970 Agreement, and by improperly and illegally transferring vast portions of Reserve lands for facilities associated with the dam.
67. In relation to the construction of the dam on Reserve lands and the subsequent negotiations and agreement, the Federal Crown owed strict fiduciary and trust-like duties to the First Nation to act in the best interest of the First Nation and all of the Band members. The Federal Crown failed to fulfill these legal duties by:
- a. supporting and assisting with the construction of the dam and flooding of Reserve lands (or taking no steps to prevent or otherwise slow down the construction or subsequent flooding), despite knowing that such construction and flooding was illegal and unauthorized;
  - b. failing to assist the First Nation to assert its legal rights to challenge the illegal construction of the dam and the continuing invasive trespass on Reserve lands by the Town and the Province caused by the dam and the flooding of Reserve lands;
  - c. during the negotiations, failing to act in the best interests of the First Nation by repeatedly and consistently misrepresenting the nature and extent of the First Nation's rights to the Maritime Resources as recognized and affirmed by the Treaty and the

- Royal Proclamation, making it improper and imprudent to rely on the First Nation's consent to the 1970 Agreement;
- d. improperly relying on a flawed expert report and the flawed April 1963 BCR as justification for consenting to the 1970 Agreement, an agreement which vastly under-compensated the First Nation for the damages it suffered as a result of the dam;
  - e. failing to provide the First Nation with the comments and report of the Federal Crown's "expert" (that assessed the damage to the First Nation caused by the dam) so that the First Nation was unable to evaluate that important assessment prior to signing the 1970 Agreement;
  - f. failing to assist the First Nation with obtaining its own, independent, unbiased expert to evaluate the damages caused to the Maritime Resources as a result of the construction of the dam;
  - g. failing to take steps to ensure that there was support from the Band members for the 1970 Agreement, especially because the lead First Nation negotiator, Mr. LaBillois and his wife, (one of only two Band Councilor's that signed the 1970 BCR that purported to signal the First Nation's support for the 1970 Agreement), were both in a serious and direct conflict of interest as they both stood to (and did) personally benefit from the 1970 Agreement;
  - h. failing to withhold consent to the 1970 Agreement as the transaction was imprudent, improvident, and exploitative. In other words, the 1970 Agreement was exploitative to the First Nation as the compensation provided was entirely inadequate and fell well short of the actual damages and losses suffered by the First Nation as a result of the construction of the dam; and
  - i. improperly granting transfers and disposing of Reserve land under s. 28(2) and s. 35 of the *Indian Act*, rather than using the legally-required surrender provisions of the *Indian Act* .

**VII. RELIEF SOUGHT**

68. In light of Canada's breaches of its lawful obligations to Eel River Bar First Nation, the First Nation seeks the following relief:
- a. complete and full compensation for damage suffered by the First Nation as a result of, or in relation to, the construction of the dam and flooding of lands on an around the Reserve for the period of 1963 to 1990;
  - b. compensation for illegal disposition of Reserve lands under s. 28(2) and s. 35 of the *Indian Act* for the dam-related facilities including the head-pond, pipeline, access road and pumping station;
  - c. equitable compensation and/or interest;
  - d. costs in relation to these proceedings; and
  - e. such other relief as this Honourable Tribunal deems just.

All of which is respectfully submitted this 16 day of November, 2015.



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