INDIAN CLAIMS COMMISSION

ATHABASCA CHIPEWYAN FIRST NATION INQUIRY
WAC BENNETT DAM AND DAMAGE TO INDIAN RESERVE 201

PANEL

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March 1998

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PART I

INTRODUCTION

BACKGROUND TO THIS INQUIRY

The purpose of this inquiry is to determine whether the Crown owes an outstanding lawful obligation to the Athabasca Chipewyan First Nation (the First Nation)[1] in relation to damages sustained by the First Nation and to the Athabasca Chipewyan Indian Reserve (IR) 201 as a result of the construction and operation of the W.A.C. Bennett Dam (the Bennett Dam) in British Columbia.

On November 6, 1991, Chief Tony Mercredi wrote to Specific Claims West, Department of Indian Affairs and Northern Development (DIAND), advising it of the First Nation's proposed specific claim in relation to damages to its reserve and its livelihood caused by the drying out of the Peace-Athabasca Delta. The First Nation alleged that "the Minister of Indian Affairs has a statutory and fiduciary obligation for the proper management and environment protection of Indian Reserve lands" and a duty to the First Nation to prevent, to mitigate, and to compensate for environmental damage to IR 201 caused by the operation of the Bennett Dam. Chief Mercredi requested a meeting with federal officials to discuss whether a specific claim could be submitted to Specific Claims West for its consideration.[2]

In March 1992, a meeting was held to discuss the proposed claim, and it was agreed that further research and analysis would be required before Canada could decide whether an outstanding lawful obligation was owed to the First Nation. Rather than undertaking a costly research project, the First Nation proposed that Canada review the *prima facie* evidence[3] in relation to the claim, along with a preliminary legal opinion prepared by its legal counsel outlining the First Nation's

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[1] Alternatively referred to as the "Athabasca Chipewyan," the "Athabasca Chipewyan Band," the "First Nation," "ACFN," or the "Band," depending on the historical context.

[2] Chief Tony Mercredi, Athabasca Chipewyan Band 201, to Manfred Klein, Director Specific Claims West, DIAND, November 6, 1991 (ICC Exhibit 2A, tab 1, ICC p. 421).

[3] The term "prima facie evidence" is defined in Black's Law Dictionary, 5th ed. (St Paul: West Publishing, 1979), as "[e]vidence good and sufficient on its face; . . . Prima facie evidence is evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence."

position on the alleged legal and fiduciary obligations of the Crown.[4] On April 13, 1992, Mr Manfred Klein, Director of Specific Claims West, responded to Chief Mercredi's letter indicating that Canada would not make a decision based on the *prima facie* evidence alone but that it would consider whether further research was necessary to decide whether to accept or reject the claim for negotiation under the Specific Claims Policy.[5]

It is unclear whether there was agreement between Canada and the First Nation to conduct further research but on December 29, 1992, Mr Jerome Slavik, the First Nation's legal counsel, forwarded to Canada's negotiator a copy of a report prepared by an environmental consultant describing the impact of the Bennett Dam on the Peace-Athabasca Delta and on the Athabasca Chipewyan Indian Reserve 201.[6]

On March 9, 1993, Mr Slavik forwarded a legal opinion to Specific Claims on behalf of the First Nation. The First Nation claimed that the construction and operation of the Bennett Dam had caused a dramatic alteration to the unique ecosystem of the Peace-Athabasca Delta and to IR 201. Mr Slavik's letter summarized the First Nation's position in these terms:

> The Band maintains that the Crown knew, (or ought to have known), prior to construction, or shortly thereafter, of the adverse impacts that the WAC Bennett Dam would have on the #201 Reserve, but failed to take any measures to prevent, mitigate, or reduce the adverse environmental impact on the lands and waters of #201 Reserve and the economy of the Athabasca Chipewyan Band. In any event the Crown is now aware of the impacts and damages.
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> It is the Band's position that the Crown was and is in breach of a continuing fiduciary and statutory obligation to prevent damage to the lands and waters of Indian Reserves. Specifically, the Crown is in breach of its obligations to ensure that activities and events which the Crown undertakes and over which the Crown

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[4] Chief Tony Mercredi, Athabasca Chipewyan Band 201, to Manfred Klein, Director Specific Claims West, DIAND, March 18, 1992 (ICC Exhibit 2A, tab 4, ICC p. 430).

[5] Manfred Klein, Director Specific Claims West, DIAND, to Chief Tony Mercredi, Athabasca Chipewyan Band 201, April 13, 1992 (ICC Exhibit 2A, tab 5, ICC p. 434).

[6] Jerome Slavik, Ackroyd Piasta Roth & Day, to Jack Hughes, Negotiator, Specific Claims West, DIAND, December 29, 1992 (ICC Exhibit 2A, tab 7, ICC p. 438).

> exercises regulatory control do not destroy the environment, traditional or intended use, or economic value of Indian Reserve lands.[7]

On December 9, 1993, Mr Klein responded to a request from Mr Slavik regarding the status of the claim. He advised that no decision had been made, since a number of reports on the nature and extent of the dam's impact on the delta would not be completed until 1996, and that Canada also required an "historical report setting out the factual basis of the claim" and further legal submissions on the specific allegations against the Crown in right of Canada.[8] Chief Mercredi responded that research had been completed in relation to the claim, including a request for information through the federal *Access to Information Act*, and that copies of the historical documents had been furnished to Specific Claims West for its review. Accordingly, Chief Mercredi requested that the Department of Justice conduct its legal review of the claim based on the information and submissions presented to date.[9] On January 4, 1994, Mr Klein confirmed that the claim had been forwarded to the Department of Justice for legal review.[10]

On January 7, 1994, representatives of the First Nation and Canada met to discuss the possibility of referring the claim to the Indian Claims Commission for an inquiry into the relevant historical and legal issues.[11] Following an exchange of correspondence, Mr Jack Hughes, Research Manager for Specific Claims West, wrote to Chief Mercredi to advise him of Canada's preliminary position on the claim. The letter states that, based on the "exceptionally weak" historical documentation submitted, Canada's preliminary position was that the claim did not disclose an

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7 Jerome Slavik, Ackroyd Piasta Roth & Day, to Manfred Klein, Director, Specific Claims West, DIAND, March 9, 1993 (ICC Exhibit 2A, tab 9, ICC p. 501).

8 Manfred Klein, Director Specific Claims West, DIAND, to Jerome Slavik, December 9, 1993 (ICC Exhibit 2B, tab 12, ICC p. 701).

9 Chief Tony Mercredi, Athabasca Chipewyan Band 201, to Manfred Klein, Director Specific Claims West, DIAND, December 17, 1993 (ICC Exhibit 2B, tab 13, ICC p. 706).

10 Manfred Klein, Director Specific Claims West, DIAND, to Chief Tony Mercredi, Athabasca Chipewyan Band 201, January 4, 1994 (ICC Exhibit 2B, tab 14, ICC p. 710).

11 Manfred Klein, Director Specific Claims West, DIAND, to Chief Tony Mercredi, Athabasca Chipewyan Band 201, January 11, 1994 (ICC Exhibit 2B, tab 15, ICC p. 712).

outstanding lawful obligation on the part of the federal Crown. There were essentially four grounds stated for rejecting the claim:

> The First Nation alleges that Canada did not warn or advise them before the construction of the dam that environmental damage might ensue, and that this evidence constitutes a breach of Canada's fiduciary obligation. In our view, the evidence submitted does not indicate that Canada had explicit knowledge of any damage the First Nation might incur as a result of the dam until several years after its construction.
>
> The First Nation alleges that Canada knew or ought to have known, at or shortly after the time of construction, that the dam would have severe adverse effects on Indian Reserve 201, and that Canada should have proposed mitigative or preventive measures. In our view, the evidence submitted by the First Nation does not indicate that Canada had any connection with the construction of the dam that might tend to suggest a fiduciary obligation in respect of the dam's affect on the First Nation.
>
> The First Nation argues that Canada has an obligation to compensate or remediate them in respect of any damages they may have incurred as a result of the construction of the dam. In our view the evidence submitted by the First Nation suggest that any such damages they may have incurred were caused exclusively by the actions of British Columbia and B.C. Hydro.
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> The First Nation alleges that there is a breach on Canada's part of its fiduciary obligation towards the First Nation in that it did not assist them in respect of their 1970 court action. In our view, the lack of evidence submitted by the First Nation does not make it possible to determine whether any request was communicated to Canada, nor do we have any evidence to indicate Canada's response to such a request.[12]

On July 28, 1994, Mr Klein confirmed an agreement in principle with Chief Mercredi to request that the Indian Claims Commission appoint a mediator to try to find a solution to the claim.[13] Unfortunately, the parties were not able to resolve the disputed issues despite the assistance of a

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[12] Jack Hughes, Research Manager, Prairies, Specific Claims West, to Jerome Slavik, May 24, 1994 (ICC Exhibit 2B, tab 21, ICC p. 730).

[13] Manfred Klein, Director Specific Claims West, DIAND, to Chief Tony Mercredi, Athabasca Chipewyan Band 201, July 28, 1994 (ICC Exhibit 2B, tab 25, ICC p. 741).

mediator. Ultimately, on March 4, 1996, Chief Archie Cyprien requested that the Commission proceed with an inquiry into the claim.[14]

The Commission's inquiry commenced with a planning conference on May 17, 1996. Community sessions were held at Fort Chipewyan, Alberta, on October 10, 1996, and November 27, 1996. Written arguments were received from counsel for the First Nation on June 18, 1997. The Crown responded with its written arguments on September 8, 1997. Oral arguments were made by legal counsel for the First Nation and the Crown on September 30, 1997, in Edmonton, Alberta.

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 . . ."[15] 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.[16] 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.
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> A lawful obligation may arise in any of the following circumstances:
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> 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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[14] Chief Archie Cyprien, Athabasca Chipewyan First Nation, to Dan Bellegarde and Jim Prentice, Co-Chairs, Indian Claims Commission, March 4, 1996 (ICC Exhibit 2B, tab 56, ICC p. 833)

[15] 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.

[16] 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.

It should be emphasized that the Commission is limited in its mandate and the Specific Claims Policy to making recommendations as to outstanding "lawful obligations" owed by the "federal government" to an "Indian band." In view of our mandate, we decline to make any findings or recommendations regarding allegations against British Columbia or BC Hydro, as an agent of a provincial Crown. Furthermore, neither British Columbia nor BC Hydro participated in this inquiry, and it would not be appropriate for the Commission to offer its recommendations in relation to the alleged obligations of an entity or person that was not represented at, or a party to, our inquiry process.

THE COMMISSION'S REPORT

The Commission has been asked to inquire into and report on whether the Athabasca Chipewyan First Nation has a valid claim for negotiation pursuant to the Specific Claims Policy. The Commission, however, has not been called upon to determine specifically whether the dam was the direct cause of the damage to IR 201.

By agreement of the parties, the Commission was to proceed on the assumption that the dam had caused damages to IR 201. However, the Commission did have the benefit of extensive technical analysis conducted by engineers, hydrological experts, biologists, and anthropologists, and many of these technical studies were cosponsored by Canada. Those scientific studies, combined with the direct and anecdotal evidence from elders of the First Nation, provided the Commission with compelling *prima facie* evidence, which leads inescapably to the conclusion that significant environmental damage was sustained by the First Nation and IR 201. The construction and the operation of the Bennett Dam have substantially changed the hydrology and ecology of the Peace-

Athabasca Delta, causing direct and serious harm to IR 201 and the Athabasca Chipewyan First Nation. No other conclusion is possible from the *prima facie* evidence before us.

Our review of the historical background, the oral submissions, and the applicable jurisprudence leads us to conclude that the Crown breached its fiduciary duty to the First Nation in not taking adequate steps to prevent or to mitigate the damages caused to IR 201 by the construction and operation of the W.A.C. Bennett Dam.

This report contains our findings and recommendations.

PART II
HISTORICAL BACKGROUND

The historical background to this claim is based on our review of a large volume of archival documents and exhibits submitted by the parties. This material includes several volumes of correspondence, expert scientific reports, and other documentary evidence, as well as testimony provided by members of the Athabasca Chipewyan First Nation and expert witnesses at community sessions held at Fort Chipewyan on October 10, 1996, and November 27, 1997. It should be noted that, although the Commission has consulted some secondary sources to supplement our understanding of issues that were not in dispute, it has relied for the most part on the materials submitted by the parties.

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 September 30, 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.

PEACE-ATHABASCA DELTA BEFORE CONSTRUCTION OF THE BENNETT DAM

Unique Geography and Ecology of the Delta

The Peace-Athabasca Delta, one of the largest freshwater deltas in the world, is formed by the convergence of the Peace, Athabasca, and Birch River systems, which empty into Lake Athabasca in northeastern Alberta (see Map 1, Peace-Athabasca Delta, on page 8). IR 201 takes up approximately 20,000 hectares of land in the eastern third of the delta (see Map 2, Area of Claim, on page 9). The flat landscape of the Peace-Athabasca Delta actually consists of two separate deltas and is characterized by its

> patchwork of marshes, lakes, mud flats, sedge meadows, willow and shrub thickets and forests of white spruce and balsam poplar, interwoven by numerous winding channels. With its variety of landforms and lush vegetation, the delta has the capacity to support a diverse mixture of animal species. In 1985, the Canadian Wildlife

Service counted 220 species of birds, mammals and fish that inhabit the delta during some part of their lifecycle.[17]

To understand fully the hydrology of the Peace-Athabasca Delta, one must first appreciate the geography of the two main rivers that feed the delta, the Peace and the Athabasca. The Peace River originates in the Rocky Mountains of British Columbia and cascades east across the province of Alberta. The Peace and the Smoky River converge near the modern-day town of Peace River, Alberta, and continue northward, eventually converging with the Wabasca River and then reaching the Peace-Athabasca Delta.[18]

The second river that feeds the delta, the Athabasca River, has its origins in the melting snow and glaciers of the Columbia Icefield, a high plateau in the Rocky Mountains between Mount Columbia and Mount Athabasca on the Continental Divide, which marks the British Columbia-Alberta border. It flows north through Jasper National Park, then northeast across the province of Alberta and is joined by a number of tributaries. From Fort McMurray, the Athabasca River flows north through the Peace-Athabasca Delta and into Lake Athabasca.

Prior to the construction of the Bennett Dam, the Peace-Athabasca Delta had a rich and diverse ecology of international significance. The hydrology of the delta, coupled with a variety of landforms and lush vegetation, supported a remarkable diversity of birds, mammals, and fish. The delta was one of the earliest areas settled in Alberta. Fort Chipewyan was an important outpost for the Hudson's Bay Company as the delta was renowned for the quantity and quality of its muskrat pelts. The delta's wetlands and ecology, however, are sensitive and highly dependent on the water levels of the various rivers and tributaries that feed the delta.

The flood regime of the Peace-Athabasca Delta is highly complex because water flow is determined by four primary drainage systems: the Peace, the Athabasca, the Birch, and the Fond du Lac Rivers. Before the Bennett Dam was constructed, water levels largely depended on the amount of water in the four basins and the timing of the water flows during the spring flood and summer

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[17] Northern Rivers Basin Study Board, *Northern Rivers Basin Study: Report to the Ministers, 1996* (Edmonton: Nautilus Publications, 1996), 22 (ICC Exhibit 3) (hereinafter *Northern Rivers Basin Study*).

[18] *Northern Rivers Basin Study*, 17, 22 (ICC Exhibit 3).

high-water periods. Spring flooding in the Peace-Athabasca Delta, which historically occurred every two or three years, contributed to the following natural phenomenon:

> The spring flood stages . . . had the effect of slowing the normal, long-term deltaic development, and held much of the area at an early successional stage . . . the frequent disturbances of the delta vegetation by flooding resulted in a diverse vegetation mosaic of extremely high value to wildlife.[19]

The Peace River played the most crucial role before the Bennett Dam was built, serving as a natural hydraulic dam at the northern edge of the delta, and determining the flow of water north from Lake Athabasca and the Peace-Athabasca Delta into the Slave River system.[20] John Macoun, a botanist with the Geological Survey of Canada, described the water patterns of the delta in 1875:

> Quatre Fourches discharges part of the waters of Lake Athabasca into the Peace when the latter river is low in the fall, but in the spring the current is reversed, and the waters of the Peace pass by it into the lake. The whole country around the South and West sides of Lake Athabasca is a vast alluvial plain, elevated but a very few feet above the level of the lake, and some years much of it remains permanently flooded.[21]

The 1996 *Northern Rivers Basin Study* also concluded that the flow of water in the Peace-Athabasca Delta is fundamental to its unique environmental features. When flooding of the Peace River results in water levels higher than that of Lake Athabasca, water flows south into Lake Athabasca and the Peace-Athabasca Delta. The flow reversal or "backflooding" in the Chenal des Quatre Fourches, Revillon Coupé, and Rivière des Rochers caused by high Peace River water levels played an integral role in maintaining the wetlands and "perched basins" of the Peace-Athabasca Delta and IR 201. The "perched basins" consist of a number of small lakes that were replenished

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[19] Jeffrey E. Green, "A Preliminary Assessment of the Effects of the W.A.C. Bennett Dam on the Athabasca River Delta and the Athabasca Chipewyan Band," Vancouver: The Delta Environmental Management Group Ltd., 1992, pp. 21-22 (ICC Exhibit 2A, tab 7, ICC pp. 466-67) (hereinafter cited as Green, "Preliminary Assessment").

[20] Green, "Preliminary Assessment," pp. 6-7 (ICC Exhibit 2A, tab 7, ICC pp. 451-52).

[21] As quoted in W.A. Fuller and G. H. La Roi, *Historical Review of Biological Resources of the Peace-Athabasca Delta* (Edmonton: University of Alberta, Water Resources Centre, 1971), 157 (ICC Exhibit 2A, tab 9, ICC p. 555) (hereinafter cited as Fuller and La Roi, *Historical Review of Biological Resources*).

only through periodic overland flooding caused by spring ice jams on the Peace River.[22] The effect of the Bennett Dam on the perched basins and other features of the delta will be discussed later in this report.

The Chipewyan People and the Peace-Athabasca Delta

The earliest written accounts to mention the Chipewyan indicate that they inhabited a large area of the barren lands and transitional forests between Hudson Bay and Great Slave Lake. The traditional land areas used by the Athabasca Chipewyan First Nation encompassed the southern shores of Lake Athabasca in Saskatchewan and Alberta and the drainage basin of the Athabasca River in the area of the Athabasca Delta.[23]

The Chipewyan gradually adapted their culture to the fur trade and pushed into Athabasca country as trading posts opened in the interior in the late 18th century. By the early 1800s, the Chipewyan were well established around Lake Athabasca and were expanding up the Peace and Athabasca Rivers.[24] The fur trade at Lake Athabasca began in earnest in 1788, when Roderick Mackenzie established a post on Old Fort Point for the North West Company. Some time before 1802, the North West Company moved its post to the north shore of Lake Athabasca near the modern site of Fort Chipewyan. The Hudson's Bay Company and the XY Company[25] also established posts in the area between 1791 and 1814. In 1821, the Hudson's Bay Company and the North West Company amalgamated, and Fort Chipewyan became the headquarters for the trade in the Athabasca District.[26]

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22 *Northern Rivers Basin Study*, 22-23 (ICC Exhibit 3).

23 Green, "Preliminary Assessment," p. 1 (ICC Exhibit 2A, tab 7).

24 J. Pollock, "Early Cultures of the Clearwater River Area," Alberta Culture, Historical Resources Division, Archaeological Survey of Alberta, *Occasional Paper #6* (1978), 13-14.

25 XY Company, also known as the New North West Co., used this name to distinguish its goods from those of the North West Company. It merged with the North West Company in about 1804: *The Canadian Encyclopedia*, 2d ed. (Edmonton: Hurtig, 1988).

26 G.H. Blanchet, "Emporium of the North," *The Beaver*, Outfit 276 (March 1946), 33-34.

Trading posts were typically established on pre-existing native trade routes and in areas where game and fish were plentiful. Renowned Canadian historian Olive Dickason stated that the bountiful resources of this area accounted for the decision of early European traders to locate Fort Chipewyan in the heart of the delta.[27] Fort Chipewyan was strategically placed, giving traders access to extensive river systems of the north and opening up trade to the west through the mountains. Fort Chipewyan would shortly become the North West Company's most important trading post in the north, accounting for a large proportion of its total business in fur.[28]

Alexander Mackenzie, who wintered near Lake Athabasca in 1787, wrote of a great bounty of furs and fish, and "during a short period of the spring and fall, great numbers of wild fowl frequent this country, which prove a very gratifying food after such long privation of flesh meat."[29] The traders living at the fort easily harvested the plentiful game and, in particular, the rich local fish stocks to sustain themselves when not trapping.

The Chipewyan and Cree in the area also flourished in the delta. John Macoun, who travelled down the Peace River by canoe in 1875, wrote that the people living in the delta region were primarily flesh eaters who were not predisposed to agricultural pursuits, but the abundant game and fish in the delta were regularly harvested by the Chipewyan people.[30]

In 1899, Canada dispatched a party to the north for the purpose of concluding Treaty 8 with the various bands. One of the members of that party, Roderick MacFarlane, a former Chief Factor for the Hudson's Bay Company, described their encounters with the wildlife of the delta region. As he and the others crossed Lake Athabasca's western limits from Fort Chipewyan, the party found themselves "skirting the most extensive marshes and feeding grounds for game in all Canada; the

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[27] Olive P. Dickason, *Canada's First Nations, A History of Founding Peoples from Earliest Times* (Toronto: McClelland and Stewart, 1992), 202.

[28] Olive P. Dickason, *Canada's First Nations, A History of Founding Peoples from Earliest Times* (Toronto: McClelland and Stewart, 1992), 202-04.

[29] As quoted in Fuller and La Roi, *Historical Review of Biological Resources*, 153 (ICC Exhibit 2A, tab 9, ICC p. 553).

[30] Fuller and La Roi, *Historical Review of Biological Resources*, 157 (ICC Exhibit 2A, tab 9, ICC p. 555).

delta is renowned throughout the north for its abundance of waterfowl, far surpassing the St. Clair flats, or other regions in the east."[31]

In 1893, an American zoologist from the State University of Iowa, Frank Russel, spent five weeks collecting various samples of waterfowl at Fort Chipewyan. He provided one of the most accurate descriptions (from a scientific perspective) of the Peace-Athabasca Delta to that date:

> The Athabasca and Peace River are both fed by the melting of mountain snow and both carry an immense quantity of mud and driftwood into their deltas, which have been extended several miles from the hills that mark the original boundaries of the lake . . . These channels swarm with muskrats and in the migratory season myriads of waterfowl halt upon the battures[32] to feed, while a comparatively small number remain during the summer to breed in the adjoining marshes. More geese and ducks are killed there than at all other posts in the north. The big and little waveys (snow geese) are the most abundant and the most highly prized though swans and Canada geese, ducks and cranes abound.[33]

In the 20th century, there have been numerous surveys of the extensive biological networks of the Peace-Athabasca Delta. The delta was regarded as possessing one of the most diverse concentrations of biological species in North America. The complex hydrology of the delta was also frequently remarked upon by the visitors to the basin region early in this century.

Treaty 8

On June 21, 1899, Treaty 8 was signed at Lesser Slave Lake. Its written terms state that the "Cree, Beaver, Chipewyan and other Indians" inhabiting the area ceded to Canada approximately 324,900 square miles of land in northern Alberta, northeastern British Columbia, northwestern Saskatchewan

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[31] Fuller and La Roi, *Historical Review of Biological Resources,* 157 (ICC Exhibit 2A, tab 9, ICC p. 557).

[32] "Battures" is defined as "a shoal or rocky shore, usually exposed at low water," "an expanse of river beach," or "a sand bar, especially one that forms a small island when the water is low," in *A Dictionary of Canadianisms* (Toronto: Gage, 1967).

[33] Fuller and La Roi, *Historical Review of Biological Resources,* 157-58 (ICC Exhibit 2A, tab 9, ICC pp. 556-57).

and southern North-West Territories.[34] Because the area was so vast, it was impossible to have all interested Indians represented at the Lesser Slave Lake negotiations, and so, in the months that followed, the Treaty Commissioners travelled to different locations in the ceded area to negotiate with other bands. By 1914, some 32 bands had adhered to the terms of Treaty 8.[35] On July 13, 1899, Treaty Commissioners J.A.J. McKenna and J.H. Ross met with two bands – one Cree and one Chipewyan – at Fort Chipewyan on Lake Athabasca. Chief Alexandre Laviolette and headmen Julien Ratfat and S. Heezell signed the adhesion to Treaty 8 on behalf of the Chipewyan Band.[36]

In the 1880s, railway construction and public works projects expanded northward in Alberta. As a result, the Hudson's Bay Company and the Indians to the north of the Treaty 6 area petitioned for a treaty. The Crown initially declined to enter into treaty in this area but with the discovery of gold in the Yukon in 1896, interest in the treaty-making process was renewed. The Yukon gold rush caused a large number of non-Indians to pass through what is now northern Alberta and Saskatchewan. An Order in Council dated June 27, 1898, gave federal Treaty Commissioners discretion to decide what territory would be included within the treaty area. Treaty Commissioner Laird explained how boundaries of the Treaty 8 area were determined:

> The scope of the Commissioners' instructions was to obtain the relinquishment of the Indian and Halfbreed title in that tract of territory north of Treaty 6 to which Governmental authority had to some extent been extended by sending Northwest Mounted Police there to protect and control whites who were going into the country as traders, travellers to the Klondike, explorers, and miners. The territory, watered by the Lesser Slave Lake, the Peace and Athabasca Rivers, the Athabasca Lake, the South of Great Slave Lake and their tributaries, was where these whites were finding

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[34] *Treaty No. 8, Made June, 1899 and Adhesions, Reports, Etc.* (Ottawa: Queen's Printer, 1966), 12 (hereinafter *Treaty No. 8*).

[35] Dennis Madill, *Treaty Research Report: Treaty Eight* (Ottawa, DIAND, 1986), 109.

[36] *Treaty No. 8*, 16-17. It should be noted that, although the Cree Band and the Chipewyan Band were two distinct bands, they operated under one administration referred to as the Athabasca Cree Chipewyan Band until 1978: see testimony of Lawrence Courtoreille in ICC Transcripts, November 27, 1996, pp. 127-28, 161.

> their way, and the Commissioners did not deem it necessary to extend Treaty 8 farther than they did.[37]

In February 1899, Commissioner Laird issued instructions to the government's field representatives to clarify the "misleading reports . . . being circulated among the Indians" of the area and to assure them that their right to hunt, fish and trap would be protected under the proposed treaty:

> You may explain to them that the Queen or Great Mother while promising by her Commissioners to give them Reserves, which they can call their own, and upon which white men will not be allowed to settle without payment and the consent of the Indians before a Government officer, yet the Indians will be allowed to hunt and fish over all the country as they do now, subject to such laws as may be made for the protection of game and fish in the breeding season; and also as long as the Indians do not molest or interfere with settlers, miners or travellers.[38]

The written terms of Treaty 8 provided for annuities, education, agricultural assistance, and "reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves." The Indians were also promised that they would have "the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered . . . subject to such regulations as may from time to time be made by the Government . . ."[39]

With respect to the establishment of reserves, the Indians told the Treaty Commissioners that they were primarily concerned with protecting and continuing in their traditional hunting, fishing, and trapping economy. This is confirmed by the following excerpts from the Commissioners' Report for Treaty 8:

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[37] René Fumoleau, *As Long As This Land Shall Last* (Toronto: McClelland and Stewart, 1975), 60, quoted in ICC, *Athabasca Denesuline Inquiry into the Claim of the Fond du Lac, Black Lake, and Hatchet Lake First Nations* (Ottawa, December 1993), reprinted (1995) 3 ICCP 27.

[38] Commissioner D. Laird to "Sir," February 3, 1899, National Archives of Canada (hereinafter NA), RG 10, vol. 3848, file 75236-1 quoted in ICC, *Athabasca Denesuline Inquiry into the Claim of the Fond du Lac, Black Lake, and Hatchet Lake First Nations* (Ottawa, December 1993), reprinted (1995) 3 ICCP 28.

[39] *Treaty No. 8,* 12

> There was expressed at every point the fear that making of the treaty would be followed by the curtailment of the hunting and fishing privileges . . .
>
> We pointed out . . . that the *same means of earning a livelihood would continue after the Treaty as existed before it*, and that the Indians would be expected to make use of them. . . .
>
> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. . . . *we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of Indians and were found necessary in order to protect the fish and fur bearing animals would be made, and they would be as free to hunt and fish after the treaty as they would be if they never entered into it.*[40]

The Treaty 8 Commissioners were aware that the northern people's traditional way of life based on hunting, fishing, and trapping would continue to provide them with a viable means of making a living. It is for this reason that the Indians did not want to be limited to reserves and, for the most part, did not want to take up farming. At Fort Chipewyan, a Catholic missionary recorded this discussion between the Indians and Treaty Commissioners in his diary:

> The Commissioner explained the Government's views and the advantages it offered to the people. The Chief of the Crees spoke up and expressed the conditions on which he would accept the Government's proposals:
>
> 1. Complete freedom to fish.
> 2. Complete freedom to hunt.
> 3. Complete freedom to trap.
> 4. As himself and his people are Catholics, he wants their children to be educated in Catholic schools.
>
> In his turn, the Chipewyan spokesman set the same conditions as the first speaker. The Commissioner acknowledged all the requests which both had voiced.[41]

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[40] *Treaty No. 8*, 6. Emphasis added.

[41] Quoted in René Fumoleau, *As Long As This Land Shall Last* (Toronto: McClelland and Stewart, 1975), 77.

Father Gabriel Breynat also witnessed the treaty at Fort Chipewyan and later wrote:

> Discussions were long enough but sincere; Crees and Chipewyans refused to be treated like Prairie Indians, and to be parked on reserves. . . . It was essential to them to retain complete freedom to move around.[42]

At the conclusion of the Treaty 8 negotiations, the Commissioners reported to the Superintendent General of Indian Affairs that the selection and survey of reserves could wait until some future date, when they were required to protect a band's land base:

> The Indians are given the option of taking reserves or land in severalty. As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of land ceded, in the event of settlement advancing.[43]

Selection and Survey of Athabasca Chipewyan Indian Reserves

In the period immediately following the treaty, the Chipewyan Band of Fort Chipewyan continued to follow its traditional pursuits in relative prosperity with minimal interference from government officials and non-Indians. The Department of Indian Affairs did not establish an agency in the area until 1911 and contact with federal officials was limited to the annual treaty annuity payments. Reports of these visits were typically short and without detail, but they do provide some information about the livelihood and well-being of the band. In 1903, for example, the Treaty 8 Inspector, H.A. Conroy, reported on his stop at Fort Chipewyan:

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[42] Quoted in René Fumoleau, *As Long As This Land Shall Last* (Toronto: McClelland and Stewart, 1975), 78.

[43] *Treaty No. 8*, 7.

> We paid the annuities of the Chipewyans and Crees. These Indians also had been very successful in their hunts, as they had sold large quantities of furs to the Hudson's Bay Company and traders. They had no sickness nor epidemics. Fish was very plentiful and they were very prosperous, fur bringing good prices.[44]

By 1918, railways had been built to Peace River Crossing and Fort McMurray, and steamers were operating on the Peace and Athabasca Rivers, both of which provided non-Indian and Métis trappers from the south with easy access to the abundant fur supply in the Fort Chipewyan area. The influx of trappers into the area soon began to cause a decline in fur harvests, and by the early 1920s, the Indians of northern Alberta were asking the Department of Indian Affairs for protection of their way of life.

At the treaty payments at Fort Chipewyan in 1922, the Cree Band and "some 50 members of the Chipewyan Band, living at the mouth of Birch River" complained to the Agent about the "outsiders," and the Agent recommended that approximately 4000 square miles be set aside as a hunting preserve for the exclusive use of these Indians:

> in my opinion, the only effective way to protect their interests would be to apply for a hunting and trapping Reserve in that district in which they have their homes and have always lived. I have outlined on the attached map the district which they desire reserved. . . . [T]he district is much larger than the amount of land guaranteed by treaty. But, as the greater part of the district is swamp and marsh ground, not suitable for farming or grazing, it would appear to me, that it might justly, viewed from the Indian standpoint, be set aside as a trapping reserve, and set aside for them, as from time immemorial, they have used it for this purpose. The Indians have no other way of making a living, constituted as they are, than by hunting and trapping.[45]

Chief Laviolette and other members of the Band made their first formal request for this land as early as 1922. The area requested was much larger than what they would later receive, but the

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[44] Report from Inspector for Treaty No. 8, October 5, 1903, in Canada, Parliament, *Sessional Papers*, 1904, "Annual Report of the Department of Indian Affairs for the Year Ending June 30, 1903," 234-36.

[45] J. Card, Indian Agent, Fort Smith, NWT, to [Department of Indian Affairs, Ottawa], July 5, 1922, NA, RG 10, vol 7778, file 27134-1.

Peace-Athabasca Delta was definitely the desired location, and they emphasized the fact that they needed the land to continue their traditional vocations:

> I have consulted the matter with my own people and the Cree Band. We are now asking for as hunting reservation, according to the size of the population of the two tribes, at the present time, viz. From the old Fort on the Athabasca River to Jack Fish Creek on the Peace River, down to the Junction of the Peace and Athabasca River, from there to Big Bay on the north shore of Athabasca Lake and across the Lake to the south shore, and up to the boundary and back to Old Fort.
>
> The above mentioned will give us the sufficient ground for hunting, trapping and fishing we want big enough hunting reserve for all of us to make a living on, in hunting, trapping and fishing.
>
> We can not go in for farming as we know farming will never be a success down here.
>
> We are all signing this to show that we are all ask for the above reserve. There are lots of white men who are trapping during the closed season, we want them stopped.[46]

In the years that followed, while federal authorities negotiated with the provincial government for larger hunting preserves, the Cree and Chipewyan Bands at Fort Chipewyan actively campaigned for a survey of its reserve. In 1923, a delegation of the bands travelled to Edmonton at their own expense where they met with the Minister of the Interior to press their case.[47] The matter was also discussed with government officials during the annual treaty payments.

By 1926, the competition for fur resources in the area became critical. In that year, the boundaries of neighbouring Wood Buffalo Park were extended to include much of the Peace delta, Lake Claire, Lake Mamawi, and areas as far west as the Athabaska and Embarrass Rivers. Non-Indian trappers who were excluded from the park moved into the Jackfish Lake area where the Indians traditionally trapped. The situation became so tense that, in the summer of 1926, the Indians retaliated against non-Indian encroachment by setting forest fires in the hunting grounds.[48]

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[46] Jonas Laviolette, Chief, and others, Fort Chipewyan, to Indian Agent, Fort Smith, July 1, 1922, NA, RG 10, vol. 7778, file 27134-1.

[47] Card to D.C. Scott, May 22, 1924, NA, RG 10, vol. 6732, file 420-2B.

[48] D.C. Scott to G. Hoadley, Minister of Agriculture for the Province of Alberta, July 17, 1926, NA, RG 10, vol. 6732, file 420-2B.

In February 1927, Chipewyan Chief Jonas Laviolette wrote a long letter to "The Chief of the Indian Department" in Ottawa. His frustration is evident as he described the problems created by the non-Indian trappers in the area and the absolute necessity of a reserve:

> I hope you will not mind me writing this letter to you but I have been waiting so long to hear from you that I think you have forgotten all about me and my people from Fort Chipewyan. . . . I told you in Edmonton that the white trappers where [sic] going to spoil my country and what I said then has come true. My country is just about ruined.
>
> The white men they kill fur with poison, they trap in the sand before the snow comes. They break the rat house and they break the beaver house and now there is hardly anything left and if you don't do something for us we are going to starve . . .
>
> For a long time now I have been begging for a Reserve for me and my people at Jackfish Lake and we still want this very badly. I hope you won't mind me writing this to you but it is no good sending this letter to Mr. Card he does not seem to try to help us. Why doesn't he come down here and try and stop these trappers doing wrong to us. No one seems to care what happens to us. There are lots of men here looking after Buffalo, no one looking after us. We only see Mr. Card once a year and then only for a few hours. . . .
>
> The white trapper comes here and kills all here then moves to another country. We cannot move and we don't want to because our fathers father's used to live here and want our children to live here when we die. Jackfish Lake use to be fine rat country but they don't get a change to breed up because there are more trappers than rat. If you will give us this country for a Reserve and someone to help us look after it will save me and my people from starvation. Thirty years ago it was a fine country because just the Indians lived in it. . . .
>
> From Jackfish Lake it is not far to the Buffalo Park and we like our Reserve to join to that line. And from Jackfish Lake we would like it to go to the big lake because there we can catch the fish. We are afraid to ask for too much hunting land for our Reserve because you may not give us what we want, but we want to have some land to call our own, where we can hunt and fish and grow a little potatoes. If we get this Reserve, the white trappers and the half breeds cannot bother us . . .[49]

At one of the Commission's community sessions, Mrs Victorine Mercredi told the Commission:

> In 1928 Chief Jonas Laviolette requested for a piece of land which is known [as] Reserve 201 today for the Band members only because there were a lot of people

[49] Jonas Laviolette, Chief of Fort Chipewyan Indians, to Chief of the Indian Department, Ottawa, February 20, 1927, NA, RG 10, vol 6732, file 420-2B.

> coming in and people were starting to mix up and it was creating a problem for everybody. So he requested the land, the delta just for trapping for the people.[50]

Despite Chief Laviolette's entreaties, federal authorities took no action to set aside reserve land until 1931, when increased mineral exploration in the area threatened the most desirable locations already selected by the Indians as reserves. In the summer of 1931, H.W. Fairchild, a surveys engineer employed by the Department of Indian Affairs, was instructed to meet with the Indians to define reserve locations "in accordance with the terms of Treaty No. 8 and according to their population at this year's Treaty payment."[51] Fairchild met the Chief and various band members after treaty annuities were paid in July 1931 and determined that Indian houses, gardens, cemeteries, and fishing grounds were located at various sites, including five small areas on the south shore of Lake Athabasca and on the eastern edge of the delta, and another two sites up the Athabasca River at Point Brule and Poplar Point. Seven small reserves, identified as Indian Reserves 201A to 201G, were surveyed that summer. The reserves ranged in size from 10.7 acres to 2237 acres for a total of 4.4 square miles of land.[52]

Establishing the boundaries of IR 201, the main reserve in the delta, was not as straightforward. Before Fairchild and the survey party had left Edmonton, they had approached Alberta government officials for permission to deviate from the standard practices by, first, granting acreage in excess of the treaty provisions because of the marshy nature of the land and, second, by accepting natural water boundaries, which could be identified from aerial surveys. Alberta officials deferred their response to this request, and the survey party in the field in the summer of 1931 traversed only the eastern boundary of the proposed reserve. It was not until 1935 that federal and provincial governments finally agreed on certain natural boundaries and an area somewhat larger than the 68 square miles required by treaty.[53] According to the survey plan, the area set aside for the

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[50] ICC Transcript, November 27, 1996, p. 135 (Victorine Mercredi).

[51] A.F. MacKenzie, Secretary, Department of Indian Affairs, to H.W. Fairchild, Surveys Engineer, Caughnawaga, PQ, June 9, 1931, NA, RG 10, vol 7778, file 27134-1.

[52] See description of reserves in Fairchild's report to the Secretary, Department of Indian Affairs, December 16, 1931, NA, RG 10, vol. 7778, file 27134-1.

[53] H.W. McGill, Deputy Superintendent General of Indian Affairs, to John Harvie, Deputy Minister, Department of Lands, Edmonton, June 19, 1935, NA, RG 10, vol. 7778, file 27134-1.

Chipewyan Band was 77.5 square miles (49,600 acres) "after deducting the water areas."[54] Certificate of title transferring the land from Alberta to Canada was issued on December 23, 1937, and on June 3, 1954, Chipewyan Reserve 201 was officially established as an Indian reserve by Order in Council PC 1954-817.[55]

In his report on the surveys in 1931, Mr Fairchild described the area within the delta as "a hunter's paradise":

> No. 201 which is the main reserve, lies wholly within "The Delta" and is without a doubt the best revenue producing tract in the north country, as it is a natural breeding ground for fur bearing animals and game birds, which afford both revenue and sustenance for this band of Indians. Thousands of muskrat are taken annually from the area between the East channel of the river and Fletcher Channel.[56]

Map 3 on page 24 shows IR 201 and a number of the isolated basins and waterways that made this reserve a prized area for trapping muskrat.[57] Clearly, both the band and the government knew that this rich hunting and trapping resource was the primary reason for selecting land in the delta for a reserve. When applying to Alberta for the lands in 1935, the Deputy Superintendent General specifically requested that the wording of the transfer from the province reflect the Band's use of the land:

> in order that there be no grounds for misunderstanding that it be stated [in the Order in Council that] these Indians are granted exclusive hunting and trapping privileges within the area. . . .
>
> The Department considers it most important that there be no doubt about the exclusive hunting and trapping privileges, as it is for this reason that so much of the

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[54] Chief Surveyor, Ottawa, to Deputy Superintendent General of Indian Affairs, July 3, 1935, and Deputy Superintendent General H.W. McGill to John Harvie, Deputy Minister, Department of Lands and Mines, Edmonton, August 23, 1935, NA, RG 10, vol. 7778, file 27134-1.

[55] DIAND, Reserve General Register, Reserve 06704 Chipewyan No. 201.

[56] H.W. Fairchild to Chief Surveyor, November 4, 1931, p. 2, and Fairchild to Secretary, Department of Indian Affairs, December 16, 1931, p. 3, in NA, RG 10, vol. 7778, file 27134-1.

[57] This map of IR 201, which shows isolated basins, the location of ditches, and major diversions through levee breaches at Locations "A," "B," and "C," is reproduced from Green, "Preliminary Assessment," p. 20 (ICC Exhibit 2A, tab 7).

> area to which these Indians are entitled under the terms of the Treaty No. 8 is being utilized to obtain an area which is of no other commercial value.[58]

At our community sessions, the elders repeatedly told us that IR 201 was chosen because of the bounty of its flora and fauna, particularly muskrat. The current chief, Archie Cyprien, told the Commission:

> One of the main reasons [th]at that particular location was chosen was because of the muskrat population. It was a prime muskrat location for this whole delta area. And the people and the Chief at that time wanted to assure that we had access to that and that we could make a livelihood . . .[59]

Mr Lawrence Courtoreille of the Mikisew Cree First Nation agreed:

> This was the big area where you could get the best beaver and muskrat. She [Mrs Mercredi] mentioned earlier that there was a lot of struggles between her people and non-Indian people coming into the region because you people coming from the south trying to make it rich through the trapping season.
>
> So in order to accommodate the Chipewyan people, there was negotiations to take a large tract of the Delta, to ensure people continued to benefit from the trapping industry. So as a result, the Chipewyan Reserve #201 was primarily for the economic benefit of trapping and the beaver industry.[60]

Seventy-nine-year-old Victorine Mercredi recounted the poignant words of Chief Jonas Laviolette to his people when the reserve was finally set aside for the Band:

> In the '40s when the reserve was formed and again Chief Laviolette met with these people and he told these Band members, he said I got this land for you, for now and for your children in the future for trapping, for hunting, for fishing. Look after the land good and it will look after you.[61]

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[58] Deputy Superintendent General H.W. McGill to John Harvie, Deputy Minister, Department of Lands and Mines, Edmonton, August 23, 1935, NA, RG 10, vol. 7778, file 27134-1.

[59] ICC Transcript, November 27, 1996, p. 170 (Chief Cyprien).

[60] ICC Transcript, November 27, 1996, pp.169-70 (Lawrence Courtoreille).

[61] ICC Transcript, November 27, 1996, p. 135 (Victorine Mercredi).

Economy and Way of Life on Indian Reserve 201

For generations, the Peace-Athabasca Delta provided a reliable livelihood for the Athabasca Chipewyan, through commercial trapping and by providing food for sustenance. After the fur trade extended into the delta region in the early 18th century, the Chipewyan began to transform their subsistence-based way of life to one closely tied to the trapping of furs for external consumption and commercial profit. Nevertheless, the Chipewyan people also derived most of their sustenance from the delta and its bounty. A 1996 study into the Peace-Athabasca Delta expressed the strong link between the Indians and the delta ecosystem in these terms:

> The intimate connection between these peoples and the land spans generations and provides a source of strength and spirituality. Due to their lifelong experience with the rivers, native elders and other traditional residents embrace a wealth of knowledge regarding the natural cycles of the ecosystem and the changes in the land.[62]

The elders recall the great numbers of muskrat and other animals in the Peace-Athabasca Delta prior to the construction of the Bennett Dam and their reliance on those abundant resources. Elder Victorine Mercredi stated that:

> Reserve 201 was our main source of income for our families, for me and my family. Not only did we trap muskrats but we also trapped fine fur elsewhere. But our main source was for trapping and for our livelihood was muskrat on Reserve 201.
>
> Because there were a lot of muskrats for the people to trap, many families relied on Reserve 201 for our livelihood. By trapping muskrats, men had income and security for their family. They were able to buy their supplies, their food, their clothing for their children, as well as their other needs, like out board motors and so forth and whatever we needed, guns. This was all provided mostly by trapping the muskrats on Reserve 201.
>
> Back then Reserve 201 had lots of water. Because they maintained a steady level of water year round there were muskrats all over the delta. Every little pot hole you would find there were muskrats on it. And by that we had a lot of security.
>
> This Reserve 201 and all the muskrat one day started to decline. At that time people were not aware what was causing the declining of the muskrat in the water because nobody came to them to tell them what was happening.[63]

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62 *Northern Rivers Basin Study*, 25 (ICC Exhibit 3).

63 ICC Transcript, October 10, 1996, p. 39 (Victorine Mercredi).

Elder Eliza Flett confirmed that, besides muskrat, her people "trapped for other fur bearing animals on reserve like mink, fox . . . weasles."[64] Elder Daniel Marcel also affirmed that:

> When we have a lot of muskrats, the muskrat also provides food for other fur bearing animals, such as mink, foxes, coyote and even mink. Now, there is almost hardly anything of other fur animals on the reserve. Mink that I used to catch on the delta were big, large in size. In the last few years that I trapped a few mink that I caught were very small and didn't bring any price and no nothing. We used to live by killing muskrats. Now, I don't know how those animals survive out there.[65]

The great reliance which the Athabasca Chipewyan people put in the resources of the reserve is obvious from the following quotation from elder Victorine Mercredi: "To trap muskrat was like going to the bank. It was like having money in the bank because it was that simple. . . ."[66]

Mrs Madeline Marcel, who lived in the delta long before the construction of the Bennett Dam, recalled the diversity of game and fish that were once present there, particularly in the area of IR 201:

> I lived on Reserve 201 on Jackfish Lake since 1937. I lived in the area for 50 some odd years. There were many families living on Reserves back then. We had a lot of resources like from trapping muskrats. The delta had a lot of water and we lived well. Life was very simple and very rewarding living on the reserve because we had a lot of wildlife, like muskrats. Not only by trapping people made their living, they also made a living by trapping other animals like moose, they hunted ducks, they fished. Life was very good to us back then.[67]

The periodic flooding of the delta area was intricately linked to the abundance of plant and animal life. It is equally clear that this flooding was crucial to the maintenance and preservation of IR 201:

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64 ICC Transcript, October 10, 1996, p. 50 (Eliza Flett).

65 ICC Transcript, October 10, 1996, p. 56 (Daniel Marcel).

66 ICC Transcript, November 27, 1996, p. 39 (Victorine Mercredi).

67 ICC Transcript, October 10, 1996, p. 33 (Madeline Marcel).

> The extensive flooding of the Delta recharged lakes and perched basin wetlands throughout the delta, deposited silt and plant seeds, provided nutrients and flushed out decomposed plant materials . . . Annual spring flooding and sedimentation also disrupted plant succession, producing a dynamic and highly productive mosaic of aquatic and terrestrial habitats. This delta ecosystem which was created by these natural conditions was estimated to support at least 250 species of plants, 250 species of birds, 45 species of mammals, and 20 species of fish . . .
>
> For the Chipewyan peoples, the Athabasca delta has for millennia been an integral force in the bond between land and people, culture and spirituality. The delta ecosystem has provided a diverse range of animal and plant foods, medicinal herbs, products for clothing and building, a reliable source of clean water, and other of life's essentials. The network of rivers, creeks, lakes and marshes also provided a natural transportation network allowing native peoples to travel, hunt, fish and trap.[68]

Well into the 1930s, the Department of Indian Affairs' Annual Reports consistently state that the Indians in the north, including the Fort Chipewyan Band, made their living primarily by hunting, fishing, and trapping. These reports were more detailed than they were after World War I, and in 1909 and 1910 the Treaty 8 Inspector estimated that the two bands at Fort Chipewyan caught at least 50,000 muskrat in the spring of 1909 and over 80,000 the following year.[69] From 1947 to 1949, W.A. Fuller studied the muskrat harvest in the delta and made these observations:

> At that time the population was recovering from a low in 1944 - 46 that coincided with low water levels . . . The muskrat harvest of the Wood Buffalo Park portion of the Delta was conservatively estimated at 40,000 - 45,000 animals with wide cyclic variation. About 70% of the trappers' income from fur came from muskrats.[70]

In 1967, a survey conducted by Alberta NewStar revealed that 69.3 per cent of family heads in Fort Chipewyan listed trapping or fishing as an occupation.[71] The Deputy Minister of Indian Affairs in 1970 reported that, before the completion of the dam,

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[68] Green, "Preliminary Assessment," p. 3 (ICC Exhibit 2A, tab 7).

[69] H.A. Conroy, Inspector, Treaty No. 8, to Frank Pedley, Deputy Superintendent General of Indian Affairs, December 30, 1909, Department of Indian Affairs, *Annual Report*, 1909-10, 187, and Conroy to Pedley, November 14, 1910, Department of Indian Affairs, *Annual Report*, 1910-11, 189.

[70] Fuller and La Roi, *Historical Review of Biological Resources* (ICC Exhibit 2A, tab 9, ICC pp.558-59).

[71] Stuart Adams & Associates, "A Changing Way of Life," draft dated January 15, 1996, p. 98 (ICC Exhibit 18) (hereinafter Adams, "Changing Way of Life").

> Indians and Metis in the Fort Chipewyan area previously derived between $100,000 to $250,000 a year from harvesting muskrat, ducks and geese in the Delta and on Lake Athabasca, not to mention the commercial fishing activity. Also there has been a very serious loss of country food resources for these people to which no dollar value can be assigned.[72]

Despite the diversity of animal life in the Peace-Athabasca Delta, the Chipewyan people relied heavily on the muskrat which thrived in the wetlands of the delta. It was a source of fur income in its own right, but it was also a food source to fur-bearing animals, such as mink, fox, and coyote.[73] Periodically there have been short episodes of drought that adversely affected the water levels in the delta and, hence, the muskrat population.[74] However, the evidence before the Commission – whether that evidence is in the form of elders' testimony, historical documents, or expert reports – consistently speaks to the undeniable social and economic benefits the Chipewyan people received through the use of IR 201 for hunting, fishing, and trapping. From all accounts, both written and oral, the delta once provided a good living for the Chipewyan people.

PEACE-ATHABASCA DELTA AFTER THE BENNETT DAM

Construction and Operation of the Bennett Dam

In 1957, Premier W.A.C. Bennett and the British Columbia government initiated plans to develop a large-scale hydroelectric project to harness the immense power-generating potential of the Peace River. In that year, British Columbia entered into an agreement with a Swedish-owned company to survey potential sites for construction of a dam.[75] By 1959, a report to the government estimated that the project would cost approximately $600 million and had the potential to generate up to 4.2 million

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[72] H.D. Robinson, Deputy Minister of Indian Affairs, to J. Austin, Deputy Minister of Energy, Mines & Resources, July 20, 1970 (ICC Exhibit 1B, p. 279).

[73] ICC Transcript, October 10, 1996, p. 35 (Madeline Marcel).

[74] Adams, "Changing Way of Life," p. 52 (ICC Exhibit 18, tab 3). It should also be noted that the Commission did not have before it all relevant information or documentation in relation to the details of the plan to construct the dam, which provincial departments and agencies were involved in the planning and development, and by what authority private firms and companies became involved in the project.

[75] Adams, "Changing Way of Life," pp. 6-9 (ICC Exhibit 18, tab 1).

horsepower for delivery to Vancouver at the going rate of 6 mills (a mill is one-tenth of a cent) per kilowatt hour.[76]

It is clear from the outset of this enormous project that the regulation of the Peace River could potentially have serious adverse effects. A thesis written by Dr Patricia McCormack on the project suggests that, although government officials were aware of potential problems, nothing was done to address these concerns in the planning and construction of the dam:

> B.C. had chosen to dam a river of considerable importance to down-river environments and users. The 1957 report to the B.C. cabinet had suggested that the consequent regulation of the river would benefit both Alberta and the NWT . . . However, . . . B.C. was aware of potential negative impacts of the project but chose to ignore them . . . As Edwin Black concluded form [sic] his analysis of decision-making in B.C., there were few safeguards "... against tyranny and irresponsibility" in provincial decision-making. . . .[77]

In July 1959, a meeting took place between the Alberta government and the Peace River Development Corporation Ltd to discuss concerns related to the effect of the proposed dam on water levels at the town of Peace River, Alberta, and fish spawning in Lake Athabasca. At issue were the ecological consequences of reducing peak flow levels during the spring and increasing the average daily flows during the winter months. By way of comparison, prior to construction of the dam the maximum water flow recorded on the Peace River at Hudson's Hope was 267,000 cubic feet per second (cfs) during the month of June 1952, whereas the minimum recorded flow was 3480 cfs in the month of November in the same year. After construction of the dam, it was expected that the long-term average yearly flow would be approximately 36,000 cfs, with the flow during the winter months from November to April being only about 15 per cent of the total flow (i.e., 5400 cfs).[78] To alleviate the downstream effects of reducing the water flow, the company and the Alberta

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[76] Earl K. Pollon and Shirlee Smith Matheson, *This Was Our Valley* (Calgary: Detselig Enterprises Ltd, 1989), 193.

[77] Patricia A. McCormack, "How the (North) West Was Won: Development and Underdevelopment in the Fort Chipewyan Region," unpublished PhD thesis, University of Alberta, Edmonton, 1984 (ICC Exhibit 2A, tab 8, p. 490). Original citations removed.

[78] Department of Northern Affairs and National Resources, Water Resources Branch, "The Effect of Regulation of the Peace River: Interim Report No. 1," June 1962, p. 9 (ICC Exhibit 1A, tab 3).

government entered into a preliminary agreement stipulating that a minimum of 6000 cfs of water would be allowed to flow across the BC-Alberta border during construction of the dam and while the water reservoir at Williston Lake was being filled.[79]

In 1961, the BC government assumed control of the project when it appropriated the Peace River Power Development Corporation and BC Electric Company and amalgamated the companies to establish the BC Hydro and Power Authority (BC Hydro) as a Crown corporation through the enactment of provincial legislation.[80] Construction of the W.A.C. Bennett Dam, located 965 kilometers west of Athabasca Chipewyan IR 201, near Hudson's Hope, BC, began in April 1962.

It is important to bear in mind that the Bennett Dam project was undertaken before the institution of mandatory environmental assessment procedures, which are currently in place to ensure that such projects comply with certain safeguards and minimum standards. In this case, before provincial licences were granted to proceed with the dam, the BC Department of Lands, Forests, and Water Resources conducted hearings into the project, later described as "inadequate to today's standards and . . . a mere formality."[81] Although it is not clear under what authority construction of the proposed dam proceeded, the BC Comptroller of Water Rights held public hearings into the project on August 2 and October 15, 1962, in Chetwynd and Victoria, BC.[82] The record suggests that a representative of the federal Department of Indian Affairs attended the hearings to make representations on behalf of the Ingenika Band in British Columbia, whose reserve would be flooded by the dam, but "no one, at either hearing, spoke of potential impacts downstream in Alberta"; "[n]or

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[79] Barry Craig, "Peace River Delta May Be Dying Because of Alberta's Indifference," *Edmonton Journal*, September 9, 1970 (ICC Exhibit 2A, p. 576). Although the minutes of this meeting and the preliminary agreement are referred to in the article, copies of the original documents were not furnished to the Commission for its review (hereinafter cited as Craig, "Peace River Delta").

[80] See Adams, "Changing Way of Life," p. 9 (ICC Exhibit 18, tab 1) and *An Act to Establish the British Columbia Hydro and Power Authority*.

[81] Patricia A. McCormack, "How the (North) West Was Won: Development and Underdevelopment in the Fort Chipewyan Region," unpublished PhD thesis, University of Alberta, Edmonton, 1984 (ICC Exhibit 2A, tab 8, p. 489).

[82] Craig, "Peace River Delta" (ICC Exhibit 2A, tab 9, p. 576). What representations, if any, were made by federal officials in these hearings cannot be ascertained because the historical record is incomplete.

did any Canadian government representatives attempt to intervene on behalf of the Chipewyan and Cree people."[83]

Following the hearings, BC Hydro was granted a licence from the Comptroller of Water Rights on December 21, 1962, which provided for minimum flow levels to be released from the dam as follows:

- Dec. 1 to March 31 Calculated natural inflows to the reservoir
- April 1 to July 15 10,000 cfs or the natural flow, whichever is the lesser, as measured near Taylor
- July 16 to Sept. 15 10,000 cfs, as measured near Hudson Hope
- Sept. 16 to Nov. 30 10,000 cfs or the natural flow, whichever is the lesser as measured near Taylor.
- Provided also that a flow of not less that 1000 cfs shall be released from the dam at all times.[84]

Although representatives of the Alberta government did not attend the public hearings, they had been invited in 1959 by BC Minister of Lands and Forests, Roy Williston, to ensure that "the needs of the Peace River in Alberta . . . would be presented at the time of the hearing by responsible authorities."[85] It may be that the Alberta government chose not to attend the hearings because it had already entered into a preliminary agreement in 1959 to ensure a minimum flow level of 6000 cfs at the Alberta border. In any event, when Alberta learned about the licence granted to BC Hydro requiring only a minimum flow of 1000 cfs it sought assurances from the BC government that it would not deviate from the understanding set out in the 1959 agreement. In a letter dated March 26, 1963, BC Minister Williston dismissed the concerns of Alberta Minister of Agriculture Harry Strom, later Premier of Alberta, regarding the status of the agreement:

> With respect to your remarks concerning promises by the Peace River Power Development Company, it is first recorded that this government was not associated

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83 Adams, "Changing Way of Life," pp. 9-10 (ICC Exhibit 18, tab 1).

84 Department of Energy, Mines, and Resources, Inland Waters Branch, "The Effects of Bennett Dam on Downstream Levels and Flows," June 1969 (ICC Exhibit 1B, tab 13, ICC p. 411). Refers to Conditional Water Licence No. 27732 issued by the Province of British Columbia on December 21, 1962.

85 Craig, "Peace River Delta" (ICC Exhibit 2A, tab 9, ICC p. 576).

> with these presentations [sic] and does not feel bound by the pronouncement of its officials.[86]

Construction of the 600-foot-high dam was completed in December 1967, the last diversion tunnel was closed off, and BC Hydro began to regulate the downstream flow of water on the Peace River to fill the Williston Lake reservoir. With the capacity to hold a total volume of 47 million acre-feet of water, Williston Lake then ranked as the eighth largest man-made reservoir in the world.[87] Although it took until 1971 for natural run-off to fill the reservoir completely, the generator units at the dam began producing hydroelectric power by 1968.[88]

Government of Canada's Involvement in the Bennett Dam Project

As early as 1959, the federal government was aware of the dam and its potential impacts downstream. The first indication of the federal Crown's awareness of potential problems with the construction and operation of the dam arises in the context of what impact it might have on navigation throughout the Peace-Athabasca Delta. On December 16, 1959, the Department of

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[86] Craig, "Peace River Delta" (ICC Exhibit 2A, tab 9, ICC p. 576).

[87] Adams, "Changing Way of Life," pp. 6-11 (ICC Exhibit 18, tab 1), and J. Austin, Memorandum to Minister of Energy, Mines, and Resources, July 17, 1970 (ICC Exhibit 1B, tab F, ICC p. 275).

[88] J. Austin, Memorandum to the Minister of Energy, Mines, and Resources, July 17, 1970 (ICC Documents, p. 275).

Northern Affairs and National Resources, Water Resources Branch, produced a preliminary report which "outlined the effects to be expected assuming various methods of filling and operating the reservoir. . . ."[89] Since there was little data available at the time to predict accurately the effects of the dam, the Water Resources Branch conducted a study, resulting in the June 1962 report entitled "The Effect of Regulation of the Peace River: Interim Report No. 1." It states that the dam would "materially affect the regimen of the Peace River and thus the Slave River, Great Slave Lake and the Mackenzie River"; the report went on to say that it was "not obvious without investigation whether the project would be beneficial or detrimental to navigation, but any detrimental effect would probably be most serious during the filling of the reservoir."[90]

It is important to note that the Water Resources Branch was asked to study the potential effects of the dam based on the following flow levels in the reservoir-filling program developed by the Peace River Power Development Company in December 1959:

> There will be no interference with the natural flow of the Peace River until the diversion tunnels are closed and the reservoir commences to fill.
>
> In each year thereafter during the construction period, it is proposed to maintain the following minimum daily average flows at the B.C.-Alberta boundary, except as lesser quantities may be agreed to by the appropriate authorities:
>
> (i) throughout the year, a flow at the rate of 6,000 cfs and subject thereto
>
> (ii) after breakup the natural flow of the river entering the reservoir until the river flow exceeds 20,000 cfs at the boundary
>
> (iii) from this time a flow at the boundary at the rate of 20,000 cfs until the natural flow of the river falls below this figure, and

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[89] Department of Northern Affairs and National Resources, Water Resources Branch, "The Effect of Regulation of the Peace River, Interim Report No. 1," June 1962 (ICC Exhibit 1A, tab 3, ICC p. 56). The 1962 study conducted by the federal government refers to a document dated December, 16, 1959, entitled "Preliminary Investigation into the Effect of Regulation of the Peace River on Lake Athabasca and the Slave River."

[90] Department of Northern Affairs and National Resources, Water Resources Branch, "The Effect of Regulation of the Peace River, Interim Report No. 1," June 1962 (ICC Exhibit 1A, tab 3, ICC p. 56).

> (iv) thereafter the natural flow of the river entering the reservoir until 30 September, subject in the period 1 September to 15 September inclusive to a flow at the rate of 25,000 cfs at the boundary.[91]

Based on these flow levels, the report estimated that water levels in Lake Athabasca would be reduced by 2.5 feet in low water years and 3.5 feet in a high water year, but concluded that "[n]avigation should not be adversely affected once the storage reservoir at Hudson Hope is filled and the power plant is in operation, but such a conclusion would have to be verified when the method of operation becomes known."[92] With regard to the dam's general effect on the delta, the report concluded that:

> The only doubtful area is in Lake Athabasca and the Athabasca River delta, where some dredging is necessary under natural conditions. If the maximum seasonal level of Lake Athabasca were lowered by two or three feet, the water gradients in the delta would be increased. This would undoubtedly cause changes in the delta, but the nature of these changes would be difficult to predict. At the present time it is thought that the delta would move further into the lake, and that it is possible that more dredging might be necessary in the lake in a low water year.[93]

The Commission is wary of placing too much reliance on the conclusions set out in the 1962 report because the licence granted to BC Hydro provided for a minimum flow level of only 1000 cfs at all times. According to a 1969 report by the Inland Water Branch of the federal Department of Energy, Mines, and Resources, the conditions in the licence were modified twice in 1968 to allow a minimum of 1000 cfs from July 16 to September 30, 1968, and a minimum of 10,000 cfs or the natural flow, whichever was less, from the period from December 1, 1968, to March 31, 1969. This 1969 report, however, also addressed navigation downstream from the Peace River and concluded

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[91] Department of Northern Affairs and National Resources, Water Resources Branch, "The Effect of Regulation of the Peace River, Interim Report No. 1," June 1962 (ICC Exhibit 1A, tab 3, ICC p. 3). Note that the minimum flow level provided for in the reservoir-filling program is consistent with the minimum level agreed to between the Alberta government and the Peace River Development Company.

[92] Department of Northern Affairs and National Resources, Water Resources Branch, "The Effect of Regulation of the Peace River, Interim Report No. 1," June 1962 (ICC Exhibit 1A, tab 3, ICC p. 58).

[93] Department of Northern Affairs and National Resources, Water Resources Branch, "The Effect of Regulation of the Peace River, Interim Report No. 1," June 1962, p. 21 (ICC Exhibit 1A, tab 3, ICC p. 59).

that once the dam was in full operation, and assuming an almost constant release of about 36,000 cfs, "the overall effect may be beneficial because of reductions in flood peaks and increases in low flows."[94] The report confirmed that the effects on water levels would be most severe during the period the reservoir is being filled.

On August 12, 1969, a meeting took place between Ray Williston, BC Minister of Lands, Forests, and Water Resources, and an undisclosed federal minister "to discuss water matters of joint interest." An internal memorandum on the consultative meeting with British Columbia confirms that the federal government proposed a special meeting in the fall of 1969 with officials from the Departments of Indian Affairs and Northern Development and Energy, Mines, and Resources and BC officials "to discuss the Bennett Dam problem," but BC officials were "defensive" and claimed that the long-term regulation of the Peace River would improve flows for downstream navigation.[95] The memorandum does not disclose whether the Department of Indian Affairs made any representations to BC officials on behalf of the Athabasca Chipewyan Band or other aboriginal residents of the area.

When BC Hydro began regulating the flow levels of the Peace River to fill the reservoir in 1968, no formal warning of the flow reduction had been given to downstream residents, and no environmental or social studies were undertaken to determine the effects of the dam.[96] Yet, similar studies completed in relation to earlier dam projects on the Kootenay and Columbia River systems indicated that detrimental environmental impacts on fisheries and wildlife downstream of the reservoirs could be anticipated.[97] These studies relating to the Kootenay and Columbia Rivers

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[94] Department of Energy, Mines, and Resources, Inland Waters Branch, "The Effect of Bennett Dam on Downstream Levels and Flows," June 1969 (ICC Exhibit 1B, tab 13, ICC p. 415).

[95] A.T. Davidson to Mr McLeod, August 19, 1969 (ICC Exhibit 1B, tab A, ICC p. 265).

[96] Michael Harvey, Lyndburst Environment Management, Sherwood Park, Alberta, *Impacts of Hydro Projects on Indian Lands in Western Canada: Indian Strategies*, prepared for Resource Development Impacts Directorate, Indian and Northern Affairs Canada, September 30, 1984 (ICC Exhibit 1B, tab Y, ICC p. 331).

[97] For example, see I.L.Withler, "Fisheries Problems Associated with Development of the Peace River and Its Tributaries for Hydro-electric Purpose," B.C. Fish and Wildlife Branch, Fish. Mgmt. Rep. 31, 1959; F.P. Mahler, "A Preliminary Report on the Effects on Fisheries of Four Dams Proposed for the Columbia and Kootenay Rivers in British Columbia." B.C. Fish and Game Branch, Fish. Mgmt. Rep. 34, 1961; G.R. Peterson and I.L. Withler, "Effects on Fish and Game Species of Development of the Duncan Dam for Hydroelectric Purposes," B.C. Fish and Wildlife Branch, Fish. Mgmt. Rep. 8, 1965; I. Smith and S. Harrison, "The Waterfowl and Furbearer

prompted concerns in the mid-1960s among professional biologists in the Canadian Wildlife Service and the Alberta Fish and Wildlife Division regarding the Bennett Dam and the potential for harmful effects on the Peace-Athabasca Delta ecosystem as early as the mid-1960s. Accordingly, in 1965-66, the Canadian Wildlife Service requested funding to conduct an environmental assessment of the delta, but the funding was not granted until 1969.[98]

A 1969-70 preliminary progress report, authored by H.J. Dirschl and released by the Canadian Wildlife Service in March 1970, indicated that the reduced water levels had already had an impact on the water regime, vegetation pattern, and waterfowl use of the delta. The report made the following comments regarding flooding of the delta, the Bennett Dam and the delta region's economy:

> This extensive delta region is maintained through inundation by silt-laden waters, silt deposition, and water retention in shallow basins. The resurgence and retention of water on the delta depends upon the spring and summer flood levels of the Peace, Athabasca, and Birch rivers. Since the filling of the reservoir behind the Bennett Dam was begun in spring, 1968, flows have remained quite low. *Although the total annual flow will slightly increase . . . the discharge pattern will follow the seasonal requirements for electricity in British Columbia. Thus we can expect low discharge in the summer and high flow in the winter – a reversal of the natural water regime . . . This reduction in water area and the concomitant lowering of the water table is expected to cause significant changes in the vegetation pattern, such as encroachment of willows into sedge meadows, and to have detrimental effects on waterfowl and muskrat habitats.*
>
> The Peace-Athabasca Delta is important for waterfowl production, but is particularly renowned as a moulting area and as a staging area for the fall migration of ducks and geese. It has also been a significant producer of muskrats and other furbearers – an important source of income for the approximately 1,500 Indian and Metis residents of Fort Chipewyan and vicinity.[99]

Resources of the Libby Reservoir," B.C. Fish and Wildlife Branch Report, 1969, referred to in Green, "Preliminary Assessment" (ICC Exhibit 1A, tab 1, ICC p. 19).

[98] Green, "Preliminary Assessment" (ICC Exhibit 1A, tab 1, ICC pp. 19-20).

[99] Canadian Wildlife Service, Prairie Migratory Bird Research Centre, Annual Progress Report, 1969-70, H.J. Dirschl, "Ecological Evaluation of the Peace-Athabasca Delta," March 1970 (ICC Exhibit 1A, tab 2, ICC pp. 47-48). Emphasis added.

By 1970, concerns over the environmental impact on the delta began to intensify. On January 11, 1970, an internal memorandum to Jack Davis, the federal Minister of Fisheries and Forestry, recognized the impact the Bennett Dam was having on areas of federal responsibility:

> The problem of low flows in the Peace River, as a result of the Bennett Dam in British Columbia, is a major concern of the Federal Government, because the area primarily affected, that is the Delta of the Athabaska (sic) and Peace Rivers in Lake Athabaska, lies within Wood Buffalo National Park. The Federal Government has responsibilities in addition because lower water levels in Lake Athabaska may affect navigation downstream on the Slave and Mackenzie Rivers. . . .
>
> *Ecologists have stated that a continuation of low water levels in the Athabaska Delta will permanently damage the vegitation (sic) and in turn the animal life. They say that it is especially necessary that high-level flood flows should enter the Delta not later than the spring of 1972, in order to avoid permanent damage.* It is clear that the basic principles of our National Parks, i.e., to preserve examples of Canada's national habitat, may be endangered in this case. *In addition, as a result of damage to fish and muskrat stocks, the welfare of Indians and Metis people in this area is in jeopardy.*[100]

The memorandum also confirms that the federal government organized a Federal-Provincial Task Force (with representatives from Canada, Alberta, Saskatchewan, and British Columbia) to study the ecological and social problems associated with the dam and offer its recommendations within 11 months on remedial measures and "engineering solutions for both the immediate and long term restoration and management of the Delta." However, representation of BC officials on this task force – and others that would follow – was short-lived, and there is no record before the Commission that the task force completed its mandate and made any recommendations in regard to the delta.

In June 1970, an ad hoc group of 13 concerned scientists led by W.M. Schultz submitted a report entitled *Death of a Delta – A Brief to Government* to the Prime Minister of Canada, Pierre Trudeau, and the Premier of Alberta, H.E. Strom, along with "a plea for action to halt further deterioration of the Delta region in Northeastern Alberta." The report summarized the impacts of the Bennett Dam on a broad range of subjects relating to hydrology, national park values, waterfowl use,

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[100] John Mullally, Executive Assistant, Office of the Minister of Fisheries and Forestry, to A.T. Davidson, January 11, 1970 (ICC Exhibit 1B, tab 12B, ICC pp. 266-67). Emphasis added.

fur trapping, fishing and hunting, the local economy, transportation, and recreational and tourist potential. Under the heading "Human Values and Civil Rights," the report states:

> The disruption and dislocation of a way of life for many northern Alberta people have not been considered. They are to be deprived of a means of livelihood without so much as an attempt being made by provincial or federal governments to investigate in advance in what ways the construction of the dam would affect them. They should, as residents of Alberta, have been adequately informed as to the consequences of regulation of the Peace River, and they should have had representations made on their behalf before it was too late to do anything about it.[101]

In view of these concerns, the report recommended that the affected governments take immediate action to study the present and anticipated conditions in the delta with a view towards remedial measures to restore the delta to its pre-dam condition. In the event that such restoration is not possible, the report stated, compensation should be provided to Alberta residents directly affected by the dam.[102]

On July 2, 1970, Alberta Premier Harry Strom wrote to Prime Minister Pierre Trudeau in regard to the concerns raised in *Death of the Delta* and the "growing controversy over the W.A.C. Bennett Dam in British Columbia and its effects on the water levels of Lake Athabasca, particularly with respect to the delta area in the vicinity of Fort Chipewyan." Premier Strom wrote:

> In addition to the observed disbenefits to the trapping industry, and the anticipated adverse results to the commercial fishing industry over the entire lake, affecting the livelihood of 1,500 people, a wildlife habitat of 1,000 square miles is being subjected to drastic change. Although it is difficult to predict at this time what the final outcome of this change might be, indications are that Canada will lose one of the most significant natural ecological environments to be found anywhere on the North American Continent.
>
> The widespread ramifications of the situation have given Alberta cause for concern. However, the problem is not of Alberta's making. The majority of the

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[101] Peace Athabasca Delta Committee, *Death of a Delta - A Brief to Government* (Edmonton: Peace Athabasca Delta, 1970) (ICC Exhibit 2A, tab 9, ICC p. 594).

[102] Peace Athabasca Delta Committee, *Death of a Delta – A Brief to Government* (Edmonton: Peace Athabasca Delta, 1970) (ICC Exhibit 2A, tab 9, ICC p. 599).

> affected area is under Federal jurisdiction, and the ramifications of the problem, as well as its cause, have national implications. Therefore, the Government of Alberta contends that the Government of Canada has a responsibility and an obligation to rectify the present situation. I am sure you will agree only Canada can be held responsible for any detrimental effects that may accrue in the future.[103]

Premier Strom requested that Canada take "some remedial action, even if only temporary or experimental in nature," before it was "too late to effectively salvage the situation at all." For its part, Alberta had already undertaken studies and data collection through the Water Resources Division.

Premier Strom's letter triggered a flurry of activity within federal government agencies and departments. On July 13, 1970, the Deputy Secretary to the Cabinet (Federal-Provincial Relations) wrote to the Deputy Minister of Energy, Mines, and Resources, J. Austin:

> The Department of Indian Affairs and Northern Development has, of course, a direct interest as it relates to national parks territory, wildlife within the parklands, and the economic condition of Indian populations; and the Department has considerable background knowledge at its disposal on this problem. Other federal departments will also have certain interests. I believe, however, this question has ramifications which go beyond what remedial action may be taken in Alberta and the North West Territories insofar as they relate to the control of water resources and involve the possibility of negotiations with the Province of British Columbia.[104]

The Deputy Minister was, therefore, requested to convene a meeting among all interested departments, including the Privy Council Office, and prepare a letter of response for the Prime Minister's signature.

Deputy Minister Austin responded on July 17, 1970, in a detailed memorandum to his Minister regarding the Peace-Athabasca Delta and the Bennett Dam. Key excerpts from Austin's comprehensive memorandum are set out below:

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[103] John A. MacDonald, Deputy Minister, Public Works, to J. Austin, Deputy Minister, Energy, Mines and Resources, Ottawa, August 14, 1970 (ICC Exhibit 1B, tab 12N, ICC pp. 271-72).

[104] E. Gallant, Deputy Secretary to the Cabinet (Federal-Provincial Relations), Privy Council Office, to J. Austin, Deputy Minister, Energy, Mines and Resources, Ottawa, July 13, 1970 (ICC Exhibit 1B, tab 12E, ICC p. 273).

1. Bennett Dam was licensed in 1962 by the Comptroller of Water Rights of British Columbia. Advised by Public Works that a federal permit was required under the *Navigable Waters Protection Act,* the province refused to make application on the ground that the Peace River was not considered navigable at the dam site. Public works referred the matter to the Department of Justice which opined that the Act did apply. *Public Works decided not to press the province, although a memo dated April 18, 1967 by the Deputy Minister of that Department to his Minister indicates that the dam is considered illegal.*

2. The total volume of water to be held in the reservoir behind Bennett Dam is 57 million acre-feet, making it the eighth largest man-made reservoir in the world . . . Minimum releases from the reservoir were governed by the 1962 conditional water license granted by the province. However, in the spring of 1968 outflows were reduced from the 10,000 c.f.s. requirement of the licenses to about 1,000 c.f.s. Low natural runoff at this time aggravated the situation throughout the Mackenzie system.

3. The Schultz Report erroneously attributes the low water levels in the Athabaska [sic] Delta entirely to the Bennett Dam. In fact, the hydrological and ecological effects noted resulted from an unfortunate coincidence of rapid filling of the reservoir behind Bennett Dam *and* below normal precipitation during this period . . .

4. *Damage to wildlife habitat in the vicinity of Lake Athabaska has been immediate and severe.* Some problems for downstream navigation were also experienced (there were other contributing factors here). Over the long-term in which the Peace flows are regulated by the Bennett Dam, the induced changes in river regime should prove beneficial for navigation on the Mackenzie system. *But as a consequence of the elimination of normal spring flooding, ecological changes will still occur, if less drastically than initially. The ultimate effects of a controlled river on channel scouring, on sedimentation and bank slides, as well as on plant and animal life which had adapted to the natural patterns of fluctuating flow, remain to be determined.*

5. The Schultz report recommends that the outflows of Lake Athabaska be obstructed as a temporary measure to maintain higher levels in the lake . . .

6. The major federal interest involved in the controversy would appear to be:

(a) Navigation. Public Works procrastinated over whether to invoke the *Navigable Waters Protection Act* until it was too late to exert much influence on B.C. Hydro and Power Authority.

(b) Fisheries. The Winnipeg office of Department of Fisheries was of the opinion in the summer of 1968 that the fisheries on the Slave River would not be harmed unless levels fell below those forecast at that time.

(c) Wildlife. National Parks. The Migratory Birds Treaty as administered by the Canadian Wildlife Service and National Parks policy as administered by the National and Historic Parks Branch seemed to play no important role in the earlier stages of the controversy. Both agencies were in the former Department of Northern Affairs and National Resources, but little consultation seems to have taken place on the Peace developments between them and the Water Resources Branch of that Department.

(d) Federal Proprietary Rights in Indian Reserves and in the Northwest Territories. *Damages from reduced flow downstream on riparians which included an Indian reserve and trapping and navigation users in the Territories might have been used to make representation to British Columbia, but were not.*

(e) Interprovincial River Conflict. Federal involvement to resolve a controversy between two provinces over the use of a common river was made difficult because the province of Alberta never registered any formal complaint, to the best of our knowledge.

Federal agencies throughout seemed to take little active interest in the Peace development beyond downstream navigation.[105]

On July 20, 1970, the Deputy Minister of Indian Affairs, H.B. Robinson, wrote a letter to Deputy Minister Austin identifying his Ministry's "vital interest" in the impacts of the Bennett Dam:

> Indians and Metis in the Fort Chipewyan area previously derived between $100,000 to $250,000 a year from harvesting muskrat, ducks and geese in the Delta and on Lake Athabasca, not to mention the commercial fishing activity. Also there has been a very serious loss of country food resources for these people to which no dollar value can be assigned. These resources are all now in jeopardy with grave social consequences and the prospect of sharply accelerating welfare costs for this department as well as for the province . . .
>
> Finally, the Delta and the shallow lakes surrounding it form a unique part of the Wood Buffalo National Park and the drastic alteration in the ecology of such a large area reduces park values very significantly . . .

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[105] J. Austin, Deputy Minister, Energy, Mines and Resources, Ottawa, Memorandum to the Minister, July 17, 1970 (ICC Exhibit 1B, tab 12F, ICC pp. 275-76).

> I am told that solutions to the problem will be difficult and could be very costly because of the soil and hydrological characteristic of the Peace-Athabasca Delta. *A much simpler method might be, by arrangement with British Columbia, to arrange for an artificial release of waters from the dam which would, as far as possible, duplicate the spring flood conditions . . .*
>
> The downstream problems associated with the Bennett Dam illustrate additional complex factors which I believe must be taken into account in relation to all water impoundment schemes in the future. In this particular instance the leadership role which I think the Federal Government must play in developing policies and programs is reinforced by the special impact this dam has had in social and ecological terms upon federal interests.[106]

Robinson offered to provide input into the Prime Minister's draft letter of reply to Premier Strom and suggested that a meeting be arranged with interested departments to discuss the matter.

On August 7, 1970, a letter from an undisclosed author in Ottawa to J.J. Greene, Minister of Energy, Mines, and Resources, expressed concerns over the environmental problems in the delta and placed part of the responsibility at the feet of the federal government:

> I find the brief [*Death of a Delta - A Brief to Government*] an objective and oppressive statement of what seems to me to be a disaster attributable in part to the inadequate planning. The fact that most of the Delta lies within a national park implicates the federal government in more ways than one. The fact, too, that some 1,300 Indian and Metis people make a subsistence living in this area is also of serious concern from the federal viewpoint.[107]

Following an intensive round of internal consultations, Prime Minister Trudeau responded to Premier Strom's letter on August 12, 1970. He wrote that he shared Premier Strom's concerns regarding the environmental and social consequences of the Bennett Dam and noted that updated information had allowed a clearer picture of the dam's consequences on the delta to emerge. Trudeau's letter went on to outline a proposed strategy to address mutual concerns:

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[106] H.B. Robinson, Deputy Minister, Indian Affairs and Northern Development, to J. Austin, Deputy Minister, Energy, Mines and Resources, Ottawa, July 20, 1970 (ICC Exhibit 1B, tab 12G, ICC pp. 279-80).

[107] To J.J. Greene, Minister of Energy, Mines and Resources, Ottawa, August 7, 1970 (ICC Exhibit 1B, tab 12K, ICC p. 286). The author of this letter was not disclosed on account of section 19(1) of the *Access to Information Act.*

> This does now appear to be a situation in which the consequences of inaction on the part of the government concerned would be most unfortunate. As a first concerted step, therefore, it seems to me that we should seek to make sure that we have a common understanding of the causes, damages and possible remedies. I have asked the Minister of Energy, Mines and Resources to undertake responsibility on the federal side for organizing whatever action is necessary to arrive at this common understanding. I would now like to suggest that there be a meeting of officials to exchange information and undertake a joint examination of the many aspects of this problem as soon as possible. If you are in agreement, and if the Government of British Columbia also agrees, I would hope that such a meeting could take place in late September.[108]

Prime Minister Trudeau wrote a similar letter to Premier Bennett on the same day, but this letter is different in that it reminds the Premier that the "increasingly severe social and environmental conditions existing in Lake Athabasca and the delta area" may have an impact on federal responsibilities relating to "national parks territories, to wildlife within the parklands and to the economic conditions of Indian populations."[109] The Commission has no record of any response to either of the Prime Minister's letters.

On August 14, 1970, the question of whether the federal *Navigable Waters Protection Act* applied to the regulation of flow levels on the Peace River was discussed again in a letter from the Deputy Minister of Public Works to Deputy Minister Austin of Energy, Mines and Resources. The letter, which summarized events from 1959 to 1966, states that the Deputy Minister of Public Works, Major-General H.A. Young, "reminded" the province of British Columbia of the requirements of the *Navigable Waters Protection Act* (*NWPA*) on October 24, 1962.[110] At that time, the *NWPA* provided that no work could be built on a navigable waterway unless the work, site, and plans were approved by the Minister of Public Works prior to the commencement of the operation.[111] On

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[108] Pierre Elliott Trudeau, Prime Minister of Canada, to Harry E. Strom, Premier, Province of Alberta, August 12, 1970 (ICC Exhibit 1B, tab 12M, ICC pp. 291-93).

[109] Pierre Elliott Trudeau, Prime Minister of Canada, to W.A.C. Bennett, Premier, Province of British Columbia, August 12, 1970 (ICC Exhibit 1B, tab 12L, ICC pp. 288-90).

[110] John A. MacDonald, Deputy Minister, to J. Austin, Deputy Minister, Energy, Mines and Resources, Ottawa, August 14, 1970 (ICC Exhibit 1B, tab 12N, ICC p. 294).

[111] *Navigable Waters Protection Act*, RSC 1952, c. 193, as amended by SC 1956, c. 41.

November 7, 1962, the Chairman of BC Hydro and Power Authority, Dr G.M. Shrum, stated its position that the Act did not apply because, according to its legal advice, the dam "structure was sited at a location where no navigation could take place." Public Works, however, was of the opinion that the *NWPA* did apply and that the dam was, therefore, illegal. At any rate, neither the province nor BC Hydro applied for or obtained a licence under the *NWPA*.

Despite Prime Minister Trudeau's request to BC Premier Bennett for a meeting among all interested federal and provincial officials, it appears that the BC government was not prepared to participate in any joint initiative to study the problem and to develop practical solutions to address environmental damages to the delta. According to a November 6, 1970, memorandum to the federal Minister of Fisheries and Forestries, the Canada-Alberta Joint Consultative Committee met in October to consider the problem of low water levels in the delta, but participants at "the meeting deplored the lack of ability to involve B.C. in discussions and there seemed to be a general feeling of helplessness with regard to the situation." The memorandum goes on to state that:

> 4. We have now been told by both Alberta and Saskatchewan fisheries people that serious fish problems exist due to the low water levels resulting from closing the dam to fill Williston Reservoir. Until last week the situation has not been represented as a fisheries problem.
>
> 5. If we can obtain adequate documentation of the fisheries problems then the *Fisheries Act* provides a very effective tool for the initiation of technical discussions with B.C. Hydro (not the B.C. Government). There are many similar instances in the past where once responsibility has been established the owner has cooperated readily to reduce the impact of the problem, i.e. Stellako River, Cheakamus River, Ash River, and most recently at Kettle Rapids on the Nelson River, to name a few. In every case the operative section has been Subsection 10 of Section 20. In each case the problem has been solved through technical discussions based on knowledge, the weight of the law, and with encouragement and support from the executive levels.[112]

On December 9, 1970, Jack Davis, the Minister of Fisheries and Forestries, wrote to his counterpart in British Columbia, Ray Williston, Minister of Lands, Forests, and Water Resources

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[112] K.C. Lucas, Director General, Environmental Quality Directorate, to the Minister, November 6, 1970 (ICC Exhibit 1B, tab 12O, ICC p. 296). Section 20(1) of the *Fisheries Act*, RSC 1970, c. F-14, stated that "[t]he owner of any slide, dam, or other obstruction shall permit to escape into the riverbed below the said slide, dam, or other obstruction, such quantity of water, at all times, as will, in the opinion of the Minister, be sufficient for the safety of fish and for the flooding of the spawning grounds to such depth as will, in the opinion of the Minister, be necessary for the safety of the ova deposited thereon."

to request the province's cooperation. Davis's letter raised concerns about the negative effects of reduced water levels on the delta and proposed some solutions:

> Our records show, also, that the local muskrat population is disappearing and fish spawning areas have been adversely affected. Should these low levels continue the local ecology could be adversely effected for a long, long time to come.
>
> In addition the livelihood of about 1700 Metis and Indians in the Fort Chipewyan area is effected. This is particularly true of those who rely heavily on the fisheries for gainful employment.
>
> There is a bright side to the question however.
>
> *Given certain precautions, especially in 1971, it is possible that a regime of discharges from the W.A.C. Bennett Dam may be preferable to the variations which were historically characteristic of the Peace River. Damaging floods will be a thing of the past and extremely low flows can also be avoided as long as there is close cooperation between the relevant authorities in B.C., Alberta and the Northwest Territories.*
>
> Rock-filled dams on the outlet channels from the Peace-Athabasca Delta might have a favourable effect on the local ecology. *Another possibility is that of water releases from the W.A.C. Bennett Dam on an appropriate seasonal schedule. Neither of these alternatives, however, can be investigated intelligently until B.C. Hydro's operating pattern of the W.A.C. Bennett Dam for power production is known with some degree of certainty.*[113]

Although Davis sought the cooperation of Mr Williston and the BC government by asking them to provide relevant data on the operation of the dam and by requesting their involvement in joint discussions with the governments of Alberta and Canada, the evidence suggests that British Columbia did not accept his overture at this time, since there was no record of a response to Davis's letter.

On December 1, 1970, a Statement of Claim was filed in the Supreme Court of British Columbia on behalf of numerous individual plaintiffs, the Athabasca Fish Co-Operative Limited, the Metis Association of Alberta, the Cree Band at Fort Chipewyan, and Fred Marcel and Patrick Mercredi, "each of them suing on his own behalf as a Councillor and member of the Chipewyan Indian Band." The action against the BC Hydro and Power Authority claimed damages for nuisance, wrongfully interfering with the Peace River, and an injunction was sought to restrain BC Hydro from

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[113] Jack Davis, Minister, Fisheries and Forestry, to Ray Williston, Minister, Lands, Forests and Water Resources, Victoria, BC, December 9, 1970 (ICC Exhibit 1B, tab 12P, ICC p. 298). Emphasis added.

interfering with the Peace River.[114] According to elders' testimony in this inquiry, the First Nation was unable to pursue this action because of a lack of resources.[115] In any event, the matter never came before the courts.

Efforts to Mitigate Environmental Damage to the Delta

As mentioned earlier, *Death of a Delta - A Brief to Government* recommended that the governments concerned take immediate action to address the detrimental effect of the Bennett Dam on the ecology and economy of the delta area. The governments of Canada, Saskatchewan, and Alberta responded to growing concern and pressure over the delta by establishing the Peace-Athabasca Delta Project Group (PADPG) in 1971 to review and to assess the environmental damage caused by the dam. In addition, the group was to devise and to implement a strategy for combatting the continuing environmental deterioration in the delta. The BC government and BC Hydro did not participate in the PADPG.[116]

The two-year PADPG study was the first to conduct a systematic assessment of the Bennett Dam's potential contribution to reduced water levels in the delta and changes in the ecosystem affecting waterfowl, fish, and aquatic fur-bearer populations and vegetation succession. The study confirmed that the Peace River project had altered the flow regime of the Peace River and that water levels were significantly lower in the delta system. The resulting changes had been most severe during the initial filling of the reservoir, and it was expected that as long as the dam continued to operate changes would cause "continued, although less severe, changes in the ecology of the Delta" than was experienced in the first few years.[117]

One of the principal concerns of the PADPG related to the dramatic effect that the Peace River can have on water levels in the delta:

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[114] Statement of Claim, December 1, 1970 (ICC Exhibit 2A, tab 9, p. 602).

[115] Lawrence Courtoreille, member of the Mikisew Cree First Nation, ICC Transcript, November 27, 1996, pp. 129 and 149.

[116] Green, "Preliminary Assessment" (ICC Exhibit 2A, tab 7, ICC p.15).

[117] Green, "Preliminary Assessment" (ICC Exhibit 2A, tab 7, ICC p. 15).

> Flood flows on the Peace River adjacent to the Peace-Athabasca delta were reduced by as much as 200,000 cubic feet per second, and this reduction in flows meant that the river levels were as much as 10-12 feet lower they would have been without regulation. The low flows on the Peace River permitted water to flow out of Lake Athabasca much more rapidly than normal during spring and summer.[118]

In an effort to restore temporarily the water levels in Lake Athabasca and the other major lakes in the delta system during the filling of the Bennett Dam, the PADPG constructed a rock weir on the Quatre Fourches channel in 1971. The weir was successful in restoring water levels to approximately 60 per cent of the delta, but it was removed because it contributed to severe flood damage in 1974.[119]

In response to the PADPG study and the deterioration of the Peace-Athabasca Delta, Canada, Alberta, and Saskatchewan entered into an agreement in September 1974 which, among other things, mandated the parties to "assign a high priority to the conservation of the Peace-Athabasca Delta."[120] The Agreement established the Peace-Athabasca Delta Implementation Committee (PADIC) as the body to carry out further studies and strategies that were necessary for the preservation of the delta. A fixed crest weir was first constructed on the Rivière des Rochers during 1975, and another rock weir was built on the Revillon Coupé in 1976. Follow-up studies to measure the efficacy of both these projects indicated that the weirs were not successful in restoring peak summer levels to pre-dam conditions in Lake Athabasca. The studies also indicate that the weirs were responsible for raising the winter levels of the lake by 0.6 meters above pre-dam levels. Most importantly, the weirs have reduced the annual fluctuations in Lake Athabasca and the Peace and Athabasca Deltas, which were essential to sustain the pre-dam ecology.[121]

The First Nation also attempted to restore some of the small lakes that have been lost since the dam was built. In 1986, the Athabascan Chipewyan Band began a program to "rewater" some

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118 Green, "Preliminary Assessment" (ICC Exhibit 2A, tab 7, pp. 15-16).

119 Green, "Preliminary Assessment" (ICC Exhibit 2A, tab 7, p. 16).

120 Peace-Athabasca Delta Implementation Committee, Canada, Alberta, Saskatchewan, *Peace-Athabasca Delta, Water Management Works Evaluation, Final Report*, April 1987 (ICC Exhibit 1A, tab 6, ICC p. 166). Agreement between the Government of Canada, the Government of the Province of Alberta, and the Government of the Province of Saskatchewan, September 16, 1974.

121 Green, "Preliminary Assessment" (ICC Exhibit 2A, tab 7, p. 16).

of the perched basin lakes located within the IR 201 in an effort to restore muskrat habitat. Assessments of the effectiveness of rewatering Sucker, Killer, Big Egg, and Frezie Lakes revealed that muskrat numbers increased from 1136 in 1986 to 17,497 in 1988. Using 1974 as a peak harvest year (156,769 muskrat pelts), post-dam harvest levels from 1977 to 1988 are still only about 9 per cent of the peak harvest and about 8 to 22 per cent of the potential harvest that could be obtained under optimal management of wetland areas. While the program restored a small portion of the former muskrat population to those lakes, the overall numbers are still well below pre-dam estimates.[122]

Impact of the Dam on the Delta and Indian Reserve 201

By letter dated October 7, 1996, counsel for Canada and the First Nation agreed to assume for the purposes of this inquiry that the construction and operation of the Bennett Dam have caused damages to IR 201.[123] Although Canada is not foreclosed from producing further evidence and arguments to rebut the compelling evidence before us, that evidence leads inescapably to the conclusion that significant environmental damage was sustained by the First Nation and IR 201 by the construction and operation of the Bennett Dam. No other conclusion is possible from the *prima facie* evidence before us.

The initial flooding of the reservoir above the dam resulted in immediate reductions in the water flow. Water levels remained low for three succeeding years after 1967, and Lake Athabasca dropped 4-5 feet below pre-dam levels. Shallow lakes in the delta were reduced to mud flats, and in the winter some lakes froze to the bottom.[124] The vegetation almost immediately began a "transition

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[122] Green, "Preliminary Assessment" (ICC Exhibit 2A, tab 7, pp. 26-27).

[123] François Daigle, counsel, Department of Justice, to Jerome Slavik, Counsel, Athabasca Chipewyan First Nation, October 7, 1996 (ICC file 2108-8-1).

[124] Patricia A. McCormack, "How the (North) West Was Won: Development and Underdevelopment in the Fort Chipewyan Region," unpublished PhD thesis, University of Alberta, Edmonton, 1984 (ICC Exhibit 2A, tab 8, ICC p. 492).

toward dominant willow communities."[125] This process occurs normally over many years when water levels are naturally reduced, but because of the dam this process was accelerated. The willows replace former species and this change may in turn alter habitat or food sources for animals dependent on them.

Planning and construction of the Bennett Dam begun as early as 1957. Yet, the Athabasca Chipewyan First Nation and other residents of the Fort Chipewyan area had not been informed of the dam or warned about its potential effects on the delta by officials of BC Hydro or the federal government.[126] During the Commission's community session, Victorine Mercredi stated that members of the First Nation were not aware of the dam until the delta began to dry out:

> This Reserve #201 and all the muskrat one day started to decline. At that time people were not aware of what was causing the declining [sic] of the muskrat and the water because nobody came to them to tell them what was happening.[127]

Mrs Flett also testified that the First Nation was never informed of the dam:

> No one has ever approached or notified us why the water was drying up. Since the Reserve started drying in 1966, from there on, every year more water was going and more lakes were drying up, until finally there was almost totally no water on the Reserve until it all dried and the willows and everything had grown in.[128]

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[125] Peace-Athabasca Delta Project Group (PADPG), *The Peace Athabasca Delta: A Canadian Resource* (Alberta: PADPG, 1973), as quoted in Patricia A. McCormack, "How the (North) West was won: Development and Underdevelopment in the Fort Chipewyan Region," unpublished PhD thesis, University of Albert, Edmonton, 1984 (ICC Exhibit 2A, tab 8, ICC p. 492).

[126] Adams, "Changing Way of Life," p. 10 (ICC Exhibit 18, tab 1), states that the "study team found only one person in Fort Chipewyan who recalls that he was aware of the Peace River hydro-electric project prior to 1965. That person is Athabasca Chipewyan First Nation member Charlie Voyageur, who worked as a driller conducting tests on the dam site. He cannot recall thinking or having it brought to his attention that the dam might have impacts on the people of the delta and Fort Chipewyan."

[127] ICC Transcript, October 10, 1996, pp. 39 and 44 (Victorine Mercredi).

[128] ICC Transcript, October 10, 1996, p. 49 (Eliza Flett).

In the years following completion of the dam, dramatic changes appeared in the delta's basins. When the dam was completed, the water flow in the Peace River was altered and the backflooding so essential to the preservation of the delta, was greatly reduced. This phenomenon disrupted water flows in all areas of the Peace-Athabasca Delta.

Fish stocks were reduced as shallow lake levels dropped. The fish use shallow lakes for wintering and spawning. When some lakes froze to the bottom in winter or became stagnant and unable to sustain life, the stocks dropped.[129] Waterfowl were similarly affected. There was a dramatic decrease in the amount of available shoreline and nesting habitat as waterways dried up. With decreased water levels, there were fewer available stop-over points for the migrating flocks, and some areas became unsuitable for their use.

Of the many species that were adversely affected by the Bennett Dam, few were harmed more than the small water-borne rodent, the muskrat, which provided a primary source of income and food for the Chipewyan. Muskrat numbers were reported to have fallen drastically in the years after the construction of the dam. The minimum optimal depths for muskrats, which in 1971-72 ranged from 2.5 feet to 2 feet, could not be sustained in much of the muskrat's pre-dam habitat:

> At present, 70 percent of the Delta lakes do not fulfil these requirements. Approximately 45 percent of the muskrat population survived the winter of 1971-72. The shallower lakes were characterized by high mortality rates and numerous signs of predation.[130]

Other fur-bearing species, such as mink and fox, also declined in population because they relied on the muskrat as a primary food source. Thus, the entire food chain was effected by the reduced water levels in this delicate ecosystem.

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[129] Patricia A. McCormack, "How the (North) West Was Won: Development and Underdevelopment in the Fort Chipewyan Region," unpublished PhD thesis, University of Alberta, Edmonton, 1984 (ICC Exhibit 2A, tab 8, ICC p. 492).

[130] Peace-Athabasca Delta Project Group (PADPG), *The Peace Athabasca Delta: A Canadian Resource* (Alberta: PADPG, 1973), as quoted in Patricia A. McCormack, "How the (North) West Was Won: Development and Underdevelopment in the Fort Chipewyan Region," unpublished PhD thesis, University of Alberta, Edmonton, 1984 (ICC Exhibit 2A, tab 8, ICC p. 492).

Since the completion of the Bennett Dam in 1967, a wide range of research studies by various individuals and groups have explored the hydrological and environmental ramifications of the Bennett Dam on the Peace-Athabasca Delta. In 1992, a report by Jeffrey Green reviewed much of the existing research and related that data to the hydrology, the natural resources, and the use of those resources in and around IR 201. A number of his main research findings are set out below:

1 The reduced frequency and magnitude of flood stages on the Peace River has greatly reduced the hydraulic damming of outlets from the Peace delta and Lake Athabasca to the Slave River. In turn, the lowered water levels in the Peace delta and Lake Athabasca has greatly reduced the backflooding of the Athabasca River and tributaries to Lake Claire and Mamawi. The disruption of this backflooding regime has lead to greatly reduced and infrequent recharging of perched basin lakes and wetlands on the Athabasca delta. Effects have been especially severe on the northern two thirds of the Chipewyan Reserve No. 201.

2 The stabilization of Lake Athabasca by the weirs on the Riviere des Rochers and Revillon Coupé has resulted in above average minimum water levels overwinter, as well as above average year round lake levels. The summer peak levels, however, are 0.5 metres below average. The net effect of these changes has been to reduce the amplitude of flooding during the spring and early summer, and to reduce open mud flats during fall and early winter. These changes have, in turn, reduced wetland habitat availability and quality for a large number of wildlife species and fish of importance to the Chipewyan people.

3 Changes in vegetation as a result of the drying out of the Athabasca delta has lead to reduced availability of some medicinal and food plants for the Chipewyan people, as well as reductions in the availability of productive wetland and meadow habitats and ecosystem integrity.

4 Numbers of waterfowl throughout the Athabasca and Peace deltas are believed to have declined as a result of reduced nesting and brood rearing habitat, and the loss of large areas of suitable fall staging habitat. The net effect to the Chipewyan people is a loss of subsistence hunting opportunities during the spring and fall, as well as a reduced potential for a guided sports hunting industry.

5 Muskrat have declined substantially since the operation of the Bennett dam, with the exception of a short recovery associated with the exceptional flood

in 1974 and attempts by Athabasca Chipewyan Band to manage wetlands in the No. 201 Reserve.

Muskrat numbers on the Reserve following the construction and operation of the Bennett dam (and prior to wetland management on the Reserve) are in the order of 5 to 11% of previous numbers. Fur harvests realized during the post-dam conditions (1977 to 1988) are in the order of 9% of the peak harvest in 1974, and 8 to 22% of the potential harvest under optimal managed wetland conditions. Maximum losses of trapping income for muskrat pelts alone are in the order of $40,000 to $123,000 annually. The reductions in muskrat numbers has also negatively affected the abundance of other furbearers such as mink and fox, and ultimately the economic potential of trapping income for these species.

6 Changes in habitat quality and availability have negatively affected the distribution and numbers of moose on and adjacent to the Reserve No. 201. In turn, this has greatly affected the ability of the Chipewyan band members to obtain moose meat from the Athabasca delta, and has required travel to areas well outside the Athabasca delta to hunt, as well as increased dependency on store-bought meat sources. The economic cost of these changes are not known.

8 Lower water levels have affected the ability of hunters to travel in the Reserve No. 201, as well as transportation of people and goods to and from the Reserve and Fort Chipewyan, and access to upstream areas (e.g., Fort McMurray).

9 Cumulative effects of vegetation changes, reductions in waterfowl, muskrat, moose and other wildlife, and more difficult travelling conditions has resulted in reduced interest by young people in traditional lifestyles and pursuits. In turn, the spiritual and cultural values of the Athabasca Chipewyan people has been detrimentally affected. . . .[131]

Green concluded the changes wrought by the construction and operation of the Bennett Dam greatly affected the ability of the First Nation to sustain traditional harvesting activities on IR 201:

The overall effect of these changes has been a gradual deterioration of the ability of the Reserve No. 201 lands to sustain traditional harvesting and lifestyles, while increasing the costs for individuals to continue subsistence harvesting. In particular,

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[131] Green, "Preliminary Assessment, pp. 31-33 (ICC Exhibit 2A, tab 7, ICC pp. 476-78).

> losses of fur trapping opportunities have reduced cash incomes for some Band members, while reduced opportunities for hunting of waterfowl, moose and other game on the Reserve has increased costs for hunting-associated travel to off-Reserve areas . . . As these opportunities have declined and costs increased, many Band members appear to have abandoned long-term use of much of the Reserve lands and have become increasingly dependent on store-purchased foods and supplies from Fort Chipewyan and Fort McMurray.[132]

In 1991, the Northern Rivers Basin Study Board was established to produce a study and make recommendations to ministers representing the governments of Canada, Alberta, and the North West Territories on issues affecting the waterways. The BC government did not participate in the study. After four and a half years of scientific study, the Board published its report, *Northern Rivers Basin Study*, in 1996 and made a number of sweeping recommendations and conclusions. Among its various findings, the study emphasized the relationship between the reduction in periodic spring flooding and the adverse environmental impact on the delta:

> The backflooding of the three channels by the Peace plays an important role in maintaining the delta wetlands. Many of the small lakes of the delta exist as "perched basins" that are only replenished through the periodic, spring ice jam flooding by the Peace River. However, since the construction of the Bennett Dam, these floods have been rare and less extensive. As a result, many of the marshy areas of the delta are transforming into terrestrial landforms dominated by willows and sedges.
>
> The transformation is of concern to both ecologists and local residents. Residents of Fort Chipewyan, located on the shores of Lake Athabasca, rely on the delta for fishing, hunting and recreation. During the heyday of the fur trade, Fort Chipewyan was renowned for the quantity and quality of its muskrat pelts. However, many of the marshes are now too shallow for muskrats to overwinter. Falling water levels have also decreased habitat for waterfowl and fish.[133]

The regulation of water flow of the Peace River downstream of the Bennett Dam is no longer determined by seasonal variations but rather by the demand for electricity by consumers inside and outside the province of British Columbia. According to the *Northern Rivers Basin Study*,

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132 Green, "Preliminary Assessment," p. 33 (ICC Exhibit 2A, tab 7, ICC p. 478).

133 *Northern Rivers Basin Study*, 23 (ICC Exhibit 3).

> Prior to regulation, the Peace River displayed seasonal flow patterns similar to other northern rivers dominated by snowmelt runoff – high flows in the spring and summer, and low in late fall and winter. The Bennett Dam has affected this pattern. While the annual amount of water flowing out of the dam is the same as before regulation, the timing of these flows has been altered. The dam releases significantly greater amounts of water during the cold months to meet rising power demands, and tends to store more water in the summer to refill the reservoir.[134]

This demand for power has not only reduced the mean annual peak flows of the Peace River but, in turn, it has also reversed the natural flood patterns in the delta.

The Commission heard oral evidence from Mr W. Veldman, a respected engineer and hydrologic consultant, who considered the conclusions of the this study "extremely credible"[135] and re-affirmed the following conclusions from the study:

> It is long established that the decrease in summer flows due to regulation have reduced water levels in the lakes and channels of the Peace-Athabasca Delta . . . Ecological changes have continued since the filling of the [Williston Lake] reservoir, due in large part to the disruption of ice and flood patterns. Water levels in the basins are replenished only through overland floods. The floods occurred approximately every second year during the 1960s prior to regulation, but only three times since. Historical records reveal that major flood peaks were produced twice during ice break-up in the spring.[136]

It is evident from the following summary of key findings and recommendations on the effects of the dam that the *Northern Rivers Basin Study* intended to send a clear and emphatic message to the governments responsible for addressing the impacts of the Bennett Dam on the Peace-Athabasca Delta:

> NRBS studies confirm that the dam has a significant impact on the flow pattems, sediment transport, river morphology, ice formation and habitat along the mainstream Peace River.
>
> Changes to flow and ice patterns are at least partly responsible for the lack of ice-jam induced floods in the Peace-Athabasca Delta. In the absence of these floods,

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134 *Northern Rivers Basin Study*, 62 (ICC Exhibit 3).

135 ICC Transcript, October 10, 1996, p. 104 (Wim Veldman, Civil Engineer, Calgary, Alberta).

136 Adams, "Changing Way of Life" (ICC Exhibit 18, tab 1, p. 66)

> the delta is slowly drying out – profoundly affecting the natural environment and the traditional lifestyles of local residents . . .
>
> Several attempts have been made to replenish water levels in the Peace-Athabasca Delta. These efforts have successfully restored water levels in the lower lakes and channels but could not flood the elevated lakes (or "perched basins"). Several new and potentially more effective options were identified within the NRBS and one of its companion initiatives – the Peace-Athabasca Delta Technical Studies.
>
> In light of improved understanding of the mechanisms controlling flooding of the Peace-Athabasca Delta, the Board feels that these new remediation options warrant consideration. *Accordingly, the Board recommends that the governments of Canada, Alberta and British Columbia implement an action plan for remediating the Peace-Athabasca Delta . . . in consultation with affected basin residents.*
>
> Previous remediation attempts were frustrated by the absence of natural flow patterns on the Peace River. The Board stresses that economic factors in hydroelectric production must not take precedence over environmental stability. *The Board recommends as a principle for any future negotiations regarding mitigation measures, that the operational regime of the Bennett Dam be modified to aid the restoration of the Peace River and the Peace-Athabasca Delta . . .*[137]

The federal government and the governments of Alberta and the Northwest Territories are currently formulating their responses to the many recommendations contained in the study. It is not known whether the BC government intends to respond to the recommendations.

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[137] *Northern Rivers Basin Study*, 8 (ICC Exhibit 3). Original emphasis.

PART III

ISSUES

In this inquiry, the Commission was asked to determine whether Canada owes an outstanding lawful obligation to the First Nation in relation to damages sustained by the First Nation and to IR 201 as a result of the construction and operation of the Bennett Dam. The parties agreed to frame the issues before the Commission as follows:

1. **Does Her Majesty in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development have a statutory or fiduciary lawful obligation to the Athabasca Chipewyan First Nation [ACFN] to have prevented, mitigated or sought compensation for environmental damages to Indian Reserve #201 caused by B.C. Hydro?**

2. **If so, what is the nature and extent of the Crown's statutory and fiduciary obligation for environmental protection of Reserve land?**

3. **In the facts and circumstances of this case, did the Crown meet their statutory and fiduciary obligations to the Band?**[138]

The parties also provided additional submissions on the following issue:

4. **Did the Crown breach the ACFN's treaty rights by allowing an unreasonable and unjustified interference with the ACFN's hunting, fishing, and trapping rights on Reserve #201?**

For the purposes of our analysis, we intend to review these issues in the context of what we consider to be the central issue, that is, whether the Crown had a fiduciary duty to the First Nation to prevent, mitigate, or seek compensation for the infringement upon the exercise of the First Nation's treaty rights and for damages caused to IR 201 by the construction and operation of the Bennett Dam. Issues surrounding the nature and scope of treaty rights and whether the Crown owed a statutory duty to protect IR 201 shall be addressed in the course of answering that central question.

As noted above, counsel for Canada and the First Nation agreed to assume for the purposes of this inquiry that the construction and operation of the Bennett Dam caused damages to IR 201.

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138 ICC Planning Conference Summary, May 17, 1996.

In order to dispose properly of the arguments before us, however, it has been necessary for the Commission to make findings on the *prima facie* evidence regarding the effect of the Bennett Dam on the Peace-Athabasca Delta and IR 201. Since Canada has not made any admission of fact or liability in relation to causation and has reserved the right to challenge the evidence or present further evidence on this point, we offer our findings on the *prima facie* evidence. These findings are subject to rebuttal by Canada upon production of additional scientific evidence on whether the Bennett Dam caused or contributed to the drying of the delta and the perched basins on IR 201.[139]

Part IV of this report sets out our analysis and findings on the legal issues placed before the Commission in this inquiry.

[139] A. François Daigle, Counsel, Specific Claims Ottawa, to Jerome Slavik, Ackroyd Piasta, Roth & Day, October 7, 1996 (ICC file, 2108-08-1).

PART IV

ANALYSIS

ISSUE 1 STATUTORY AND FIDUCIARY OBLIGATIONS OF THE FEDERAL CROWN

Does Her Majesty in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development have a statutory or fiduciary lawful obligation to the Athabasca Chipewyan First Nation to have prevented, mitigated or sought compensation for environmental damages to Indian Reserve #201 caused by B.C. Hydro?

If so, what is the nature and extent of the Crown's statutory and fiduciary obligation for environmental protection of Reserve land?

In the facts and circumstances of this case, did the Crown meet their statutory and fiduciary obligations to the Band?

Fiduciary Obligations of the Crown

Although a number of decisions of the Supreme Court of Canada have established that the Crown owes certain duties to First Nations in the management and protection of their reserve lands, this inquiry raises a novel issue because the First Nation submits that the federal Crown has a fiduciary duty to take positive steps to protect reserve land from exploitation, interference, or damage *caused by third parties*.[140] Canada contends that, although the courts have been clear that a general fiduciary *relationship* exists between the Crown and First Nations, not every aspect of that relationship gives rise to a legally enforceable fiduciary *duty* or *obligation*.[141]

To determine whether the Crown owed a fiduciary obligation to the Athabasca Chipewyan First Nation in this case, it is important to recognize the general principle that aboriginal people stand in a fiduciary relationship to the Crown. Any doubt about this has been laid to rest by Mr Justice Iacobucci in *Quebec (Attorney-General) v. Canada (National Energy Board)*:

> 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.*

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140 Submissions on Behalf of Athabasca Chipewyan First Nation, June 1997, p. 59.

141 Submissions on Behalf of the Government of Canada, September 8, 1997, p. 20.

> *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.[142]

It is clear from this plain statement of the law that the relationship between the Crown and aboriginal peoples is inherently fiduciary in nature, but the Supreme Court of Canada has also emphasized that not every aspect of the relationship will give rise to an enforceable fiduciary obligation. The scope and content of the Crown's specific fiduciary duties can only be determined through a meticulous examination of the nature of the relationship between the Crown and the First Nation in question. The recent decision of the Federal Court of Appeal in *Semiahmoo Indian Band v. Canada* confirms that this is the preferred approach of the courts:

> The authorities on fiduciary duties establish that courts must assess the specific relationship between the parties in order to determine whether or not it gives rise to a fiduciary duty and, if yes, to determine the nature and scope of that duty. This approach applies equally in the context of the fiduciary duty owed to Indian bands when they surrender reserve land. In my view, while the statutory surrender requirement triggers the Crown's fiduciary obligation, the Court must examine the specific relationship between the Crown and the Indian band in question in order to define the nature and scope of that obligation.[143]

Before analyzing the specific nature of the relationship between the First Nation and the Crown, we wish to provide a brief overview of the general legal principles concerning fiduciary obligations to assist in determining whether the facts attract an application of the fiduciary doctrine in this case.

General Fiduciary Principles

The decisions of the Supreme Court of Canada in *Guerin v. R.* and *Blueberry River Band v. Canada (Department of Indian Affairs and Northern Development)*, more commonly known as the *Apsassin* decision, demonstrate that the Crown has an enforceable fiduciary duty in the context of reserve land

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[142] *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 at 147; [1994] 1 SCR 159 at 183.

[143] *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3 at 23 (CA).

surrenders to ensure that Indians are not exploited in such transactions with third parties.[144] We also know from the Court's decisions in *R. v. Sparrow* and *R. v. Van Der Peet* that the Crown has a fiduciary obligation to justify the exercise of legislative or regulatory powers that infringe upon existing aboriginal or treaty rights.[145] The difficulty in this inquiry is that no case law has dealt with facts similar to those before us. We must, therefore, determine whether a fiduciary duty exists by reviewing the major decisions dealing with fiduciary obligations in the private law and in the context of the Crown-aboriginal relationship.

The starting point in this analysis is the landmark decision of the Supreme Court of Canada in *Guerin v. R.* In *Guerin*, Mr Justice Dickson, writing for the majority of the court, held that the Crown's historic undertaking in the *Royal Proclamation of 1763* and the *Indian Act* provided the source of a distinct fiduciary obligation to protect the Indians' interests in reserve land for their collective use and benefit. Dickson J made the following findings about the Crown's fiduciary obligations, after discussing the rationale behind the surrender requirement in the *Royal Proclamation of 1763* and the *Indian Act*:

> 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 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*.[146]
>
> 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. Professor Ernest Weinrib maintains . . . that "the hallmark of a fiduciary relation is that the relative legal positions are such that one person is at the mercy of the other's discretion." Earlier . . . he puts the point in the following way:

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144 *Guerin v. R.*, [1984] 2 SCR 335 at 383, and *Blueberry River Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 370-71 [*sub. nom.* and hereinafter *Apsassin*].

145 *R. v. Sparrow* (1990), 70 DLR (4th) 385 and *R. v. Van Der Peet* [1996] 2 SCR 507.

146 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.

> [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that *where 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*.
>
> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.[147]

Outside the established categories where a fiduciary relationship is presumed to exist (e.g., trustee-beneficiary, doctor-patient, solicitor-client), the courts have sought to identify the underlying principles governing the imposition of a fiduciary obligation on a new relationship. In *Frame v. Smith*, Wilson J offered the following principles as a "rough and ready guide" for the courts to apply in determining whether fiduciary obligations arise in different factual circumstances:

> There are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[148]

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147 *Guerin v. The Queen*, [1984] 2 SCR 335 at 383-4, [1985] 1 CNLR 120 at 137. Emphasis added.

148 *Frame v. Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81 at 99.

Justice Wilson's "rough and ready guide" has been applied by the Court in numerous cases following *Frame* and has become an accepted approach for determining whether a fiduciary relationship exists outside the established categories.[149]

In *Hodgkinson v. Simms*, Mr Justice La Forest discussed some of the difficulties encountered by the courts in applying Wilson J's guidelines in *Frame v. Smith*, by reference to what he characterized as the three "uses" of the term fiduciary:

> The first [use of the term fiduciary] is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are *per se* fiduciary, Wilson J.'s three-step analysis is a useful guide.
>
> As I noted in [*International Corona Resources Ltd. v. LAC Minerals Ltd.*[150]], however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary" [i.e. the second use], viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship . . . *In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.*
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.[151]

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149 See, for example, *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 DLR (4th) 14 (SCC); *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 SCR 534; *M.K. v. M.H.*, [1992] 96 DLR (4th) 289 (SCC); and *Norberg v. Wynrib*, [1992] 4 WWR 609 (SCC).

150 *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 SCR 574.

151 *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 409.

Central to La Forest J's reasoning was his finding that relationships characterized by unilateral discretion are simply a species of a broader family of relationships referred to as "power-dependency" relationships, which he described as follows:

> in my view, *the concept accurately describes any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking gains a position of overriding power or influence over another party.*
> . . .
> [T]he law's response to the plight of vulnerable people in power-dependency relationships gives rise to a variety of often overlapping duties. . . . *The existence of a fiduciary duty in a given case will depend upon the reasonable expectations of the parties, and these in turn depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards.*
> In seeking to identify the various civil duties that flow from a particular power-dependency relationship, it is simply wrong to focus only on the degree to which a power or discretion is somehow "unilateral". . . *Ipso facto*,[152] persons in a "power-dependency" relationship are vulnerable to harm. Further, the relative "degree of vulnerability", if it can be put that way, does not depend on some hypothetical ability to protect one's self from harm, but rather on the nature of the parties' reasonable expectations. Obviously, a party who expects the other party to a relationship to act in the former's best interests is more vulnerable to an abuse of power than a party who should be expected to know that he or she should take protective measures.[153]

It is clear from this passage that La Forest J is advancing the notion of "reasonable expectations" as the underlying fiduciary principle that gives rise to fiduciary duties outside the established categories. For the purposes of this inquiry, it is therefore important to remember that the reasoning in *Guerin*, regarding obligations created through the operation of statute, agreement, or unilateral undertaking, is not an absolute rule but rather a guide to identifying whether a "power-dependency" relationship exists. Such obligations can also arise out of a particular course of conduct, which creates reasonable expectations that one party will act on behalf of another. Nor is it necessary that there be a specific

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[152] The Latin phrase *ipso facto* means "by the fact itself" or by "the mere fact" (*Black's Law Dictionary*).

[153] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 411 and 412-3. Emphasis added.

undertaking or obligation in the sense that it must be express. Fiduciary obligations can be express or implied.

To determine whether the Crown had a fiduciary duty on the facts of this case to protect and preserve the First Nation's reserve land, we shall have regard to the "reasonable expectations" of the parties and whether the indicia identified in the "rough and ready guide" from *Frame v. Smith* are present in this case.

Scope for the Exercise of Discretion or Power

The essential question in determining whether the Crown had scope for the exercise of discretion and power to act on behalf of the First Nation relates to whether the Crown had undertaken to protect reserve land on behalf of the First Nation by statute, agreement, unilateral undertaking, or through a particular course of conduct. After careful consideration of the arguments presented by Canada and the First Nation, we find that the Crown did in fact undertake to protect the treaty rights of the Athabasca Chipewyan First Nation and its exclusive use, occupation, and enjoyment of IR 201.

The source of the Crown's discretion and power can be traced back to 1763, when the Crown first took upon itself the responsibility of protecting Indians from exploitation by forbidding the direct sale of Indian lands to settlers. This historical duty is reflected in the *Royal Proclamation of 1763*; it entrenched and formalized the process by which only the Crown could obtain Indian lands through agreement or purchase from the Indians:

> 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. . . .

Prior to Confederation, the colonial government vested title to Indian lands in the Crown to protect against trespasses and encroachments by third parties. The rationale behind this protective measure was explained by the Nova Scotia Commissioner for Indian Affairs in 1846:

> Trespasses are committed upon the Indian reserves with the most daring impunity. I have made efforts to check the removal of timber from these lands, but the remoteness of their situation renders the task almost impossible. As the soil must be the foundation of every improvement, and the civilization of the tribe, it is necessary that these lands, and the timber upon them should be carefully protected.[154]

After Confederation, section 91(24) of the *British North America Act, 1867*, vested exclusive legislative authority with respect to "Indians, and Lands reserved for the Indians" in the federal Crown. Legislation enacted by Parliament continued the protective responsibility of the Crown by including provisions that prohibited the alienation of reserve lands by Indian bands except upon surrender to the Crown. The fact that reserve lands are generally inalienable except to the Crown is still a main feature of the present *Indian Act*.

In *Guerin*, Dickson J found that the historical undertakings of the Crown and the *Indian Act* provided the source of a distinct fiduciary obligation on the part of the Crown to protect the Indians' interests in reserve land for their collective use and benefit:

> 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. It is rather a fiduciary duty. 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.

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[154] Nova Scotia, Legislative Assembly, *Journal* (1846), App. 24, 118, quoted in Richard Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Law Library, 1990), 21.

> An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the *Royal Proclamation of 1763* [see R.S.C. 1970, App. I]. It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.[155]

Further support for our finding that the Crown has undertaken a general responsibility to protect and to preserve Indian reserve land can be found in Justice Wilson's reasons in *Guerin*, which were consistent with those of Dickson J except to the extent that she held that the Crown's fiduciary obligation in relation to reserve land crystallized upon surrender into an express trust for the purposes specified in the surrender:

> While I am in agreement that s. 18 does not *per se* create a fiduciary obligation in the Crown with respect to Indian reserves, I believe it recognizes the existence of such an obligation. The obligation has its roots in the aboriginal title of Canada's Indians . . .
>
> I think that when s. 18 mandates that reserves be held by the Crown for the use and benefit of the Bands for which they are set apart, this is more than just an administrative direction to the Crown. I think this is the acknowledgment of a historic reality, namely that Indian Bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it. This is not to say that the Crown either historically or by s. 18 holds the land in trust for the Bands. The Bands do not have the fee in the 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. I believe that in this sense the Crown has a fiduciary obligation to the Indian Bands with respect to the uses to which reserve land may be put and that s. 18 is a statutory acknowledgment of that obligation. It is my view, therefore, that while the Crown does not hold reserve land under s. 18 of the Act in trust for the Bands because the Bands' interests are limited by the nature of Indian title, *it does hold the lands subject to a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction*.[156]

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155 *Guerin v. The Queen*, [1984] 2 SCR 335 at 376.

156 *Guerin v. R.*, [1984] 2 SCR 335 at 349-50, Wilson J. Emphasis added.

In *Mitchell v. Peguis Indian Band*, Mr Justice La Forest also emphasized the importance of the Crown's historical undertaking to protect Indian lands:

> As is clear from the comments of the Chief Justice in *Guerin v. The Queen* . . . these legislative restraints on the alienability of Indian lands are but the continuation of a policy that has shaped the dealings between the Indians and the European settlers since the time of the Royal Proclamation of 1763. *The historical record leaves no doubt that native peoples acknowledged the ultimate sovereignty of the British Crown and agreed to cede their traditional homelands on the understanding that the Crown would thereafter protect them in the possession and use of such lands as were reserved for their use*; see the comments of Professor Slattery in his article "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727 at p. 753. The sections of the *Indian Act* relating to the inalienability of Indian lands seek to give effect to this protection by interposing the Crown between the Indians and the market forces which, if left unchecked, had the potential to erode Indian ownership of these reserves.
>
> . . .
>
> [Since the *Royal Proclamation of 1763*], the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of their property which they hold *qua* Indians, i.e., their land base and the chattels on that land base.[157]

Mr Justice La Forest not only acknowledges that the *Indian Act* is a codification of the Crown's historical undertaking to protect the Indians' interests in reserve lands from being eroded, but he also emphasizes the relationship between the treaty rights of Indians and the Crown's fiduciary duties. The fact that Indian people ceded their traditional homelands on the understanding that the Crown would protect them in the possession and use of their reserve lands is critical, because the expectation that the Crown will exercise its power or discretion to protect reserve lands may give rise to an enforceable fiduciary duty depending on the facts and circumstances.

In addition to the general undertakings of the Crown under the *Royal Proclamation* and the *Indian Act*, the evidence surrounding the negotiation of Treaty 8 and the allocation of land in the delta confirms that the Crown also made a specific undertaking to protect IR 201 and its rich wildlife and plant habitat for the collective use and benefit of the Athabasca Chipewyan First Nation. Since

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[157] *Mitchell v. Peguis Indian Band* (1990), 71 DLR (4th) 193 at 225-26 (SCC). Emphasis added.

the interpretation of Treaty 8 is in issue, it is helpful to bear in mind the following interpretive principles summarized by the British Columbia Court of Appeal in *Claxton v. Saanichton Marina*:

> a. The treaty should be given a fair, large and liberal construction in favour of the Indians;
>
> b. Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians;
>
> c. As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned;
>
> d. Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible;
>
> e. Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.[158]

It is also important to consider the recent decision of the Court in *Delgamuukw v. R.*, where Chief Justice Lamer held that proper regard must be given to the oral history and tradition of First Nations as evidence in the adjudication of cases dealing with aboriginal rights and Indian treaties:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: *Sioui*, *supra*, at p. 1068; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227, at p. 232. To quote Dickson C.J., given that most aboriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on aboriginal peoples, and "render nugatory" any rights

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158 *Claxton v. Saanichton Marina Ltd.*, [1989] 3 CNLR 46 at 50 (BCCA).

> that they have (*Simon v. The Queen*, [1985] 1 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis.[159]

The evidence before us demonstrates that countless generations of Chipewyan hunters, trappers, and fishermen have benefited from the rich resources of the Peace-Athabasca Delta. When the fur trade spread into the area in the late 1700s, the Chipewyan profited from the sale of their furs to traders competing for business in the delta. While the muskrat were the most bountiful fur-bearing species in the area, the Chipewyan also trapped mink, fox, coyotes, and other animals for profit, and there can be no doubt that they made a good living from trapping prior to entering into Treaty 8.

During the Treaty 8 negotiations, the Indians sought assurances from the Treaty Commissioners that they would not be confined to reserves and that they would be able to continue to earn a livelihood from hunting, fishing, and trapping. The Commissioners' report on the treaty negotiations confirmed that this was a critical issue, which had to be addressed before the Indians would agree to enter into the treaty:

> There was expressed at every point the fear that making of the treaty would be followed by the curtailment of the hunting and fishing privileges . . .
>
> We pointed out . . . that the *same means of earning a livelihood would continue after the Treaty as existed before it*, and that the Indians would be expected to make use of them. . . .
>
> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting fears of the Indians for they admitted it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, *we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of Indians and were found necessary in order to protect the fish and fur bearing animals would be made, and they would be*

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[159] *Delgamuukw v. British Columbia* (1997), SCC File No. 23799 [unreported]. Also see *R. v. Taylor and Williams* (1981), 34 OR (2d) 360 at 364 (CA), cited with approval in *R. v. Sioui*, [1990] 1 SCR 1025 at 1045, [1990] 3 CNLR 127 at 155, and *R. v. Sparrow*, [1990] 1 SCR 1075 at 1107, where the Ontario Court of Appeal held that where the interpretation of an Indian treaty is in question, the general principle is that the courts may consider the broad historical context of the treaty as an aid to determining the intention of the parties to the treaty:

> . . . cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.

> *as free to hunt and fish after the treaty as they would be if they never entered into it.*[160]

Accordingly, the written text of Treaty 8 states that Her Majesty the Queen promised the Indians the

> right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[161]

In addition to the right to hunt, fish, and trap, Treaty 8 also promised the establishment of Indian reserves:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individuals as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.[162]

In *R. v. Badger*, the Supreme Court of Canada relied on the Treaty Commissioners' statements to find that "for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties."[163] This finding is of crucial importance in the case of the Athabasca Chipewyan because it is apparent that, when Chief Laviolette and his people adhered to Treaty 8, they had no intention of giving up their ability to earn

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160 *Treaty No. 8*, 6. Emphasis added.

161 *Treaty No. 8*, 12.

162 *Treaty No. 8*, 13.

163 *R. v. Badger* (1996), 133 DLR (4th) 324 at 339 (SCC).

a livelihood from trapping, fishing, and hunting. Although the treaty also provided for the setting aside of reserves, the following excerpt from a letter written by Treaty Commissioner McKenna to the Superintendent General of Indian Affairs on April 17, 1899, makes clear that the Indians were reluctant to be placed on reserves because they did not want to abandon their traditional ways of life and economies:

> From the information which has come to hand it would appear that the Indians who we are to meet fear the making of a treaty will lead to their being grouped on reserves. Of course, grouping is not now contemplated; but there is the view that reserves for future use should be provided for in the treaty. I do not think this is necessary . . . it would appear that the Indians there act rather as individuals than as a nation . . . *They are averse to living on reserves; and as that country is not one that will be settled extensively for agricultural purposes it is questionable whether it would be good policy to even suggest grouping them in the future. The reserve idea is inconsistent with the life of a hunter, and is only applicable to an agricultural country.*[164]

In the years following treaty, the Athabasca Chipewyan continued to prosper by exercising their treaty harvesting rights. It was not until large numbers of trappers from the south came into the area in the 1920s that the First Nation expressed any desire to have reserve land set aside for its benefit. Even then, the impetus for the selection and survey of reserve land was not for the purposes of settlement and agriculture but rather to preserve a large trapping, hunting, and fishing area in the delta for the First Nation's exclusive use and benefit. The fact that the land was not suitable for agriculture prompted Indian Agent Card to suggest that 4000 square miles, a much larger area than would normally be provided for under the terms of Treaty 8, "be set aside as a trapping reserve, and set aside for them, as from time immemorial, they have used it for this purpose. The Indians have no other way of making a living, constituted as they are, than by hunting and trapping."[165]

Despite the repeated requests of Chief Laviolette and Agent Card for a reserve to be set aside for the band to protect its traditional way of life, no steps were taken to survey a reserve until 1931.

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[164] Commissioner James McKenna to Clifford Sifton, Superintendent General of Indian Affairs, April 17, 1899, NA RG 10, vol. 3848, file 75236-1, quoted in *Fort McKay Inquiry Report* (1996) 5 ICCP 23.

[165] J. Card, Indian Agent, Fort Smith, NWT, to [Department of Indian Affairs, Ottawa], 5 July 1922, in NA, RG 10, vol 7778, file 27134-1.

In the meantime, the Alberta *Natural Resources Transfer Agreement, 1930* (*NRTA*), was enacted, which transferred administration and control over all unoccupied Crown lands from the federal government to the province of Alberta; therefore, any allocation of reserve land after 1930 would require provincial consent in terms of both the quantity (insofar as the land requested exceeded the band's minimum entitlement under treaty) and the location of the land to be set aside. Agent Card's request that 4000 square miles be set aside was not granted, but in 1935, federal and provincial officials agreed to set aside approximately 77.5 square miles of land (after deducting the water areas) for the Band as IR 201. The surveyor who set aside IR 201 stated that it was "without a doubt the best revenue producing tract in the north country, as it is a natural breeding ground for fur bearing animals and game birds, which afford both revenue and sustenance for this band of Indians. Thousands of muskrat are taken annually from the area between the East channel of the river and Fletcher Channel."[166]

The evidence is clear and unequivocal that both the Band and the government knew that IR 201 was selected specifically because its rich hunting and trapping would secure a stable source of income for members of the First Nation. To avoid any misunderstanding over the purpose for which IR 201 was set aside, the federal government requested that the provincial Order in Council transferring administration and control of the reserve to the Department of Indian Affairs expressly state that "these Indians are granted exclusive hunting and trapping privileges within the area" because "much of the area . . . is of no other commercial value."[167]

The elders' testimony and various historical sources confirm that pressure from non-Indian trappers in the 1920s and 1930s created in Chief Laviolette and Agent Card a sense of urgency to have set aside within the delta an extensive area of land as reserve over which members of the First Nation would have the exclusive right to hunt, fish, and trap. The evidence is clear that IR 201 was selected specifically because of its unique ecology and rich resources of game, muskrat, waterfowl, and fish. The elders of the First Nation provided consistent and uncontradicted testimony that

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[166] H.W. Fairchild to Chief Surveyor, 4 November 1931, p. 2, and Fairchild to Secretary, Department of Indian Affairs, 16 December 1931, p. 3, in NA, RG 10, vol. 7778, file 27134-1

[167] Deputy Superintendent General H.W. McGill to John Harvie, Deputy Minister, Department of Lands and Mines, Edmonton, August 23, 1935, NA, RG 10, vol. 7778, file 27134-1

hunting, trapping, and fishing were essential to their livelihood and economy prior to and after the creation of IR 201. This was the dominant purpose for the selection and survey of IR 201.

Canada points out, however, that the Supreme Court of Canada held in *Badger* and *R. v. Horseman* that Article 12 of the *NRTA*[168] "evidenced a clear intention to extinguish the treaty protection of the right to hunt *commercially*," although the "right to hunt *for food* continued to be protected and had in fact been expanded by the *NRTA*."[169] Since the *NRTA* eliminated the treaty right to hunt, fish, and trap *commercially*, Canada's position correctly states that what "we are left with are treaty rights to hunt, fish and trap for food circumscribed with respect to both geography and regulatory authority."[170]

Although we do not dispute the accuracy of this position, the emphasis that Canada places on the limits of the treaty right to hunt, fish, and trap for food is entirely misleading because it fails to take into account the true nature and extent of the legal and economic interests of the First Nation that were affected by the dam. First, it should be borne in mind that the treaty right to hunt, trap, and fish for food is an important economic benefit in its own right. Deprived of the ability to exercise this right, members of the First Nation suffered hardship because they had to rely more heavily on store-bought goods rather than fish and game they caught themselves. Second, even though the treaty right to hunt, fish, and trap for commercial purposes had been extinguished by the *NRTA*, the fact remains that the provincial regulatory regime sanctioned commercial trapping and fishing, so the

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[168] *Natural Resources Transfer Agreement, 1930* (Constitution Act, 1930, Schedule 2), para. 12 states:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right which the Province hereby assures them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

[169] It should also be noted that in *Horseman*, Mr Justice Cory recognized that it might be unfair to allow the unilateral extinguishment of the commercial right to hunt, but Parliament had the power to alter this important treaty right. He stated that, "although it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the native people affected, nonetheless the power of the federal government to unilaterally make such a modification is unquestioned and has not been challenged in this case": *R. v. Horseman*, [1990] 1 SCR 901 at 933-36, [1990] 3 CNLR 95 at 104-6.

[170] Submissions on Behalf of the Government of Canada, September 8, 1997, p. 27.

First Nation continued to rely heavily on the substantial income derived from trapping in and around IR 201 until the Bennett Dam virtually destroyed the ecology of the delta and the economy of the reserve. Furthermore, we cannot overemphasize that IR 201 was selected by the First Nation and set aside by Canada under the terms of Treaty 8 to protect the reserve as a hunting, fishing, and trapping area for the exclusive use and benefit of the First Nation. The harvesting of game and fish on the reserve was itself an exercise of the First Nation's treaty rights and the First Nation continued to harvest and sell furs and fish because this commercial activity was allowed by the provincial regulatory regime with respect to game and fish.

Based on the historical evidence before us in this inquiry, we make the following conclusions regarding the nature and content of the First Nation's treaty rights. First, the Crown's objective and purpose for entering into Treaty 8 was to extinguish Indian or aboriginal title to the treaty area and to open those lands for settlement, mining, lumbering, trading, or other purposes. At the same time, the federal Crown agreed to protect the Indian economies and ways of life, which were based upon hunting, trapping, and fishing in their traditional areas.

Second, the reason the First Nation adhered to Treaty 8 was to protect its rights to hunt, trap, and fish. Elders' testimony confirms that these rights were fundamental to the First Nation's culture, community, economy, and way of life. The Treaty Commissioners' strong assurances and guarantees that these rights would continue, and the promise of other benefits, were the inducements that ultimately persuaded the leaders of the day to sign the treaties.

Third, IR 201 was selected by the band because of its rich environment and abundance of muskrat, game, fish, and birds. Canada set aside IR 201 for the express purpose of providing the First Nation with exclusive rights to hunt, fish, and trap over this area and to protect the First Nation's ability to continue its traditional way of life and economy. This was justified by federal officials on the grounds that IR 201 had no other commercial value. Given the Crown's particular course of conduct in setting aside IR 201 for the exclusive use and benefit of the First Nation to assist it in exercising traditional pursuits, it was reasonable for the First Nation to expect that the Crown would take reasonable steps to protect the natural resources on IR 201 to ensure that its treaty rights and entitlements had meaningful content.

Although it is our view that the Crown provided a specific undertaking to the Athabasca Chipewyan First Nation to protect IR 201 for its exclusive use and benefit, we do not intend to suggest that the Crown was obligated to take positive steps to protect the First Nation's treaty rights and IR 201 from even the slightest encroachment by a third party. However, the facts in this case are so stark and the impacts on the First Nation so severe that we have no difficulty in finding that the Crown had a duty to take reasonable steps to protect IR 201 from extensive environmental damage.

In light of the importance of the facts in this case, it is helpful to summarize our findings on the nature and extent of the damages to IR 201 at this point. In 1967, the Bennett Dam was completed and regulation of the Peace River began in the spring of 1968. Although the First Nation had not been given any advance notice of the dam or its effects on water levels in the delta, it was not long before the environmental ramifications of the dam became apparent. The federal government's awareness of the dam's adverse effects on the delta is confirmed in a July 17, 1970, memorandum, which stated that "*[d]amage to wildlife habitat in the vicinity of Lake Athabaska has been immediate and severe*."[171] Three days later, the Deputy Minister of Indian Affairs confirmed that the treaty rights of the First Nation and its very economic livelihood had been seriously affected. The Deputy Minister confirmed that the "Indians and Metis in the Fort Chipewyan area previously derived between $100,000 to $250,000 a year from harvesting muskrat, ducks and geese in the Delta and Lake Athabasca, not to mention the commercial fishing activity."[172]

The elders' testimony on this point is unequivocal. Elder Madeline Marcel aptly expressed the repeated concerns of elders who had witnessed the decline of resources on IR 201:

> When the lake started drying out after the Bennett Dam was built, the muskrats declined. And when the muskrats declined, other fur bearing animals like the mink and everything else started to decline. And today there is hardly anything, nothing.[173]

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[171] J. Austin, Deputy Minister, Energy, Mines and Resources, to the Minister, July 17, 1970 (ICC Exhibit 1B, tab 12F, ICC pp. 275-76). Emphasis added.

[172] H.D. Robinson, Deputy Minister of Indian Affairs, to J. Austin, Deputy Minister of Energy, Mines, and Resources, July 20, 1970 (ICC Exhibit 1B, tab 12g, ICC p. 279). Emphasis added.

[173] ICC Transcript, October 10, 1996, p. 35 (Madeline Marcel). Similar testimony was made by Daniel Marcel, Chief Cyprien, and other elders, as reviewed in the historical section of the report.

Elder Daniel Marcel also informed the Commission that the First Nation's trapping heritage has all but disappeared:

> Since Bennett Dam came into effect we started losing water and without water there was no muskrat. I don't know what is going to happen in the future. I worry about that a lot. Because of the Bennett Dam, the lakes where we normally trap and harvest our muskrat were dried out. And when that happened there was nothing to trap and all those lakes, like the Frezie Lake behind their home, willows started to grow all over the area. And if this goes on, in another few years there won't be any lake. And once there is no lake, there is nothing to trap.
>
> And another area is north of Big Egg Lake. One time I remember there was about 20 trappers on that one lake trapping muskrat in the spring. Since the water start drying out, the lake start drying out, that lake dried out. *Today, I don't know where that lake is. It is just willows and just land now*.
>
> When there were plenty of muskrats on Reserve 201, it was very easy for me to go and kill 100 muskrats a day. Today when I look at the Reserve 201, all the areas that I have trapped, I don't know if I will [be] able to kill even one muskrat . . . We used to live by killing muskrats. Now I don't know how those animals survive out there . . . After Bennet Dam was built, the Reserve 201 started drying up slowly year after year . . . As far as I know I am the only one that still tries to go out there now and then, but for almost nothing. There is nothing to trap out there. I still go out.[174]

The pictures of Egg Lake, taken around 1974 and in 1994, provide graphic evidence of what Elder Daniel Marcel meant when he said that he no longer knows where that lake is. Although it was once a rich area for muskrat trapping on IR 201, the marshy shores of Egg Lake have disappeared.[175]

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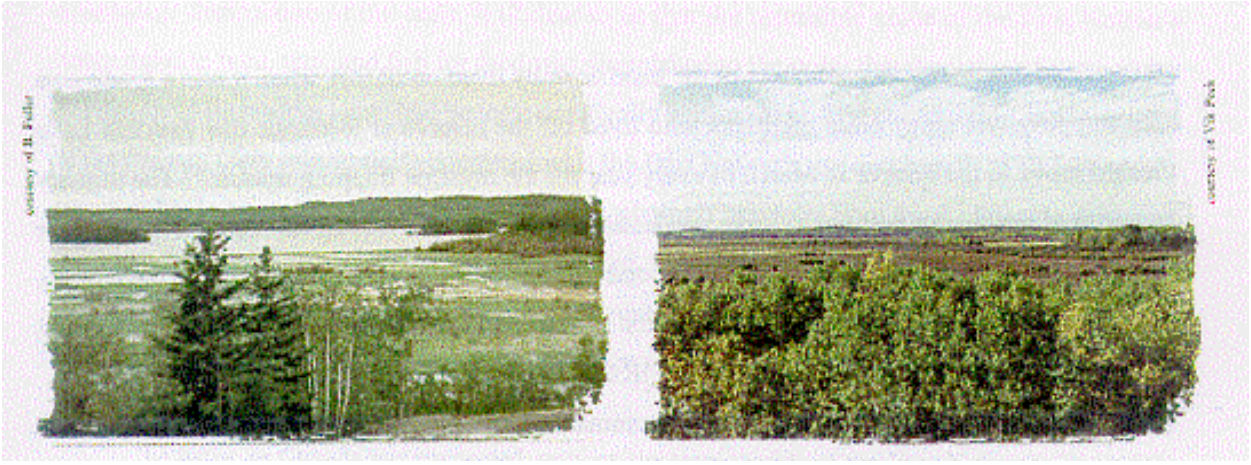
[174] ICC Transcript, October 10, 1996, pp. 56-58 (Daniel Marcel).

[175] These pictures are reproduced from the *Northern Rivers Basin Study*, which provided the following caption and description at page 23 of the report:

> **Then and Now:** Egg Lake is one of the perched basins of the Peace-Athabasca Delta that is only replenished by periodic overland flooding. Its marshy shores were once a focal point for fur trappers and a haven for waterfowl. In fact, this lake once set the Hudson's Bay Company standard for high quality muskrat pelts. In the absence of these floods over the last two decades, Egg Lake is being transformed into a terrestrial ecosystem marked by grasses and willows.



Perhaps the most compelling and memorable words in this inquiry came from Elder Josephine Mercredi, who compared how life was before IR 201 dried out with how things are today:

> When I used to trap with my husband on Reserve #201 there was a lot of water and because of a lot of water, we had a lot of muskrat. And I used to walk back in the sloughs and I set traps along the small sloughs where white men didn't bother with because they were looking for bigger areas. But I trapped in those smaller areas and there were lots of muskrats. I ran my traps in the morning and picked up muskrats off the trap. And I went back in the evening and there were the same amount again taken. So I looked at the traps twice a day and I got muskrats both times.
>
> Today if people have to go back to set their traps on Reserve #201, there would be nothing in the traps for them to pick, maybe because there is no water. Without water, there are no muskrats. There is, where lakes were where I had traps in years back, there is only willows and grass and just a dense bush now in many of those little lakes . . .
>
> *Today you go on Reserve, you look, you listen for the sounds of birds, waterfowl, ducks, geese. You don't hear anything anymore.*[176]

It is telling that only some members of the band actually lived on IR 201 when it was a prime area for trapping, yet many other members who lived off the reserve at locations like Jackfish Lake would move to the reserve in March of every year for the muskrat trapping season.[177] The primary purpose of the reserve was not to serve residential needs but to provide an economic livelihood for people

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176 ICC Transcript, October 10, 1996, pp. 51-52 (Josephine Mercredi).

177 See elders' testimony in ICC Transcript, October 10, 1996, pp. 46-56.

who had few alternative means of income. Today, only a few people go back to the reserve, and it no longer has any real value to the First Nation because of the massive decline in muskrat habitat and other fur-bearing populations on IR 201.[178]

Legal counsel for the First Nation summarized the impacts on the reserve and the First Nation in these terms:

> The use and benefit for which Reserve #201 was selected has been eradicated. As Chief Cyprien testified, it no longer has any value for trapping and hunting. "There are no muskrats, no water . . . and no other animals which feed off the muskrats." ACFN members still go to the Reserve because it has historical and spiritual value for them. It has no economic value and the number of muskrats and other animals are so small that only Daniel Marcel goes there from time to time for the purposes of hunting and trapping. It is not possible for ACFN members to effectively exercise their treaty rights in other parts of the Delta, because the whole Delta has been affected by the Bennett Dam.
>
> The use and benefit of Reserve #201 has been *de facto* expropriated by the withholding of water from the Peace River and the Delta as the result of the operation of the Bennett Dam . . . As the elders testified at the community session, many of the lakes in Reserve #201 have dried up and lakes and waterways which were formerly used as a transportation route and for habitat for fish, birds, and water fowl, have dried up, rendering the land unusable.[179]

In our view, the First Nation's submissions are compelling, particularly because the intentions of the First Nation in selecting IR 201 and of Canada in setting it aside as an exclusive hunting, fishing, and trapping area for the First Nation have been almost entirely frustrated by the ecological destruction of the delta. It is clear to us that the ostensible value of the First Nation's treaty rights to hunt, trap, and fish for food was diminished to the point that the value of these rights in respect of its reserve lands had become practically non-existent. The construction and operation of the Bennett Dam substantially interfered with the First Nation's use and benefit of IR 201 and its treaty rights to hunt, fish, and trap for food. As is glaringly apparent from the evidence in this case, it is more than the First Nation's treaty rights to hunt, fish, and trap for food that have been affected; the First Nation's very way of life and its economic lifeblood were substantially damaged as the

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178 See Chief Cyprien's testimony, ICC Transcript, November 27, 1996, pp. 168-69.

179 Submissions on Behalf of Athabasca Chipewyan First Nation, June 1997, p. 55.

Government of Canada, armed with full knowledge of the ecological destruction that would ensue, did nothing.

To focus, as Canada has suggested, only on the treaty rights of the First Nation to hunt, fish, and trap for food is too narrow and excludes other legitimate uses of IR 201. The fact of the matter is that the Bennett Dam substantially diminished the First Nation's beneficial use of IR 201 and its ability to earn a livelihood from commercial trapping. Even though the ability to earn a livelihood is not, strictly speaking, a treaty right, the harvesting of muskrats and other fur-bearing animals took place largely on the reserve itself, and the sale of furs was allowed by the provincial regulatory regime respecting game.

In our view, no reasonable interpretation of Treaty 8 could allow either the Government of Canada or a provincial government to destroy the ability of a First Nation to exercise its treaty harvesting rights or to alter fundamentally the environment upon which those activities were based. Nor do we believe that a reasonable interpretation of Treaty 8 would allow any government to effectively destroy the very economies upon which the Indians' signature of Treaty 8 was premised. Even if we are incorrect in these two conclusions, it is surely clear that no reasonable interpretation of Treaty 8 would allow the substantial interference with treaty rights *on reserve land* set aside by Canada specifically as an exclusive hunting, fishing, and trapping area for the use and benefit of the First Nation. Despite the Crown's undertaking to protect these lands for the exclusive use of the First Nation, the construction and operation of the Bennett Dam deprived the First Nation of the beneficial use of its treaty entitlement.

The inequity of the result is dramatic. The federal Crown's right to take up lands for settlement and other purposes has certainly been exercised in the Treaty 8 area. The First Nations have honoured their part of the treaty, and the Crown has received the benefits of that treaty in the form of lands and resources worth untold millions of dollars. Yet the consideration received by the First Nation under Treaty 8, namely, the right to hunt, trap, and fish and the exclusive right to the beneficial use of a mere 77 square miles of land in IR 201 has been rendered almost entirely valueless because of the ecological destruction of those lands – a consequence the Government of Canada could have prevented, but chose not to.

For the above reasons, we have no hesitation in concluding that members of the Athabasca Chipewyan First Nation suffered extreme hardship and economic loss as a result of the destruction of the delta and environmental damages to IR 201. Given the severity of the impact on this community, it is our view that members of this First Nation were and are entitled to expect the Crown to take reasonable steps to prevent, to mitigate, or to seek full compensation for the destruction of the First Nation's economic livelihood, for damages to IR 201, and for the substantial infringement on its food harvesting rights under Treaty 8. Although the duty to take reasonable steps to protect IR 201 or to seek compensation is not expressly provided for in the treaty, we find the reasoning of La Forest J in *Mitchell v Peguis Indian Band* compelling in this regard:

> It would be highly incongruous if the Crown, given the tenor of its treaty commitments, were permitted . . . to diminish in significant measure the ostensible value of the rights conferred.[180]

The purpose for which IR 201 was selected and the First Nation's beneficial interest in the reserve were based on the continued ability to hunt, trap, and fish. The extensive infringement on these treaty rights and entitlements has essentially deprived the First Nation of a large measure of the benefits and consideration provided for under the terms of Treaty 8. It is for this reason that members of the First Nation are, at the very least, entitled to compensation for its damages. To suggest otherwise would run afoul of this oft-quoted principle from *Sparrow*:

> This court found [in *Guerin*] that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams*[181], ground a general guiding principle for s. 35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[182]

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180 *Mitchell v. Peguis Indian Band* (1990), 71 DLR (4th) 193 (SCC) at 230.

181 *R. v. Taylor and Williams* (1981), 62 CCC (2d) 227, 34 OR (2d) 360 (CA).

182 *R. v. Sparrow* (1990), 70 DLR (4th) 385 at 408 (SCC).

Counsel for the First Nation suggested that the common thread running through the case law is the notion that the Crown has a fiduciary duty to protect reserve lands for the benefit of Indians:

> A broad and purposive view of the Crown's fiduciary obligations to preserve and protect the Indians' interest in reserve lands is a thread which runs through all judicial considerations of the issue. The overriding consideration which will inform the specific fiduciary duties will be the preservation of the Indians' interest in the use and benefit of the lands. The exercise of Indian hunting, fishing, and trapping rights are intrinsic to the [Athabasca Chipewyan First Nation's] use and benefit of the reserve land. Whether the threat to the interest is direct dispossession, such as in the case of a surrender, or indirect loss, such as through collection remedies available against non-Indian interests or loss of use by reason of environmental damage, the resultant loss of use and benefit of the land is the fundamental issue.[183]

We agree. The thrust of the cases reviewed by the Commission emphasizes the fiduciary relationship between the Crown and aboriginal peoples and the historical undertaking of the Crown to protect the Indian interest in land. This undertaking is reflected in the *Royal Proclamation of 1763*, the *Indian Act*, and in the solemn promises contained in the treaties between the Crown and aboriginal peoples. To use the language of Justice La Forest in *Hodgkinson*, the broad scope and power assumed by the Government of Canada with respect to Indians and reserve lands confirm the existence of a power-dependency relationship between the Crown and First Nations and a reasonable expectation that the Crown would protect and preserve reserve land for the use and benefit of the First Nation. This is further reinforced in this case by the specific nature of the relationship and treaty promises between the Crown and the First Nation.

We are, of course, aware of the Crown's arguments that, although the First Nation may be entitled to recover damages for nuisance, trespass, or interference with its treaty rights, such damages are recoverable from those persons or entities who were responsible for the damages, not the federal Crown. However, our finding that the Crown had a duty to take reasonable steps to prevent, to mitigate, or to seek compensation for damages to IR 201 and the First Nation's treaty rights caused by a third party is reinforced by the fact that the Crown had scope for the unilateral exercise of a

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183 Submissions on Behalf of Athabasca Chipewyan First Nation, June 1997, p. 66.

power or discretion affecting its reserve lands and treaty rights. This takes us into the second branch of our three-stage analysis.

Unilateral Discretion or Power Affecting First Nation's Legal or Practical Interests

In *Apsassin*, McLachlin J held that the Crown must have some unilateral discretion or power that it can exercise with respect to the First Nation's legal or practical interests before a fiduciary duty will be imposed by the courts. The First Nation submits that the *Indian Act* as a whole confers on the Crown unimpeded control with respect to the management of reserve lands, which in itself established a general fiduciary duty on the part of the Crown. In addition to section 18(1) of the *Indian Act*, there are a number of other provisions that clothe the Minister of Indian Affairs or the Governor in Council (i.e., the federal cabinet) with substantial scope and power with respect to the management and development of reserve land.[184] Nor are the Crown's fiduciary obligations simply confined to surrendered lands; they extend to *unsurrendered* reserve lands, the title to which is vested in the Crown for the collective use and benefit of an Indian band.

Although counsel for the First Nation acknowledged that the Crown can narrow the scope of its fiduciary duties with respect to reserve lands, counsel asserted that this narrowing can only be accomplished through the express devolution of the Crown's powers over reserve lands to the band pursuant to section 60 of the *Indian Act*:

> **60.(1)** The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.
>
> (2) The Governor in Council may at any time withdraw from a band right conferred on the band under subsection (1).

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[184] Various provisions under the *Indian Act* confer broad power and discretion in the federal Crown over the management and protection of Indian reserve land. For example, see sections 20 (possession of lands in reserve); 28 (Ministerial permits for use and occupation); 29 (exemption from seizure); 30 (penalty for trespass); 34 (authority of superintendent and Minister re: maintenance of roads, bridges, etc.); 35 (lands taken for public purposes); 37 (surrenders and designations); 58 (uncultivated or unused lands); and 93 (removal of material from reserves).

Even this authority, it is argued, must be exercised with due regard to the Crown's fiduciary duty to ensure that "the First Nation had the requisite knowledge, expertise, financial and technical resources to properly manage the administration of the reserve."[185] According to counsel for the First Nation, it is notable that, on the facts before us, the First Nation has never made such a request for control and management of its reserve lands. And, since an Indian agent was maintained at Fort Chipewyan until the mid 1970s, the Crown apparently did not consider it desirable to confer such a right upon the band.

Canada contends that the Crown did not have unilateral power or discretion to protect and preserve the First Nation's reserve lands and treaty rights in this case, because the *Indian Act* did not preclude the First Nation from commencing legal proceedings against BC Hydro for environmental damages to the reserve. Therefore, Canada submits that the First Nation had sufficient power to seek the appropriate remedy on its own, which it did by initiating legal proceedings in 1970.

As a starting point, it is important to recognize that the Crown's fiduciary obligations are not absolute and can be narrowed on the facts of any given case. In *Guerin,* Dickson J confirmed that "[t]he discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case. This is as true of the Crown's discretion vis-a-vis the Indians as it is of the discretion of trustees, agents, and other traditional categories of fiduciary."[186] For instance, the Crown's discretion under section 18(1) of the *Indian Act* can be narrowed by the terms of any treaty, surrender, or other provisions of the *Indian Act*. Therefore, it is necessary to examine carefully the applicable statutory provisions, the nature of the relationship between the First Nation and the Crown, the extent of the Crown's power and discretion over matters affecting the First Nation's legal or practical interests, and, finally, the extent to which the First Nation exercises its own autonomy over decisions affecting its interests.

Looking at the statutory scheme under the *Indian Act*, it is clear that the Act provides the Minister of Indian Affairs and the Governor in Council with extensive powers over the management and development of reserve land. Section 18(1) in particular confers a broad discretion on the

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185 Submissions on Behalf of Athabasca Chipewyan First Nation, June 1997, p. 74.

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

Governor in Council to determine whether any use of reserve land is for the benefit of an Indian band. The difficulty in this case is that sections 18 and 31 of the *Indian Act* do not give the Crown any unilateral power to prevent third parties from damaging reserve lands. Accordingly, Canada asserts that the First Nation was "never precluded in law from taking legal action against the Province of British Columbia or B.C. Hydro whether under s. 31 of the *Indian Act* of 1952 for trespass or in nuisance."[187]

Although it could be said that the First Nation exercised a measure of autonomy with respect to decisions affecting its interest in IR 201, Canada also had the scope to exercise some of its powers under the Act in a unilateral fashion. For instance, the Crown had the authority to initiate trespass proceedings on behalf of the First Nation (assuming that the facts support an action in trespass) and presumably was entitled to protect the First Nation's interests and the Crown's title in the reserve by initiating a legal action in nuisance. However that may be, it strikes us as patently unreasonable for Canada to assert that it had no obligation to do anything to protect IR 201 from damages caused by the Bennett Dam, simply because the First Nation was in a position to seek the appropriate legal remedy (which it indeed sought, albeit unsuccessfully because it apparently lacked the resources to pursue the matter).

In our view, Canada's narrow interpretation of its fiduciary obligations is not consistent with the honour of the Crown and the tenor of its promises under the terms of Treaty 8. In light of the severity of the impact on the band's treaty rights and interest in IR 201, we find that the particular facts and circumstances in this case triggered the Crown's fiduciary duty to take reasonable steps to protect the band's reserve land from degradation caused by the construction and operation of the Bennett Dam. While we take Canada's point that the First Nation was not precluded from initiating its own legal proceedings, the devastating impacts of the dam on the First Nation's treaty rights and interest in IR 201 demanded that the Crown take some action to protect the First Nation's interests and to prevent the destruction of its way of life and livelihood. The fact that the First Nation did not have the resources to pursue the action against BC Hydro demonstrates its vulnerability under the circumstances. Although the Crown knew at least as early as 1959 that the dam might have

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[187] Submissions on Behalf of the Govemment of Canada, September 8, 1997, p. 23.

significant hydrological and ecological effects on the delta and IR 201, it did nothing to prevent the First Nation from harm. The Crown did not even inform the First Nation of the Peace River project and its potential adverse effects on the delta. Although there was precedent for the Crown to study and assess the potential impacts on hydro projects – since it had done so in relation to the Columbia and Kootenay Rivers – it made little effort to review the effects of the enormous Bennett Dam project on one of the most ecologically sensitive areas on the continent. It simply defies belief that nothing was done to address these concerns before it was too late.

The Crown's reply to the First Nation's assertions that it had a fiduciary duty to protect IR 201 is simply that it did not have any unilateral power or discretion to intervene in the Peace River power development project to prevent or to mitigate damages caused to the reserve. We disagree. It is our view that, on the specific facts of this case, the Crown had significant power and discretion at its disposal, pursuant to its regulatory authority under the *Navigable Waters Protection Act* (*NWPA*), with respect to the construction and operation of Bennett Dam. This regulatory authority, in turn, gave the Crown a broad discretion to protect interests that fall within the exclusive legislative authority of the federal Crown. Furthermore, the Crown's regulatory authority and discretion to protect other matters of federal interest could, in fact, be exercised in a unilateral manner, whereas the First Nation did not have such powers or discretion at its disposal.

The 1956 amendments to the *Navigable Waters Protection Act* provided the federal Minister of Public Works with the following authority:

> **4.**(1) No work shall be built or placed in, upon, over, under, through or across any navigable water unless
>
> (a) the site and plans thereof have been approved by the Minister;
> (b) the work is built, placed and maintained in accordance with the plans and the regulations.
>
> (2) This section does not apply to any work, other than a bridge, boom, dam, aboiteau or causeway, if in the opinion of the Minister
>
> (a) the work does not interfere substantially with navigation, and
> (b) the value of the work does not exceed five thousand dollars.[188]

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[188] *Navigable Waters Protection Act*, RSC 1952, c. 193, as amended by SC 1956, c. 41.

If a work was built or placed upon a site that had not been approved in advance by the Minister of Public Works, or if it was not maintained in accordance with the approved plans and regulations, section 5(1) of the NWPA gave the Minister of Public Works the legislative power to remove and destroy the work.[189] Section 5(2) also gave the Minister the authority to approve a project after construction has commenced. The 1969 amendments to the *NWPA* are similar to the 1956 version, since they also require the approval of works, including dams, and provide the Minister of Public Works with a broad remedial power to order the owner to remove or to alter a work built without prior approval or not maintained in accordance with pre-approved plans and regulations.[190]

A thorough consideration of the facts, the provisions of the *NWPA*, and the relevant case law on this subject leads us to conclude that the *NWPA* applied to the Bennett Dam, and a licence was required by BC Hydro for the construction and operation of the dam. Indeed, the federal Crown was also of the opinion that the *NWPA* applied at all material times, as evidenced by the 1970 memorandum of the Deputy Minister of Energy, Mines, and Resources:

> Bennett Dam was licensed in 1962 by the Comptroller of Water Rights of British Columbia. Advised by Public Works that a federal permit was required under the *Navigable Waters Protection Act,* the province refused to make application on the ground that the Peace River was not considered navigable at the dam site. Public

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189 Section 5(1) of the 1956 *Navigable Waters Protection Act* states:

> 5. (1) Any work to which this Part applies that is built or placed upon a site not approved by the Governor in Council, or is not built or placed in accordance with plans so approved, or having been so built or placed, is not maintained in accordance with such plans and the regulations, *may be removed and destroyed under the authority of the Governor in Council by the Minister of Public Works*, and the materials contained in the said work may be sold, given away or otherwise disposed of, and the costs of and incidental to the removal, destruction or disposition of the work, deducting therefrom any sum that may be realized by sale or otherwise, are recoverable with costs in the name of Her Majesty from the owner. [Emphasis added.]

190 In 1969, the relevant sections of the *NWPA* were amended to read as follows:

> 4.(1) No work shall be built or placed in, upon, over, under, through or across any navigable water unless
> (a) the work and the site and plans thereof have been approved by the Minister upon such terms and conditions as he deems fit prior to commencement of construction . . . .
> (2) This section does not apply to any work, other than a bridge, boom, dam or causeway if, in the opinion of the Minister, the work does not interfere substantially with navigation.

> works referred the matter to the Department of Justice which opined that the Act did apply. *Public Works decided not to press the province, although a memo dated April 18, 1967 by the Deputy Minister of that Department to his Minister indicates that the dam is considered illegal*.[191]

Other government correspondence confirms that the Deputy Minister of Public Works, Major-General H.A. Young, "reminded" the province in 1962 that a federal permit was required under the *NWPA*.[192] The Chairman of BC Hydro responded in 1962 by asserting that no licence was required, because the Peace River was not navigable "*at the dam site*." This assertion is specious, since principles of common law clearly establish that navigability is not determined by reference to the site of the proposed work only; rather the whole water body must be looked at to determine whether that body of water is in fact navigable.[193] This point was made in *Friends of the Oldman River Society v. Canada*,[194] where the Supreme Court of Canada held that the regulation of navigable waters must be viewed functionally as an integrated whole to ensure that projects which obstructed navigation at one point in a navigable water were considered in respect of impacts on navigability at another point along a navigational system. Justice La Forest, writing for the majority, also held that the Act applied to the provincial Crown:

> Certain navigable systems form a critical part of the interprovincial transportation networks which are essential for international trade and commercial activity in Canada. With respect to the contrary view, *it makes little sense to suggest that any semblance of Parliament's legislative objective in exercising its jurisdiction for the conservancy of navigable waters would be achieved were the Crown to be excluded from the operation of the Act. The regulation of navigable waters must be viewed functionally as an integrated whole, and when so viewed it would result in an absurdity if the Crown in right of a province was left to obstruct navigation with*

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191 J. Austin, Deputy Minister, Energy, Mines and Resources, to the Minister, July 17, 1970 (ICC Exhibit 1B, tab 12F, ICC pp. 275-76).

192 SC 1956, c. 41.

193 See, for instance, *International Minerals & Chemicals Corp. (Canada) Ltd. v. Canada (Minister of Transport)* (1992), 58 FTR 302 at 310-13 (FCTD); *Coleman v. Ontario (Attorney General)* (1983), 27 RPR107 at 113, 119 (Ont. HC); *Stephens and Mathias v. MacMillan et al.*, [1954] OR 133 at 140-45; *Quebec (Attorney General) v. Fraser* (1906), 37 SCR 577 at 594, 597.

194 *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 (SCC).

> *impunity at one point along a navigational system, while Parliament assiduously worked to preserve its navigability at another point.*[195]

In determining whether a water is navigable, the "rule is that if waters are navigable in fact, whether or not the waters are tidal or non-tidal, the public right of navigation exists."[196]

It is clear that many locations along the Peace River and throughout the Peace-Athabasca Delta were navigable. Therefore, a permit was required for the Bennett Dam. The report conducted by the federal government in 1962, entitled "The Effect of Regulation of the Peace River," emphasized the importance of navigation on the Peace-Athabasca river system for trade and commerce and concluded that the dam "will materially affect the regimen of the Peace River and thus the Slave River, Great Slave Lake and the Mackenzie River." Even though the report stated that it was not obvious whether the dam project would be detrimental to navigation, and that "any detrimental effect would probably be most serious during the filling of the reservoir," the Water Resources Branch obviously considered the Peace River and the delta area to be navigable.[197]

We also reject Canada's assertions that the *NWPA* did not apply to the Bennett Dam on the grounds that the evidence was equivocal on whether the regulation of the Peace River would interfere with navigation. Whether an actual adverse impact on navigation was anticipated is immaterial, because the *NWPA* provides that the requirement for approval by the Minister applies to *all dams constructed on navigable waters*. Section 4(2) of the 1956 Act states that the Minister's approval is not required for any work, *other than a dam*, if the Minister is of the opinion that it will

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195 *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 at 39 (SCC). Emphasis added. La Forest J also held that the federal Crown has jurisdiction over navigation both by virtue of the "ancient common law public right of navigation" and the constitutional authority over the subject matter expressed under section 91(10) of the *Constitution Act, 1867* which assigns exclusive legislative authority over "Navigation and Shipping" to the federal Parliament. La Forest J held that the provincial Crown, and any grantee of the provincial Crown, were bound by the NWPA in constructing the Oldman dam and that any proprietary right which the province of Alberta may have had in relation to the bed of a river was still subject to the exclusive legislative jurisdiction of Parliament:

> Neither the Crown nor the a [sic] grantee of the Crown may interfere with the public right of navigation without legislative authorization. The proprietary right the Crown in right of Alberta may have in the bed of the Oldman River is subject to that right of navigation, legislative jurisdiction over which has been exclusively vested in Parliament (at 38).

196 *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 at 34 (SCC).

197 Department of Northern Affairs and National Resources, Water Resources Branch, "The Effect of Regulation of the Peace River, Interim Report No. 1," June 1962 (ICC Exhibit 1A, tab 3, ICC p. 56).

not interfere substantially with navigation. The wording of section 4(2) in the 1969 *NWPA* is essentially the same. In any event, the evidence is clear that Canada was aware that construction and operation of the dam would have an impact on navigation even if there was some question about how extensive such impacts would be and whether they would be positive or negative in the long term. Therefore, we find that, because the Peace River was navigable and the work involved a dam which impacted on navigation, section 4 of the *NWPA* required that the site and plans for Bennett Dam be approved in advance by the Minister of Public Works and that the dam be operated in accordance with the plans and regulations. Because the construction and operation of the dam was never approved, the Minister of Public Works had the remedial power to remove or to destroy the work, or, alternatively, to approve the project after its completion. While it is extremely unlikely that the Minister of Public Works would have seriously entertained the use of this draconian power, the fact remains that Canada had considerable leverage to intervene in the construction and the operation of the dam, because it had an express statutory power to do so.

Since the federal Crown had regulatory authority under the *NWPA* at all relevant times, it remains to be considered whether the Crown had the discretion to exercise this power in a manner that allowed the Crown to protect other federal interests, including the First Nation's interest in IR 201. Counsel for Canada submitted that any exercise of the authority under the *NWPA* for purposes not related to navigation and shipping would be improper:

> the *NWP Act* does not provide the Minister of Transport with the authority to prevent works for other reasons such as impacts on surrounding lands. It is submitted that to attempt to exercise such authority would amount to the exercise of a discretionary power on the basis of considerations irrelevant to the purposes of the *NWP Act.* Courts have the authority to judicially review and quash such improper exercises of discretionary power. The *NWP Act* is aimed at protecting navigable waters and regulating works which impair *navigability,* it is not aimed at protecting land from the effects that the works may have on land . . . The *NWP Act* was not meant as a general purpose environmental protection statute and, it is submitted, could not have been used as one.[198]

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[198] Submissions on Behalf of the Government of Canada, Septemver 8, 1997, p. 30. Emphasis in original.

Essentially the same argument was considered in the *Friends of the Oldman River Society* and rejected by Mr Justice La Forest on this basis:

> If the appellants are correct, it seems to me that the Minister would approve of very few works because several of the "works" falling within the ambit of s. 5 do not assist navigation at all, but by their very nature interfere with, or impede navigation, for example bridges, booms, dams and the like. If the significance of the impact on marine navigation were the sole criterion, it is difficult to conceive of a dam of this sort ever being approved. *It is clear, then, that the Minister must factor several elements into any cost-benefit analysis to determine if a substantial interference with navigation is warranted in the circumstances.*
>
> *It is likely that the Minister of Transport in exercising his functions under s. 5 always did take into account the environmental impact of a work, at least as regards other federal areas of jurisdiction, such as Indians or Indian land.* However that may be, the *Guidelines Order* now formally mandates him to do so, and I see nothing in this that is inconsistent with his duties under s. 5.[199]

La Forest J not only found that it is appropriate for the Minister responsible for the *NWPA* to consider the environmental impacts of a work on other federal areas of jurisdiction, such as Indians and reserve lands, fisheries, and national parks, but he clearly alluded to the fact that the federal Crown has always had the authority to consider environmental impacts on federal interests, even before the advent of environmental screening and assessment procedures pursuant to the *Environmental Assessment Guidelines Order* in 1984 and the enactment of the *Environmental Assessment Act* in 1994. This result is consistent with La Forest J's finding that Parliament has legislative jurisdiction respecting environmental matters, at least to the extent that it relates to the exercise of power over specific heads of jurisdiction, such as Indians and Indian lands, fisheries, navigable waters, and national parks.

Finally, it is important to observe that La Forest J held that the Minister of Transport had an "affirmative regulatory duty" because the *NWPA* provides for a "legislatively entrenched regulatory scheme . . . in which the approval of the Minister is required before any work that substantially interferes with navigation may be placed in, upon, over or under, through or across any navigable

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[199] *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 at 23-24 (SCC). Emphasis added.

water."[200] Although the Court considered a more recent version of the Act, the view that the Crown had a positive duty to exercise its regulatory authority under the *NWPA* is supported by the reasoning of the Privy Council in *Province of Bombay v. City of Bombay*, cited with approval by La Forest J in *Friends of the Oldman River Society*:

> If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound.[201]

In view of La Forest J's finding that the public right of navigation is paramount and takes precedence over the rights of the owner of a water bed, even when the owner is the Crown, it stands to reason that the object of the *NWPA* can only be fulfilled if the responsible Minister has a positive duty to exercise the regulatory authority conferred on him by Parliament.

Therefore, we find that the federal Crown had the power at all material times to consider whether the Bennett Dam would impact on federal interests, including Indians and Indian lands, under section 91(24) of the *Constitution Act, 1867*. We also find that the federal Crown had an affirmative duty to exercise its regulatory authority and, in the course of deciding whether to approve the dam project, the Crown had the discretion to consider whether the dam's construction would impact on federal areas of interest, including the First Nation's treaty rights and interests in IR 201. To read the legislative and constitutional jurisdiction of the Crown in a more limited fashion would frustrate the purpose of the Act, which, in its essence, is and was a tool to regulate navigation and to protect riparian owners from the harmful effects of works constructed on navigable waterways. Even though there was no express wording binding the provincial Crown under the *NWPA*, the Act by necessary implication bound the provincial Crown, which was required to receive approval of any works that could interfere with navigation.[202]

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200 *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 at 30 (SCC).

201 *Province of Bombay v. City of Bombay*, [1947] AC 58 at 63, cited with approval in *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 at 32 (SCC).

202 *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 at 38 (SCC).

In view of the findings above, we conclude that the Crown had a duty to act and broad scope for the unilateral exercise of power or discretion. It is also clear that Canada's decision not to exercise its power and discretion impacted significantly on the First Nation's legal and practical interests. We shall now address the third, and final, stage of the analytical approach outlined in *Frame v. Smith*.

Peculiarly Vulnerable to or at the Mercy of the Fiduciary

The Commission finds that the First Nation was, in fact, peculiarly vulnerable to the Crown's unilateral power and discretion to regulate the construction and operation of the Bennett Dam. The federal government was well aware of the hydroelectric development plans of British Columbia on the Peace River prior to the completion of the dam. Following Premier Bennett's public announcement of his government's intentions to construct the dam in 1957, the Peace River hydroelectric development project became a high profile issue of the day. It is apparent from the many books and articles written on Premier Bennett's vision to develop the Peace River that there was also a political dimension to the project, which took priority over discussions that had been ongoing for years among British Columbia, Canada, and the United States to develop the hydro potential of the Columbia River. With the establishment of BC Hydro in 1962, Premier Bennett sought to ensure that British Columbia would be the primary benefactor of the immense wealth that Bennett Dam would generate.[203] It is clear that the Crown knew very early that, given the magnitude of this project, the regulation of the Peace River was likely to have significant effects downstream. In fact, the historical record confirms that the federal Crown had undertaken a study in 1959 through the Water Resources Branch to determine what effect the dam might have on navigation.

The First Nation was peculiarly vulnerable to the Crown's discretion and power because it did not have knowledge of any real or potential effects of the dam. Notably absent in the facts before the Commission is any evidence that representatives of the government of Canada or of British

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[203] At the time, Premier Bennett explained why establishment of the BC Hydro and Power Authority was necessary: "Because the federal government has refused to act in giving B.C. a fair return of the taxes paid by power corporations, it is this government's policy to have basically all electric power and energy that is supplied to the public under public auspices," quoted in Earl K. Pollon and Shirlee Smith Matheson, *This Was Our Valley* (Calgary: Detselig Enterprises, 1989), 196.

Columbia consulted with the Athabasca Chipewyan First Nation, or informed its members that the ecology, flora, and fauna of the delta could be significantly altered by the Bennett Dam. Nor was the First Nation given an opportunity to provide input into the planning and development of the Bennett Dam. It was only when the water flow on the Peace River was cut off to fill the reservoir in 1968 that members of the Band began to realize that a structure built 650 kilometers away would have significant implications on their lives and the land.

The delta began to dry out, and by 1970 Canada acknowledged that the impacts on wildlife habitats "were immediate and severe." Still, it took the efforts of a group of scientists, acting on their own initiative, as well as those of the Premier of Alberta, to draw the concerns of the aboriginal residents of the delta area into critical focus for the federal government. On July 2, 1970, Alberta Premier Harry Strom wrote to Prime Minister Trudeau expressing his concems in relation to the growing controversy over the Bennett Dam. His letter is worth repeating:

> In addition to the observed disbenefits to the trapping industry, and the anticipated adverse results to the commercial fishing industry over the entire lake, affecting the livelihood of 1,500 people, a wildlife habitat of 1,000 square miles is being subjected to drastic change. Although it is difficult to predict at this time what the final outcome of this change might be, indications are that Canada will lose one of the most significant natural ecological environments to be found anywhere on the North American Continent.
>
> The widespread ramifications of the situation have given Alberta cause for concern. However, the problem is not of Alberta's making. The majority of the affected area is under Federal jurisdiction, and the ramifications of the problem, as well as its cause, have national implications. Therefore, the Government of Alberta contends that the Government of Canada has a responsibility and an obligation to rectify the present situation. I am sure you will agree only Canada can be held responsible for any detrimental effects that may accrue in the future.[204]

Aside from a few feeble attempts to invite British Columbia or BC Hydro to participate in joint discussions to determine how to address environmental impacts on the delta, Canada did not exercise its regulatory authority to ensure that federal interests were protected.

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[204] John A. MacDonald, Deputy Minister, Public Works, to J. Austin, Deputy Minister, Energy, Mines and Resources, Ottawa, August 14, 1970 (ICC Exhibit 1B, tab 12N, ICC pp. 271-72).

Canada either knew, or ought to have known, of the impacts the dam would have on the economy and way of life of the First Nation, and this information should have been disclosed to the First Nation at the earliest possible opportunity. Canada's failure to provide timely disclosure of the dam and the impending damages to the delta amplified the effects of the First Nation's vulnerability, because it was deprived of the opportunity to make representations to BC Hydro or to seek whatever recourse was available to try to prevent or to mitigate the damages.

It is significant that an Indian Agent continued to administer most of the First Nation's affairs until he retired around 1973. As the Minister of Indian Affairs' field representatives, Indian Agents were responsible for a broad range of matters related to band affairs. The Indian Agent assisted the band council in administering its affairs, drafted band council resolutions and by-laws, and attended to some of the most basic needs of the community, including the distribution of social assistance to those members that needed it.[205]

An action was commenced in 1970 by the First Nation and a number of other plaintiffs against BC Hydro, but it should be recalled that the First Nation still had limited control over its own administration and affairs. The First Nation did not have funding at this time to pursue legal actions to protect reserve lands, and it had very limited resources to challenge BC Hydro and the Province of British Columbia with respect to a project of this magnitude. The technical nature of the evidence demonstrates that the First Nation would have required considerable resources to obtain and produce the information, technical data, studies, and evidence necessary to prove its case in a court of law. The Crown not only had knowledge of the dam and its potential consequences, but it had virtually unlimited resources to study its effects on the hydrology and ecology of the delta, to force BC Hydro to comply with its regulatory authority under the *NWPA*, and to take whatever measures it considered necessary to prevent or to mitigate the dam's effects on the delta. Although, following a careful analysis and consideration of the available options, Canada might have decided that the broader public interest must prevail over the preservation and maintenance of the delta's ecology, we are nevertheless of the view that Canada should have taken the necessary steps to ensure that the First

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[205] For instance, see testimony of Chief Tony Mercredi, ICC Transcript, November 27, 1996, pp. 122-27, and Lawrence Courtoreille, member of the Mikisew Cree First Nation, p. 128.

Nation received adequate compensation for the damages caused to IR 201, the exercise of its treaty rights, and the destruction of its economic livelihood.

Accordingly, we find that the First Nation was peculiarly vulnerable to the exercise of the federal Crown's unilateral power and discretion. It was the Crown that had regulatory authority with respect to the dam's construction and operation, not the First Nation. Furthermore, the Crown had the resources and the influence to prevent, to mitigate, or to seek compensation for damages caused to IR 201. Why the Crown chose not to exercise its authority over the Bennett Dam, while members of the First Nation suffered undue hardship, is perplexing, given the nature of the Crown's fiduciary relationship with aboriginal peoples and its treaty commitments.

Standard of Care and Breach of Fiduciary Duty

For the reasons stated above, we find that the Crown owed a fiduciary duty to the First Nation to prevent, to mitigate, or to seek compensation for damages to IR 201 caused by the dam. Since the nature of the Crown's fiduciary relationship with First Nations has been described by the courts as *sui generis,* the standard of care the Crown is required to meet in each case will vary, depending on the particular facts and circumstances. In cases involving the management of trust moneys or surrendered lands, the case law suggests that the standard of care is an onerous one, because the nature of the duty is analogous to that required of a trustee.[206] In cases such as *Sparrow*, where the issue in question relates to the enactment of legislation or an exercise of regulatory power that infringes upon existing aboriginal or treaty rights, the duty is not one of undivided loyalty to the First Nation, since other interests must be balanced against the aboriginal or treaty right in question; rather, the duty is to ensure that the legislation or regulation meets a rigid standard of justification to minimize the impairment on the exercise of such rights.

In the case before us, we agree with counsel for the First Nation that the appropriate standard of care is based on what a person of ordinary prudence would do in managing his or her own

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[206] For instance, in *Guerin v. The Queen*, [1984] 2 SCR 335 at 388, Dickson J held that the Crown breached its fiduciary duty and that "[e]quity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal."

affairs.[207] Thus, the Crown was required to take reasonable steps and to exercise ordinary prudence to protect IR 201 and the First Nation's economic livelihood from being irreparably damaged. The Crown, however, asserted that it had neither the duty nor the power to act on behalf of the First Nation. With all due respect, we think the Crown is incorrect on both counts. We have already found that the Crown had a duty to act in light of its treaty obligations, the severity of the damage caused to IR 201, and the undue hardship suffered by members of the First Nation. All that remains to be determined is what reasonable steps the Crown should have taken to protect the First Nation's interests.

We have already found that the Crown had regulatory authority under the *NWPA* with respect to the dam's construction and operation. Yet the Crown did not exercise that authority. The question is why? It has been suggested by Canada that it did not intervene because studies done by the Water Resources Branch in 1959 and 1962 were equivocal, and that the dam may have been beneficial to navigation. The evidence before us suggests, however, that the conclusions in the 1962 report were based on the erroneous assumption that outflows on the Peace River would be fixed at a minimum of 10,000 cfs. By 1968, an internal memorandum of the federal government indicates that the federal Crown was clearly aware that this minimum outflow requirement was not being adhered to:

> Minimum releases from the reservoir were governed by the 1962 water license granted by the province. However, in the spring of 1968 outflows were reduced from the 10,000 c.f.s. requirement of the license to about 1000 c.f.s. Low natural runoff at this time aggravated the situation throughout the Mackenzie system.[208]

An internal memorandum to the Minister of Energy, Mines, and Resources in 1970 states that British Columbia was informed in 1962 that a licence was required under the *NWPA*, and that the Deputy Minister of Public Works considered the dam to be illegal as early as April 1967. The same memorandum acknowledges that the federal government was aware that the low water levels on the

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[207] *Fales v. Canada Permanent Trust Co.* (1976), 70 DLR (3d) 257 at 267, [1977] 2 SCR 302; applied in *Blueberry River Indian Band v. Canada [subnom. Apsassin]* (1995), 130 DLR (4th) 193 at 230 (SCC).

[208] J. Austin, Deputy Minister, Energy, Mines and Resources, to the Minister, July 17, 1970 (ICC Exhibit 1B, tab F, ICC p. 275).

Peace River and throughout the delta were impacting negatively on federal interests, such as navigation, fisheries, wildlife, and, in particular, federal proprietary rights in Indian reserves:

> Damages from reduced flow downstream on riparians which included an Indian Reserve and trapping and navigation users in the Territories might have been used to make representations to British Columbia, but were not.[209]

Regarding navigation, the author expressed the opinion that:

> Public Works procrastinated over whether to invoke the Navigable Waters Protection act until it was too late to exert much influence on B.C. Hydro and Power Authority.[210]

Canada submitted that, when it became aware of the magnitude of the problems caused by the Bennett Dam on federal interests in 1970, it did take steps to address these concerns. In 1970, Prime Minister Trudeau wrote Premier Bennett requesting a meeting among the interested governments to discuss what action should be taken in light of the "increasingly severe social and environmental conditions existing in Lake Athabasca and the delta area," which impacted on federal responsibilities relating to "national parks territories, to wildlife within the parklands and to the economic conditions of Indian populations."[211] There is no evidence that Premier Bennett ever responded to this letter. A similar letter was written by the federal Minister of Fisheries and Forestries to his provincial counterpart in December 1970, requesting the province's participation in discussions to address the environmental damages caused by the dam; he even proposed the following solutions:

> Given certain precautions, especially in 1971, it is possible that a regime of discharges from the W.A.C. Bennett Dam may be preferable to the variations which

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[209] J. Austin, Deputy Minister, Energy, Mines and Resources, to the Minister, July 17, 1970 (ICC Exhibit 1B, tab F, ICC p. 277).

[210] J. Austin, Deputy Minister, Energy, Mines and Resources, to the Minister, July 17, 1970 (ICC Exhibit 1B, tab F, ICC p. 276).

[211] Pierre Elliott Trudeau, Prime Minister of Canada, to W.A.C. Bennett, Prime Minister of British Columbia, August 12, 1970 (ICC Exhibit 1B, tab 12L, ICC pp. 288-90).

> were historically characteristic of the Peace River. Damaging floods will be avoided as long as there is close cooperation between the relevant authorities in B.C., Alberta and the Northwest Territories.
>
> Rock-filled dams on the outlet channels from the Peace-Athabasca Delta might have a favourable effect on the local ecology. *Another possibility is that of water releases from the W.A.C. Bennett Dam on an appropriate seasonal schedule. Neither of these alternatives, however, can be investigated intelligently until B.C. Hydro's operating pattern of the W.A.C. Bennett Dam for power production is known with some degree of certainty.*[212]

Again, British Columbia chose not to respond to Canada's invitation to participate in any discussions. Technical discussions regarding the environmental impacts of the dam on the delta were held in 1970 by an intergovernmental task force with participants from Canada, Alberta, and Saskatchewan, who expressed "a general feeling of helplessness" over the fact that British Columbia was not involved. Attempts to engage the province in discussions to address concerns over fisheries also proved fruitless.

Although it is clear from the evidence before us that the federal Crown was aware that the Bennett Dam could have significant impacts on navigation and other federal interests, and did seek to invite the participation of the BC government and BC Hydro in discussions about the impacts, these overtures and invitations did not go far enough. The Crown had the authority, and the duty, to ensure that the approval requirements of the *NWPA* were complied with. Canada's regulatory authority under the *NWPA*, when used in conjunction with its broad jurisdiction over navigation and other federal heads of power, provided the federal Crown with a powerful basis for initiating discussions with British Columbia as to the project's potential impacts on downstream federal interests. By simply insisting that British Columbia receive authorization under the *NWPA*, or by initiating legal proceedings to ensure that it did, the federal government could have taken the first step in protecting other federal interests, which were at risk of being significantly damaged by the construction and operation of the dam. Even when the federal Crown became aware of the negative impacts on IR 201 and the economic well-being of the Indian and Métis people of the Peace-Athabasca Delta, the Crown chose not to exercise its regulatory authority under the *NWPA*.

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[212] Pierre Elliott Trudeau, Prime Minister of Canada, to W.A.C. Bennett, Prime Minister of British Columbia, August 12, 1970 (ICC Exhibit 1B, tab 12P, ICC p. 298). Emphasis added.

Nor are we convinced that any of the Crown's other initiatives to mitigate the effects of the dam on the delta discharged its fiduciary obligations towards the First Nation. As a result of a task force's recommendations, a temporary rock-fill dam was constructed on the Quatre Fourches Channel in 1971, but it was removed after it contributed to severe flooding damage in 1974. Fixed crest weirs were also installed on the Rivière des Roches in 1975 and the Revillon Coupé in 1976, but these remedial efforts were also unsuccessful in restoring water levels in the delta to pre-dam conditions. Most significantly, they did not have the desired effect of recharging the elevated lakes, or perched basins.

Simply put, these efforts were too little, too late. Numerous studies have been completed since the dam's construction, including the 1996 *Northern Rivers Basin Study*, conducted jointly by Canada, Alberta, and the Northwest Territories, which emphasized the strong relationship between the regulation of water flows on the Peace River and attempts to remediate the dam's effects on the delta. The *Northern Rivers Basin Study* concluded that efforts to replenish water levels have been successful in restoring water levels on many of the lower lakes and channels but have not flooded the perched basins. The study emphasized the need for a coordinated approach with the BC government to modify the operational regime of the dam, if future remediation attempts are to be successful. Finally, the Board stressed that "economic factors in hydroelectric production must not take precedence over environmental stability."[213]

The Crown had extraordinary power and influence over the dam. If BC Hydro did not address federal concerns or mitigate damages to the delta and IR 201, the Minister could have ordered that the dam be torn down. Although it is extremely unlikely that the Minister would have used this extraordinary remedy under such circumstances, surely it gave the Crown the power at least to compel discussions with BC Hydro to protect federal interests. We do not accept the suggestion that such discussions would have been an exercise in futility, because the scientific evidence suggests that a coordinated approach with British Columbia, BC Hydro, Canada, and Alberta could have mitigated the effects on the delta, while still enabling British Columbia to meet its economic objectives. If waters were discharged at certain times of the year and in certain quantities, such a

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[213] *Northern River Basins Study*, 8 (ICC Exhibit 3). Emphasis in original.

measure could have replicated the effect of the natural spring floods and regenerated the perched basins.

In the final analysis, the Crown had the regulatory authority, and the duty, to ensure that the Bennett Dam complied with the requirements of the *NWPA*. The exercise of this regulatory authority did not limit the Minister of Public Works to considering only the dam's potential impacts on navigation. The Minister had a broad discretion to consider the environmental impacts on other areas within Parliament's legislative authority, including Indians and reserve lands. If Canada had insisted that the dam be constructed and operated in accordance with the requirements of the *NWPA*, the technical evidence suggests that Canada could have imposed terms and conditions on the operation of the dam to ensure that its environmental impact on federal interests was minimized. One obvious measure, suggested by the Minister of Fisheries and Forestries in 1970 and by the *Northern Rivers Basin Study* in 1996, would have been to stipulate conditions for the discharge of water in certain amounts and at certain times of the year to recreate natural spring flooding conditions, which periodically recharged the perched basins before the dam's construction.

Why did the Government of Canada not exercise its regulatory authority? The First Nation's legal counsel suggested that Canada's inaction was driven by political considerations:

> It is our submission that why this died as a federal issue was for pure grounds of political expediency. The Federal Government simply did not want to challenge what in the late 1960s was a symbol of B.C.'s economic growth and power and independence, and that the W.A.C. Bennett Dam, named after the former premier there, was a project too powerful, too important to B.C. for the Federal Government to weigh into on behalf of the interests of a few fish, a few buffalo and a few Indians.[214]

Whatever the underlying reasons were for Canada's decision to take no action to protect IR 201 from substantial environmental damage, it is our view that the Crown's actions and omissions do not meet the standard of care required of a fiduciary in these circumstances. The Crown simply did not take the necessary steps that persons of ordinary prudence would in managing their own affairs. Therefore, we find that the Crown breached its fiduciary duty to the Athabasca Chipewyan First

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[214] ICC Transcript, September 30, 1997, p. 16 (Jerome Slavik).

Nation, by failing to take reasonable steps to prevent, to mitigate, or to seek compensation for damages caused to IR 201 and to the First Nation's livelihood.

In our view, the federal Crown had extraordinary power to impose conditions on the operation of the dam but chose not to exercise it. Although it could be said that this power was not conferred on the responsible Minister to exercise for the sole benefit of First Nations, it is reasonable to infer that, where public works substantially impact on federal interests and other matters of national concern, Parliament intended the Minister to exercise this power in a proactive manner. To suggest otherwise would be to frustrate the will of Parliament and the object and purpose of the Act.

This situation cried out for the Government of Canada to intervene on behalf of aboriginal people and Canadians in general, who share a profound concern over the integrity of one of the most ecologically rich and sensitive areas on the continent. The Peace-Athabasca Delta has an intrinsic value to all Canadians, and efforts should have been made to preserve the integrity of the delta, while attempting to balance the need for economic development. The federal government had significant interests in maintaining the delta for the benefit of future generations. The Bennett Dam impacted on the Crown's federal responsibilities over national parks, navigation, riparian rights, the Crown's proprietary interests in Indian lands, the preservation of fish and fish-spawning areas, the maintenance of wetlands for migratory birds, and the economic well-being of hundreds of aboriginal people, who relied on the Crown for the protection and preservation of their treaty rights and interest in reserve lands. By declining to take reasonable steps to prevent or to mitigate environmental damages to the delta, the Crown has forsaken the legitimate interests of all Canadians and certainly the treaty rights of the Athabasca Chipewyan First Nation.

ISSUE 2 INTERFERENCE WITH TREATY RIGHTS

For the reasons stated above, we find that no interpretation of treaty could justify such a massive infringement on the treaty rights of a First Nation and destruction of its economic livelihood. Although the interference with treaty rights in this instance was not committed directly by the actions of the federal Crown, we find that Canada breached its fiduciary obligations towards the First Nation by failing to take reasonable steps to prevent or to mitigate the environmental damages to the delta and IR 201 specifically. In view of this finding, we decline to address the First Nation's submissions

that the Crown did not meet the strict justification test set out in *Sparrow*.[215] Generally speaking, it is our view that the test in *Sparrow*, regarding what is required to justify an infringement on treaty rights, does not apply in this case, because the material events took place prior to the entrenchment of existing aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982*. Having said that, we have no hesitation in finding that, except to the extent that the *NRTA* extinguished the treaty right to hunt, trap, and fish for commercial purposes, the evidence before the Commission does not demonstrate a "clear and plain" intention on the part of the Crown to extinguish the First Nation's rights under Treaty 8 to hunt, trap, and fish for food and to use IR 201 for its exclusive use and benefit. Although the dam's impact substantially interfered with the exercise of these treaty rights and entitlements, they were never extinguished, and such existing rights are now protected by section 35(1) of the *Constitution Act, 1982*.

We also decline to consider the First Nation's argument that the provincial or federal Crown had a positive duty under the *NRTA* to secure a supply of game and fish for the Indians, since it adds little, if any, significance to the Commission's findings in this inquiry.

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[215] *R. v. Sparrow*, (1990) 70 DLR (4th) 385 (SCC).

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 of the Athabasca Chipewyan First Nation. To determine whether the claim discloses an outstanding lawful obligation owed by Canada to the First Nation, the Commission was called upon to address four issues. In our view, the central issue before us was whether the Crown owed a fiduciary duty to the First Nation to prevent, mitigate, or seek compensation for the infringement upon the exercise of the First Nation's treaty rights and for damages caused to IR 201 by the construction and operation of the Bennett Dam. Issues surrounding the nature and scope of treaty rights and whether the Crown owed a statutory duty to protect IR 201 from environmental damage were also addressed in the course of answering that central question.

Our findings are summarized below.

ISSUE 1 STATUTORY AND FIDUCIARY OBLIGATIONS OF THE FEDERAL CROWN

The scope and content of the Crown's fiduciary duties can only be determined through a careful examination of the nature of the relationship between the Crown and the First Nation in question. The essential question is whether the Crown had undertaken to protect reserve land on behalf of the First Nation by statute, agreement, unilateral undertaking, or through a particular course of conduct. After careful consideration of the arguments presented by Canada and the First Nation, we find that the Crown did in fact undertake to protect the treaty rights of the Athabasca Chipewyan First Nation and its exclusive use, occupation, and enjoyment of IR 201.

The Crown's discretion and power to protect Indians in the use and occupation of their reserve lands is reflected in the *Royal Proclamation of 1763*, section 91(24) of the *Constitution Act, 1867*, and the *Indian Act*. In addition, the evidence surrounding the negotiation of Treaty 8 and the allocation of land in the Peace-Athabasca Delta confirms that the Crown also made a specific undertaking to protect IR 201 and its rich wildlife and plant habitat for the exclusive use and benefit of the Athabasca Chipewyan First Nation.

Based on the historical evidence before us in this inquiry, we make the following conclusions regarding the nature and content of the First Nation's treaty rights. First, the Crown's objective and purpose for entering into Treaty 8 was to extinguish Indian or aboriginal title to the treaty area and to open those lands for settlement, mining, lumbering, trading, or other purposes. At the same time, the federal Crown agreed to protect the Indian economies and ways of life, which were based upon hunting, trapping, and fishing in their traditional areas. Second, the reason the First Nation adhered to Treaty 8 was to protect its rights to hunt, trap, and fish. Elders' testimony confirms that these rights were fundamental to the First Nation's culture, community, economy, and way of life. The Treaty Commissioners' strong assurances and guarantees that these rights would continue, and the promise of other benefits, were the inducements that ultimately persuaded the leaders of the day to sign the treaties. Third, IR 201 was selected by the band because of its rich environment and abundance of muskrat, game, fish, and birds. Canada set aside IR 201 for the express purpose of providing the First Nation with exclusive rights to hunt, fish, and trap over this area and to protect the First Nation's ability to continue its traditional way of life and economy. This was justified by federal officials on the grounds that IR 201 had no other commercial value. Given the Crown's particular course of conduct in setting aside IR 201 for the exclusive use and benefit of the First Nation to assist it in exercising traditional pursuits, it was reasonable for the First Nation to expect that the Crown would take reasonable steps to protect the natural resources on IR 201 to ensure that its treaty rights and entitlements had meaningful content.

In our view, no reasonable interpretation of Treaty 8 could allow either the Government of Canada or a provincial government to destroy the ability of a First Nation to exercise its treaty harvesting rights or to alter fundamentally the environment upon which those activities were based. Nor do we believe that a reasonable interpretation of Treaty 8 would allow any government to effectively destroy the very economies upon which the Indians' signature of Treaty 8 was premised. Even if we are incorrect in these two conclusions, it is surely clear that no reasonable interpretation of Treaty 8 would allow the substantial interference with treaty rights *on reserve land* originally set aside by Canada specifically as an exclusive hunting, fishing, and trapping area for the use and benefit of the First Nation. Despite the Crown's undertaking to protect these lands for the exclusive

use of the First Nation, the construction and operation of the Bennett Dam deprived the First Nation of the beneficial use of its treaty entitlement.

The inequity of the result is dramatic. The federal Crown's right to take up lands for settlement and other purposes has certainly been exercised in the Treaty 8 area. The First Nations have honoured their part of the treaty, and the Crown has received the benefits of that treaty in the form of lands and resources worth millions of dollars. Yet the consideration received by the First Nation under Treaty 8, namely, the right to hunt, trap, and fish and the exclusive right to the beneficial use of IR 201 have been rendered almost entirely valueless because of the ecological destruction of those lands – a consequence the Government of Canada could have prevented, but chose not to.

For the above reasons, we have no hesitation in concluding that members of the Athabasca Chipewyan First Nation suffered extreme hardship and economic loss as a result of the destruction of the delta and environmental damages to IR 201. Given the severity of the impact on this community, it is our view that members of this community were and are entitled to expect the Crown to take reasonable steps to prevent, to mitigate, or to seek full compensation for the destruction of this First Nation's economic livelihood, for damages to IR 201, and for the substantial infringement on its food harvesting rights under Treaty 8.

With respect to the question of whether Canada had unilateral power or discretion over the legal and practical interests of the First Nation, we find that the federal Crown had significant power and discretion to exercise its constitutional jurisdiction over navigation, federal proprietary interests, and Indian lands. We also find that the federal Crown had an affirmative duty to exercise its regulatory authority under the *Navigable Waters Protection Act*, and, in the course of deciding whether to approve the dam project, the Crown had the discretion to consider whether the dam's construction would impact on federal areas of interest, including the First Nation's treaty rights and interests in IR 201. To read the legislative and constitutional jurisdiction of the Crown in a more limited fashion would frustrate the purpose of the Act, which, in its essence, is and was a tool to regulate navigation and to protect riparian owners from the harmful effects of works constructed on navigable waterways. Further, the federal Crown had a fiduciary obligation, both under treaty and

under the *Indian Act*, to protect and to preserve the treaty rights, the reserve land base, and the legal and economic interests of the First Nation.

The Commission finds that the First Nation was, in fact, peculiarly vulnerable to the Crown's unilateral power and discretion to regulate the construction and operation of the Bennett Dam. The federal government was well aware of British Columbia's hydroelectric development plans on the Peace River prior to the completion of the dam, but representatives of the government of Canada and British Columbia never informed or consulted the First Nation about the fact that the Bennett Dam might significantly alter the ecology, flora, and fauna of the delta. Nor was the First Nation given an opportunity to provide input into the planning and development of Bennett Dam to ensure that its interests and concerns were adequately addressed. The First Nation was also vulnerable to and at the mercy of the Crown's discretion or power in the sense that it was not aware of the dam and its potential impacts, and it did not have the sophistication or resources at that time to pursue the matter on its own.

Canada either knew, or ought to have known, of the impacts the dam would have on the economy and way of life of the First Nation, and this information should have been disclosed to the First Nation at the earliest possible opportunity. Canada's failure to provide timely disclosure of the dam and the impending damages to the delta amplified the effects of the First Nation's vulnerability, because the First Nation was deprived of the opportunity to make representations to BC Hydro or to seek whatever recourse was available to try to prevent or to mitigate the damages.

It was the Crown that had regulatory authority with respect to the dam's construction and operation, not the First Nation. Furthermore, the Crown had the resources and the influence to prevent, to mitigate, or to seek compensation for damages caused to IR 201. Why the Crown chose not to exercise its authority over the Bennett Dam, while members of the First Nation suffered undue hardship, is perplexing, given the nature of the Crown's fiduciary relationship with aboriginal peoples and its treaty commitments.

In view of the specific nature of the relationship between the Crown and the First Nation in this case, we find that the appropriate standard of care is based on what a person of ordinary prudence would do in managing his or her own affairs. Thus, the Crown was required to take reasonable steps and to exercise ordinary prudence to protect IR 201 and the First Nation's economic

livelihood from being irreparably damaged. In our view, the Crown failed to discharge this standard of duty in this case.

This situation cried out for the Government of Canada to intervene on behalf of aboriginal people, and Canadians in general, who share a profound concern over the integrity of one of the most ecologically rich and sensitive areas on the continent. The Peace-Athabasca Delta has an intrinsic value to all Canadians, and efforts should have been made to preserve the integrity of the delta, while attempting to balance the need for economic development. The federal government had significant interests in maintaining the delta for the benefit of future generations. The Bennett Dam impacted on the Crown's federal responsibilities over national parks, navigation, riparian rights, the Crown's proprietary interests in Indian lands, the preservation of fish and fish-spawning areas, the maintenance of wetlands for migratory birds, and the economic well-being of hundreds of aboriginal people who relied on the Crown for the protection and preservation of their treaty rights and interest in reserve lands. By declining to take reasonable steps to prevent or to mitigate environmental damages to the delta, the Crown has forsaken the legitimate interests of all Canadians and certainly the treaty rights of the Athabasca Chipewyan First Nation.

ISSUE 2 INTERFERENCE WITH TREATY RIGHTS

For the reasons stated above, we find that no interpretation of treaty could justify such a massive infringement on the treaty rights of a First Nation and destruction of its economic livelihood. In view of this finding, we decline to address the First Nation's submissions that the Crown did not meet the strict justification test set out in *Sparrow*. Nevertheless, we found that, although the dam's impact substantially interfered with the exercise of the First Nation's treaty rights and entitlements, they were never extinguished, and such existing rights are now protected by section 35(1) of the *Constitution Act, 1982*.

RECOMMENDATION

Based on a thorough consideration of the facts and law in relation to this claim, we find that Canada breached its statutory and fiduciary obligations towards the Athabasca Chipewyan First Nation by failing to take reasonable steps to prevent, to mitigate, or to seek compensation for an unjustified

infringement on its treaty rights and for environmental damages to IR 201 caused by the construction and operation of the W.A.C. Bennett Dam. Accordingly, we find that Canada owes an outstanding lawful obligation to the Athabasca Chipewyan First Nation and recommend:

> **That the Athabasca Chipewyan First Nation's claim be accepted for negotiation under Canada's Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC Commission Co-Chair	Carole T. Corcoran Commissioner	Aurélien Gill Commissioner

Dated this 31st day of March, 1998

APPENDIX A

ATHABASCA CHIPEWYAN FIRST NATION INQUIRY

1	Request that Commission conduct inquiry	March 4, 1996
2	Planning conferences	May 17, 1996
3	Community sessions	October 10, 1996 November 27, 1996

Two community sessions were held. At the first, held on October 10, 1996, the Commission heard from Tony Mercredi, Madeline Marcel, Victorine Mercredi, Eliza Flett, Josephine Mercredi, Daniel Marcel, Margaret Marcel, Mary Bruno, Rene Bruno. Expert evidence was provided by the following witnesses: Wim M. Veldman and David William Schindler.

Witnesses heard at the November 27, 1996, session were Tony Mercredi, Lawrence Courtoreille, Chief Archie Cyprien, Victorine Mercredi.

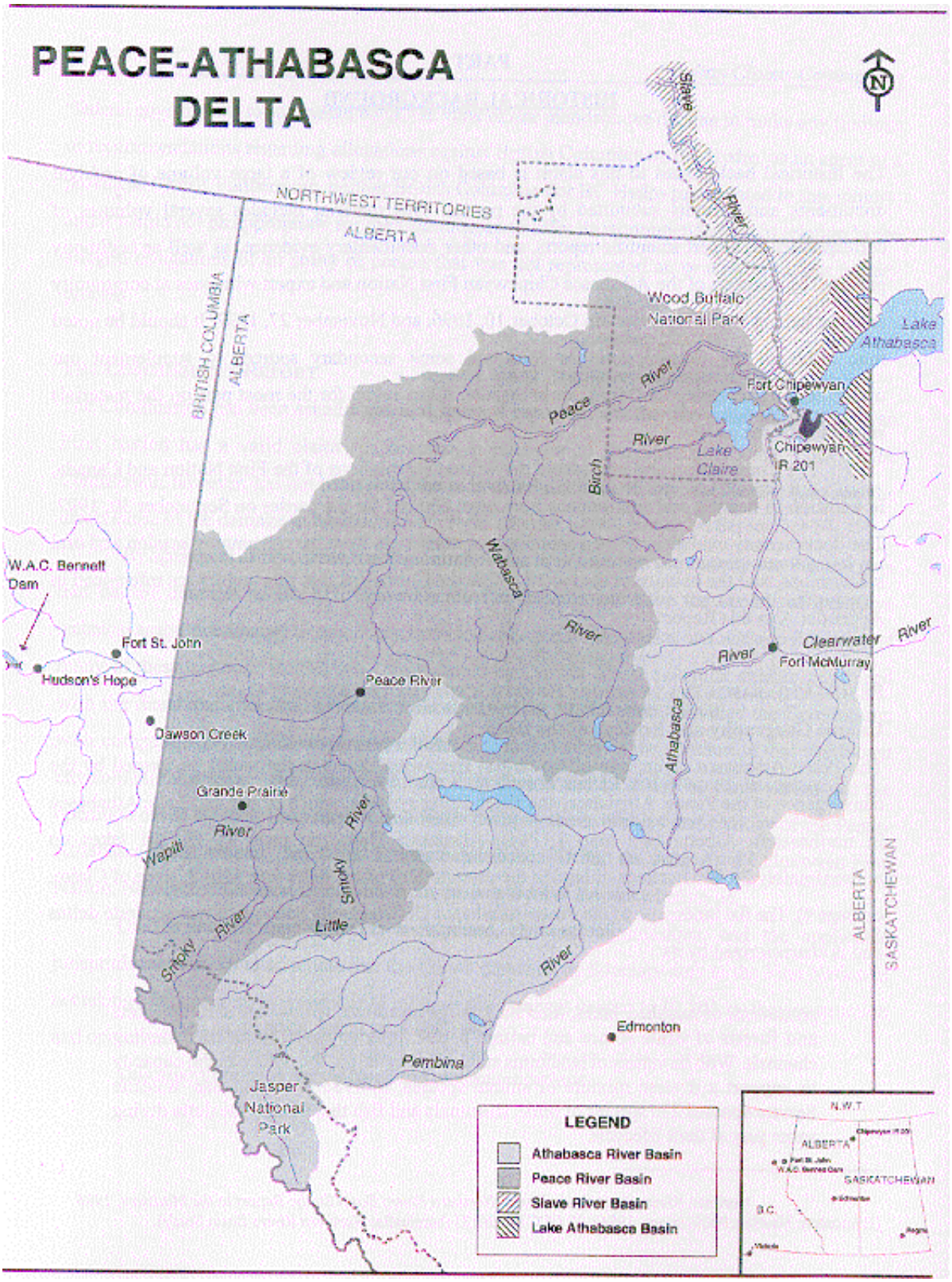
4	Oral session	September 30, 1997

5 Content of the formal record

The formal record for the Athabasca Chipewyan First Nation Inquiry into the WAC Bennett Dam and Damage to Indian Reserve No. 201 consists of the following materials:

- 22 exhibits tendered during the inquiry
- written submissions from counsel for the Athabasca Chipewyan 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.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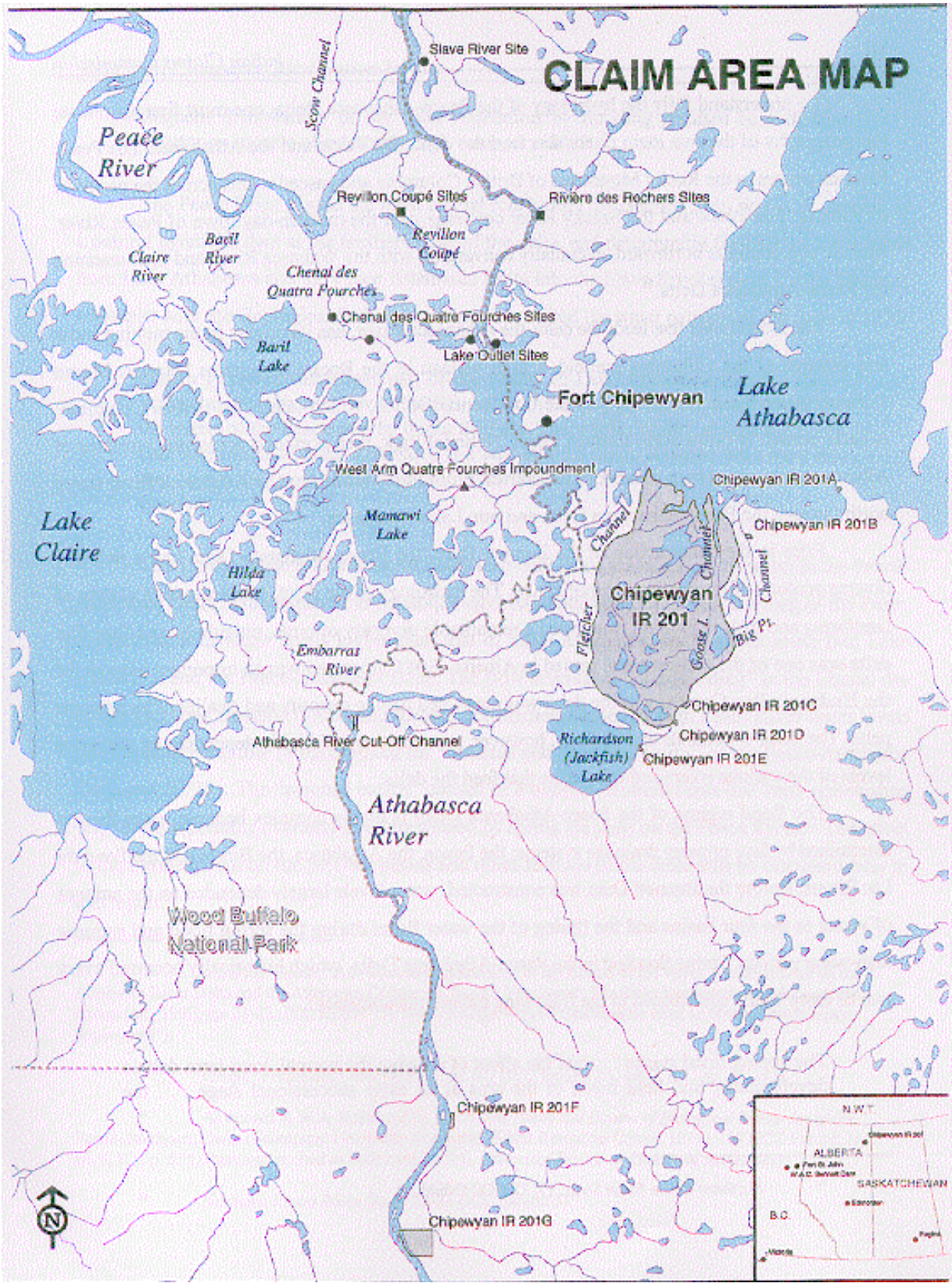
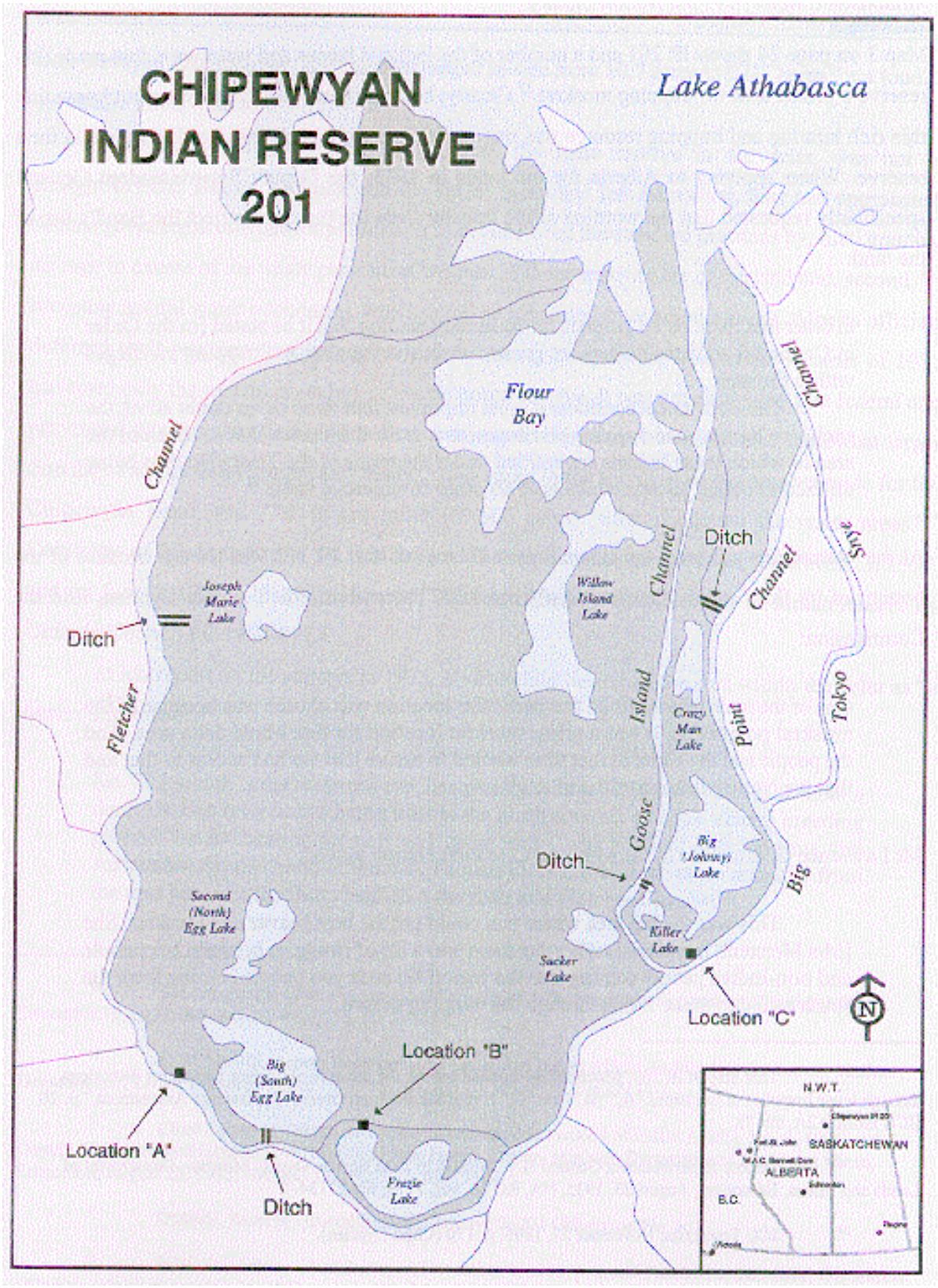
NORTHWEST TERRITORIES
ALBERTA
BRITISH COLUMBIA
ALBERTA
Slave River
Wood Buffalo National Park
Lake Athabasca
Fort Chipewyan
Chipewyan IR 201
Lake Claire
Peace River
Birch River
Wabasca River
Athabasca River
Clearwater River
Fort McMurray
W.A.C. Bennett Dam
Fort St. John
Hudson's Hope
Peace River
Dawson Creek
Grande Prairie
Wapiti River
Smoky River
Little Smoky River
Pembina River
Edmonton
Jasper National Park
ALBERTA
SASKATCHEWAN
LEGEND
Athabasca River Basin
Peace River Basin
Slave River Basin
Lake Athabasca Basin
N.W.T.
ALBERTA
SASKATCHEWAN
B.C.


CLAIM AREA MAP
Slave River Site
Peace River
Scow Channel
Revillon Coupé Sites
Rivière des Rochers Sites
Revillon Coupé
Claire River
Baril River
Chenal des Quatre Fourches
Chenal des Quatre Fourches Sites
Lake Outlet Sites
Baril Lake
Fort Chipewyan
Lake Athabasca
West Arm Quatre Fourches Impoundment
Chipewyan IR 201A
Chipewyan IR 201B
Lake Claire
Mamawi Lake
Hilda Lake
Channel
Chipewyan IR 201
Goose I.
Big Pt.
Fletcher
Embarras River
Chipewyan IR 201C
Chipewyan IR 201D
Chipewyan IR 201E
Athabasca River Cut-Off Channel
Richardson (Jackfish) Lake
Athabasca River
Wood Buffalo National Park
Chipewyan IR 201F
Chipewyan IR 201G
N.W.T.
ALBERTA
SASKATCHEWAN
B.C.


CHIPEWYAN
INDIAN RESERVE
201
Lake Athabasca
Flour
Bay
Channel
Channel
Channel
Ditch
Ditch
Ditch
Ditch
Joseph
Marie
Lake
Willow
Island
Lake
Island
Crazy
Man
Lake
Point
Tokyo
Bay
Fletcher
Goose
Big
Johnny
Lake
Big
Killer
Lake
Second
(North)
Egg Lake
Sucker
Lake
Big
(South)
Egg Lake
Frazie
Lake
Location "A"
Location "B"
Location "C"
N
N.W.T.
SASKATCHEWAN
ALBERTA
B.C.