

Ministre des Affaires indiennes et  
du Nord canadien et interlocuteur fédéral  
auprès des Métis et des Indiens non inscrits



Ottawa, Canada K1A 0H4

Minister of Indian Affairs and  
Northern Development and Federal Interlocutor  
for Métis and Non-Status Indians

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Ms. Renée Dupuis  
Chief Commissioner  
Indian Specific Claims Commission  
400 - 427 Laurier Avenue West  
PO Box 1750, Station B  
OTTAWA ON K1P 1A2

FILE # 2108-1-2 NO. DOSSIER
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Dear Ms. Dupuis:

I am in receipt of the Indian Specific Claims Commission's March 20, 2003, report entitled "Alexis First Nation: TransAlta Utilities Rights of Way Claim." I would like to acknowledge the hard work that went into the very detailed report concerning this complex and challenging claim. After a careful review of the Indian Specific Claims Commission's report, I do not accept the recommendation to accept this claim for negotiation under the Specific Claims Policy. A brief summary of Canada's position regarding this claim is set out below.

As you are aware, the Indian Specific Claims Commission Report dealt with the granting of two electrical power line permits in 1959 and 1967 and one electrical power line transfer granted pursuant to Section 35 of the *Indian Act* in 1969 over Alexis Reserve No. 133. The easements were granted to Calgary Power Limited. The Alexis Nakota Sioux Nation alleges that Canada breached its statutory and fiduciary duties by failing to obtain proper compensation for each of the permits and the transfer. The First Nation claims that:

- Canada failed to obtain any lump sum compensation for the land allocated to Calgary Power Limited under the 1959 subsection 28(2) Permit or to levy any annual charges, fees or assessments;
- Canada failed to negotiate a term in the 1967 Agreement regarding the amount of any annual charge to be paid by Calgary Power Limited;
- Canada failed to negotiate a larger one-time payment and impose an additional annual charge, rent, fee or assessment against Calgary Power Limited under the agreement for the 1969 transfer pursuant to Section 35 of the *Indian Act*; and,

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Canada

- Canada failed to impose a charge, rent or assessment against Calgary Power Limited after the 1969 Agreement had been entered into between Canada and Calgary Power Limited.

## **The Indian Specific Claims Commission Report**

### The 1959 Distribution Line:

The First Nation argued that the failure to obtain any compensation for this distribution line was a breach of treaty rights and a breach of the Crown's fiduciary duty. The treaty argument made by the First Nation was that the promise of land was fundamental to Treaty 6. The First Nation cannot be expected to trade off one treaty right (land), without compensation, for another treaty right (education). The Indian Specific Claims Commission did not accept that Canada had breached any lawful obligations with regard to the First Nation's consent to the easement or with regard to compensation.

### The 1967 Distribution Line

The only issue before the Indian Specific Claims Commission was the adequacy of compensation paid for the right of way to allow the 1967 distribution line. The Indian Specific Claims Commission found that the primary purpose of the 1967 distribution line was to service on reserve homes although its construction may have also brought electricity to an off reserve location. While the 1967 line did demand some compensation, the Indian Specific Claims Commission concluded that there was no evidence to suggest the amount paid was patently unreasonable in the circumstances and as such found no outstanding lawful obligations regarding this easement.

### 1969 Transmission Line

The Indian Specific Claims Commission report identified six outstanding lawful obligations regarding the 1969 Transmission line. The six breaches can be grouped into three general issues:

#### **1. The Crown's lawful obligations with respect to the adequacy of compensation and failure to obtain an annual fee, rental or charge**

The Indian Specific Claims Commission, relying on the *Apsassin* decision to determine the Crown's lawful obligations in relation to whether a reasonable person of ordinary prudence would have made the same decisions regarding their own affairs, found that the Crown breached its lawful obligations to the First Nation by failing to obtain an annual payment and failing to advise the First Nation of the bargaining position it had in dealing with Calgary Power.

The Supreme Court in *Osoyoos* has provided guidance relevant to this claim. In accordance with the *Osoyoos* decision, the first stage of an expropriation is the decision to expropriate. During this stage, the Crown acts in the public interest and no fiduciary duties arise. After the decision to expropriate is made in light of a public purpose, the Crown then has fiduciary duties to ensure that the expropriating authority takes no greater legal interest in land than is necessary and that the First Nation is properly compensated.

Canada is of the view that, linked to the fact that there is no fiduciary obligation to the First Nation in the public interest decision to expropriate, the Crown does not need to seek a premium for the land by determining bargaining positions for the First Nation (e.g., determining the cost of an alternate route around the reserve lands). Canada's obligation is to ensure minimal impairment of the First Nation interest and proper compensation. The Indian Specific Claims Commission did not find a breach concerning the duty to minimally impair the First Nation's interest in the land and it found that Canada acted reasonably with respect to the value of the land. Canada disagrees with the Indian Specific Claims Commission's finding that the First Nation could not be adequately compensated by a lump-sum payment. In cases of expropriation, the payment for the interest expropriated is frequently by a lump-sum payment. As such, Canada does not agree that it has any outstanding lawful obligations with regard to the form of compensation for this easement.

## **2. The Crown's lawful obligations relating to obtaining annual revenues by means of taxes**

The Indian Specific Claims Commission found a fiduciary duty on the part of Canada to implement a taxation by-law or to collect tax equivalencies on behalf of the Alexis Nakota Sioux Nation in this claim. More specifically, the Indian Specific Claims Commission suggested that a clause in the 1969 expropriation document provided the band with the power to tax. It is Canada's position that the clause concerned does not confer any taxing power or jurisdiction onto the First Nation. In our view, such clauses are standard in commercial transactions and serve to ensure that the responsibility for the payment of any taxes levied and tax increases is that of the grantee rather than the grantor. Canada is of the view that there is no positive legal obligation, fiduciary or otherwise, on the Crown to enact taxation by-laws or to advise a First Nation of any taxation powers that it may have. Therefore, it is Canada's position that it has no lawful obligation to advise First Nations of taxation authorities or to take steps to implement these authorities.

**3. The Crown's lawful obligation to obtain the First Nation's informed consent**

The Indian Specific Claims Commission found that the Crown breached a lawful obligation to the band by failing to obtain its informed consent to the 1969 expropriation. Canada is of the view that there is no legal requirement that the First Nation's consent, informed or otherwise, be obtained for an expropriation. In accordance with *Osoyoos*, no fiduciary duty is owed to First Nations while the Crown determines if the land is required to satisfy a public purpose.

In support of its finding that the First Nation did not grant informed consent for the expropriation, the Indian Specific Claims Commission determined that more land was taken than the amount for which the First Nation received compensation. 61 acres were cleared by First Nation members and only 42.96 acres were made subject to the right of way. The additional land that was cleared was to allow sufficient clearance for the installation and construction of the towers and wires and to remove any protrusions onto the right of way such as tree branches. Canada is of the view that the amount of land above 42.96 acres that was cleared was not expropriated and is not required for the continued operation of the transmission line. There was no evidence that Calgary Power Limited is using or occupying more than the 42.96 acres taken.

After reviewing the Indian Specific Claims Commission Report and considering the recommendations, I do not accept this claim for negotiation under the Specific Claims Policy.

Again, thank you for your Report and for your patience in waiting for Canada's response.

Yours sincerely,

A handwritten signature in black ink that reads "Andy Scott". The signature is written in a cursive, flowing style.

The Honourable Andy Scott, PC, MP

c.c.: Daniel Bellegarde  
Sheila Purdy