
RESPONSES

Re: Mamaleqala Qwe'Qwa'Sot'Enox Band McKenna-McBride Applications
Robert D. Nault, Minister of Indian Affairs and Northern Development,
to Chief Robert Sewid
December 8, 1999
393

Re: 'Namgis First Nation McKenna-McBride Applications
Robert D. Nault, Minister of Indian Affairs and Northern Development,
to Chief Councillor William Cranmer,
December 8, 1999
395

RESPONSE TO MAMALELEQALA QWE'QWA'SOT'ENOX BAND

Minister of Indian Affairs
and Northern Development



Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

DEC - 8 1999

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Chief Robert Sewid
Mamaleleqala-Qwe'Qwa'Sot'Enox Band
1441A Old Island Highway
CAMPBELL RIVER BC V9W 2E4

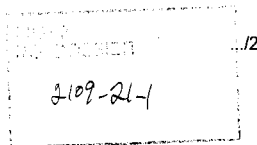
Dear Chief Sewid:

As you are aware, I am in receipt of the Indian Specific Claims Commission's (ISCC) March 1997 report on your band's specific claim, the *Mamaleleqala Qwe'Qwa'Sot'Enox Band - Report on McKenna-McBride Applications Inquiry*. Please accept my sincere apologies for Canada's delay in responding to the ISCC's recommendations.

Three issues were canvassed by the ISCC in this report: (1) Canada's alleged fiduciary obligation to represent the Mamaleleqala-Qwe'Qwa'Sot'Enox Band's interests before the historic McKenna-McBride Commission; (2) Canada's alleged fiduciary obligation to protect Indian settlement lands; and (3) the scope of Canada's Specific Claims Policy.

As you know, the ISCC recommended a portion of your claim be accepted for negotiation: a minimum of 5 acres in Lull Bay, 2.83 acres in Shoal Harbour and the lands in Knight's Inlet claimed by your band as settlement lands. In the ISCC's view, liability on the part of the Crown existed pursuant to the "Lawful Obligation" clause of *Outstanding Business*, Canada's Specific Claims Policy, on the basis of three findings: (1) that the alleged fiduciary obligations of Canada's Indian Agents are "lawful obligations" within the meaning of the Specific Claims Policy, and thus an alleged breach of such obligations falls within the scope of the policy; (2) that the Indian Agent assigned to the Kwakwewith Agency during the 1914 McKenna-McBride Commission hearings had a fiduciary obligation to the members of the Mamaleleqala-Qwe'Qwa'Sot'Enox Band which he breached by failing to assist the band in its preparations for the McKenna-McBride Commission hearings; and (3) that Canada had a fiduciary obligation to protect the Mamaleleqala First Nation's traditional settlement lands from encroachment by provincial timber licences.

Canada



- 2 -

After careful consideration of the Commission's report, I regret that I am unable to accept the ISCC's recommendation to accept this claim on the basis outlined above. Canada's response to each of the ISCC's findings is as follows:

- (1) Canada rejects the ISCC's finding that the enumerated examples of "lawful obligation" outlined in *Outstanding Business* were not intended to be exhaustive. Canada is of the view that outside the circumstances outlined in the "lawful obligation" and "beyond lawful obligation" clauses of *Outstanding Business* (i.e. a treaty obligation, statutory requirement and/or responsibility for management of Indian land or assets), fiduciary obligations are not "lawful obligations" within the meaning of the Specific Claims Policy. Only those fiduciary obligations arising within the context of lawful obligations (as defined in the policy) may fall within the scope of *Outstanding Business*.
- (2) Canada takes the position that: (a) there is no general fiduciary duty in relation to Aboriginal interests in non-reserve lands; and (b) the necessary elements required to establish a fiduciary obligation (i.e. a statute, agreement or unilateral undertaking to act for or in the interests of the First Nation; unilateral power to affect the First Nation's interests; and/or vulnerability on the part of the First Nation to the exercise of that power) were not present on the facts of this claim.
- (3) Canada's position remains, as has been articulated in response to other British Columbia specific claims dealing with the issue of Indian settlement lands, that there is no general fiduciary obligation to protect traditional Indian settlement lands from the actions of other individuals or governments.

I know that this claim was important to you and to the other members of the Mamaleleqala-Qwe'Qwa'Sot'Enox First Nation. Should you wish further clarification of Canada's position, representatives of the Specific Claims Branch and the Department of Justice would be pleased to meet with you and members of your First Nations. Arrangements for such a meeting may be coordinate with Ms. Deborah McIntosh of the Specific Claims Branch, who can be reached at (604) 775-8139.

I truly regret my inability to resolve your grievance under the Specific Claims Policy.

Yours sincerely,

ORIGINAL SIGNED BY
ORIGINAL SIGNÉ PAR
ROBERT D. NAULT

Robert D. Nault, P.C., M.P.

c.c.: Mr. Daniel J. Bellegarde
Mr. James Prentice
Mr. Allan Donovan

RESPONSE TO NAMGIS FIRST NATION

Minister of Indian Affairs
and Northern Development



Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

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RECEIVED

DEC - 8 1999

Chief Councillor William Cranmer
'Namgis First Nation
P.O. Box 210
ALERT BAY BC V0N 1A0

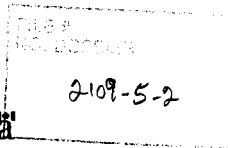
Dear Chief Councillor Cranmer:

As you are aware, I am in receipt of the Indian Specific Claims Commission's (ISCC) February 1997 report on your First Nation's specific claim, the *'Namgis First Nation - Report on McKenna-McBride Applications Inquiry*. Please accept my sincere apologies for Canada's delay in responding to the ISCC's recommendations.

Two issues were canvassed by the ISCC in this report: (1) Canada's alleged fiduciary obligation to represent the 'Namgis First Nation's interests before the historic McKenna-McBride Commission; and (2) the scope of Canada's Specific Claims Policy.

As you know, the ISCC recommended the portion of your claim dealing with Plumper Island be accepted for negotiation, and as well that further research between Canada and the 'Namgis First Nation be conducted to determine whether there were additional unalienated lands available to your First Nation at the time of the McKenna-McBride hearings. In the ISCC's view, liability on the part of the Crown existed pursuant to the "Lawful Obligation" clause of *Outstanding Business*, Canada's Specific Claims Policy, on the basis of two findings: (1) that the alleged fiduciary obligations of Canada's Indian Agents are "lawful obligations" within the meaning of the Specific Claims Policy, and thus an alleged breach of such obligations falls within the scope of the policy; and (2) that the Indian Agent assigned to the Kwawkwalth Agency during the 1914 McKenna-McBride Commission hearings had a fiduciary obligation to the members of the 'Namgis First Nation, which he breached by failing to assist the band in its preparations for the McKenna-McBride Commission hearings and by failing to represent the band's interests before the Commission.

Canada



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After careful consideration of the Commission's report, I regret that I am unable to accept the ISCC's recommendation to accept this claim on the basis outlined above. Canada's response to each of the ISCC's findings is as follows:

- (1) Canada rejects the ISCC's finding that the enumerated examples of "lawful obligation" outlined in *Outstanding Business* were not intended to be exhaustive. Canada is of the view that outside the circumstances outlined in the "lawful obligation" and "beyond lawful obligation" clauses of *Outstanding Business* (i.e. a treaty obligation, statutory requirement and/or responsibility for management of Indian land or assets), fiduciary obligations are not "lawful obligations" within the meaning of the Specific Claims Policy. Only those fiduciary obligations arising within the context of lawful obligations (as defined in the policy) may fall within the scope of *Outstanding Business*.
- (2) Canada takes the position that: (a) there was no general fiduciary obligation on the part of the federal Crown to protect and/or promote the interests of the 'Namgis First Nation before the McKenna-McBride Commission; and (b) the necessary elements required to establish a fiduciary obligation in this particular context (i.e. a statute, agreement or unilateral undertaking to act for or in the interests of the First Nation; unilateral power to affect the First Nation's interests; and/or reliance on or vulnerability to these things by the First Nation) were not present on the facts of this claim.

I know that this claim was important to you and to the other members of the 'Namgis First Nation. Should you wish further clarification of Canada's position, representatives of the Specific Claims Branch and the Department of Justice would be pleased to meet with you and members of your First Nations. Arrangements for such a meeting may be coordinate with Ms. Deborah McIntosh of the Specific Claims Branch, who can be reached at (604) 775-8139.

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Mr. Stan H. Ashcroft