RESPONSES

Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

MAR 2 9 2001

Messrs. Daniel J. Bellegarde and James Prentice, Q.C.
Co-Chairs
Indian Specific Claims Commission
PO Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Messrs. Bellegarde and Prentice:

Thank you for providing me with copies of the Indian Specific Claims Commission's (ISCC) March 1999 report on the Moose Deer Point inquiry. I regret Canada's delay in responding to the Commission's report on this claim.

As you will recall, there were three issues considered by the Commission in this claim. The following issues were considered by the inquiry:

1) Were promises made by the Crown to its allies, including the ancestors of the Moose Deer Point First Nation?

2) If promises were made by the Crown to its allies, including ancestors of the Moose Deer Point First Nation, what were the nature and scope of the promises?

3) Does the Crown have an outstanding lawful obligation to the Moose Deer Point First Nation?

I note that the ISCC found that the 1837 speech by Samuel Jarvis constituted a "Treaty". However, Canada maintains the position that the Jarvis address was a unilateral statement of government policy which included the invitation to the assembled Indians to settle on Manitoulin Island. I also note that the ISCC did not conclude that Canada owed an outstanding lawful obligation to the Moose Deer Point First Nation in relation to the alleged unfulfilled treaty promises.

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Canada

The ISCC found that the right to "presents" was terminated in 1852 by Superintendent Anderson at an address to the Indians at Penetanguishene. With respect to the First Nation's equality rights, and rights to use and occupy lands for traditional purposes, the Commission noted that "the First Nation has failed to tender the sort of evidence on which we can comfortably rely to define the precise extent of these rights or to be able to conclude definitively that the Crown has failed to fulfill them". Despite this finding, I note that the ISCC recommended that Canada enter into negotiations with Moose Deer Point First Nation and conduct further research to determine if the rights at issue can be substantiated.

Under the Specific Claims Policy, Canada is mandated to enter into negotiations where it is determined that there is an outstanding lawful obligation. Under the Specific Claims Policy, First Nations are provided with funding to assist with their claims research, to retain lawyers, and to advance their claims. In this case, although no outstanding lawful obligation has been determined, the ISCC has recommended that Canada "further research and negotiate the First Nations' outstanding entitlements, if any, under that treaty".

Canada has certainly undertaken joint research projects with First Nations in the past. However, the parameters of this research and the precise issues being researched have always been well defined beforehand. I am sure that the ISCC will appreciate that the circumstances of this particular claim are quite different. After a fully researched claim submission, consideration by Canada, a full ISCC inquiry and, I understand, very able representation by the First Nation's counsel, the very substance of the treaty rights Canada is alleged to have breached cannot be defined with any certainty. Given these circumstances, I am not prepared to authorize a joint research project with the First Nation.

I readily add, however, that it is always open to the First Nation to make further submissions on any of the issues touched upon by the ISCC, and that Canada will consider such submissions in accordance with the Specific Claims Policy. The First Nation has been advised with respect to the availability of funding to conduct further research.

I regret that my response could not be more favourable at this time.

Yours sincerely,

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

c.c. Chief Edward Williams

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and Northern Development

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APR - 2 2001
AVR

Mr. James Prentice, Q.C.
Chair
Indian Specific Claims Commission
PO Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Commissioner Prentice:

Thank you for providing me with copies of the Indian Specific Claims Commission's (ISCC) March 1998 report concerning the Athabasca Chipewyan First Nation's (the FN) specific claim, *Athabasca Chipewyan First Nation Inquiry - WAC Bennett Dam and Damage to Indian Reserve No. 201 Claim.*

As you will recall, there were four issues reviewed by the ISCC in this report:

(1) Does Canada have a statutory or fiduciary lawful obligation to the FN to have prevented, mitigated or sought compensation for environmental damages to IR 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) Did the Crown meet its statutory and fiduciary obligations to the FN?

(4) Did the Crown breach the FN's treaty rights by allowing an unreasonable and unjustified interference with the FN's hunting, fishing and trapping rights on IR 201?

The ISCC concluded that Canada owes an outstanding lawful obligation to the FN and recommended that the FN's claim be accepted for negotiation under Canada's Specific Claims Policy. Based on the Department of Justice Canada's legal review of the facts, Canada does not agree with this recommendation and this claim will not be accepted for negotiation under the Specific Claims Policy.

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In Canada's view, Canada did not have a fiduciary duty to protect Reserve No. 201 against damage caused to the reserve by construction and the operation of the Bennett Dam by a third party. Canada did not have a duty to invoke the provisions of the *Navigable Waters Protection Act* to stop the construction of the Bennett Dam or dispose of it once it was built. Furthermore, Canada did not have an obligation on the basis of Treaty No. 8 to ensure that the reserve would be protected from any damage resulting from the construction and operation of the Bennett Dam. Therefore, there is no outstanding lawful obligation owed to the FN on the part of Canada.

I would like to thank the Indian Specific Claims Commission for its consideration of this claim.

Yours sincerely,

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

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MAY 11 2001

Mr. Daniel J. Bellegarde
Mr. James Prentice, Q.C.
Co-Chairs
Indian Specific Claims Commission
PO Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Commissioners Bellegarde and Prentice:

As you are aware, I am in receipt of the Indian Specific Claims Commission's (ISCC) March 1996 report regarding the Namgis First Nation's specific claim, *Namgis First Nation Inquiry - Report on: Cormorant Island.* I regret Canada's delay in responding to the Commission's report on this claim.

The seven issues raised before the ISCC are as follows:

1. Did Canada have the mandatory obligation, pursuant to the Orders in Council (and related documentation), which effectively appointed W.J. Sproat as sole Indian Reserve Commissioner, to refer the rejection of Sproat's allotment of Cormorant Island to a Judge of the British Columbia Supreme Court?

2. Did Canada have a fiduciary obligation to refer the rejection of Sproat's allotment of the Island to a Judge of the British Columbia Supreme Court?

3. In the alternative, did Canada have an obligation, pursuant to Article 13 of the *Terms of Union 1871*, to refer the rejection of Sproat's allotment of the Island to the Secretary of State for the Colonies?

4. If the answer to question 2 or 3 is yes, did Canada fulfill its obligation by requesting a review and opinion from Prime Minister MacDonald's "Confidential Agent on Indian Affairs and Railway Matters, J.W. Trutch"?

5. If the rejection of Sproat's allotment had been referred to a Judge of the British Columbia Supreme Court, would the allotment have been upheld?

Canada

6. Was Canada negligent in not referring the rejection of Sproat's allotment to either a Judge of the British Columbia Supreme Court or the Secretary of State for the Colonies?

7. Does this claim fall within the scope of the Specific Claims Policy?

The ISCC recommended that Canada accept this claim for negotiation. The ISCC found that, pursuant to the Order in Council (and related documentation) appointing Sproat as Commissioner, Canada had a mandatory obligation to refer the rejection of his allotment of Cormorant Island to a Judge of the British Columbia Supreme Court. The ISCC also found that Canada had a fiduciary obligation to make such a referral and that Canada did not fulfil its fiduciary obligation by requesting its confidential agent, Mr. Joseph Trutch, to review and provide his opinion on the matter. The ISCC also indicated that, had Canada fulfilled its obligations, it might have succeeded in having the allotment upheld or at least in obtaining a larger portion of reserve land for the First Nation.

In light of these conclusions, the ISCC did not consider it necessary to address the issues of whether an obligation arose from Article 13 of the *Terms of Union 1871* or whether Canada was negligent in failing to refer the rejection of Sproat's allotment of the Island to a Judge of the British Columbia Supreme Court. The ISCC concluded that the First Nation's claim fell within the scope of the Specific Claims Policy.

Canada has thoroughly reviewed the recommendations of the ISCC. Despite the legal and policy analysis conducted as a result of this ISCC report and others, Canada maintains its view that the facts do not disclose an outstanding lawful obligation to the Namgis First Nation. In Canada's view, the wording of the Order in Council (and related documentation) appointing Sproat contemplate that a referral of differences between Sproat and the Chief Commissioner of Lands and Works to a Judge of the British Columbia Supreme Court was a discretionary rather than a mandatory obligation, as found by the ISCC.

Canada does not view the nature and scope of its fiduciary obligations to be the same as that found to exist by the ISCC. Canada maintains that the elements required to establish a fiduciary obligation to refer the rejection of Sproat's allotment to a Judge of the British Columbia Supreme Court are not present.

In addition, Canada continues to conclude that, although it was not required to take further steps following the rejection of Sproat's allotment, it acted in a reasonable manner to investigate the difference between Sproat and the Chief Commissioner by obtaining an opinion from Mr. Trutch on the matter and by later agreeing that Commissioner O'Reilly should proceed to the Island to allot reserves for the First Nation.

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As recognized by the ISCC, we cannot know with certainty what a Judge would have done if the matter of the rejection of Sproat's allotment had been referred to a Judge of the British Columbia Supreme Court. There is no evidence that a judicial decision would have meant that different or more lands were allotted to the First Nation by Commissioner O'Reilly.

Therefore, Canada concludes that there is not an outstanding lawful obligation owed to the Namgis First Nation in respect of the subject matter of this claim. Consequently, the claim will not be accepted for negotiation.

I would like to thank the Indian Specific Claims Commission for its consideration of this claim.

Yours sincerely,

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

Minister of Indian Affairs
and Northern Development

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JUN 13 2001

Mr. Daniel J. Bellegarde
Mr. James Prentice, Q.C.
Mr. Roger J. Augustine
Co-Chairs
Indian Specific Claims Commission
PO Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Commissioners Augustine, Bellegarde and Prentice:

As you are aware, I am in receipt of the Indian Specific Claims Commission's (ISCC) September 1999 report regarding the Duncan's First Nation's specific claim, *Duncan's First Nation Inquiry - Report on: 1928 Surrender Inquiry*. I appreciate the detailed consideration which the Commission brought to the issues.

I would also like to thank you sincerely for the work done during the ISCC inquiry, which resulted in Canada's agreement to negotiate the Duncan's First Nation's claim with respect to IR 151H. These negotiations led to the settlement of that claim in 1999.

As you know, Canada and the Duncan's First Nation settled an earlier claim in 1996 relating to the application of the *Farmers' Creditors Arrangement Act* to sales of surrendered reserve lands.

In your report, although the ISCC concluded that Canada owes no lawful obligation to the Duncan's First Nation in relation to six of the seven reserve parcels at issue, the Commission recommended that Canada accept Duncan's claim with respect to one parcel, IR 151E (118 acres). The ISCC stated that Canada should have brought a 1923 leasing proposal in relation to IR 151E to the First Nation's attention and that:

> ...having failed to fulfil this duty, the Governor in Council should have withheld consent to the surrender of IR 151E since, without the Band having been afforded the opportunity to consider its options, the surrender must be considered to have been foolish, improvident, and exploitive.

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After careful review, Canada has declined to accept the Commission's recommendation to negotiate with the Duncan's First Nation regarding IR 151E, for the reasons outlined below.

First, the leasing proposal was submitted by Mr. Early five years before the actual surrender, and there is no evidence that a lease of IR 151E was still being sought in 1928. In addition, the evidence indicates that the First Nation knew of the 1923 leasing proposal and could have raised the issue on its own behalf. The Crown cannot substitute its own decision for that of the First Nation, and the Commission found that the assent to the surrender was given freely, and that Canada invited the First Nation to raise issues. The ISCC accepted that Canada posed the question at the surrender meeting: "What do you want to do?" In Canada's view, nothing prevented the First Nation from raising the leasing issue at the time.

Finally, the Commission did not examine the terms of the proposed lease and, as a result, made no finding that the 1923 lease proposal was either more or less advantageous to the First Nation than a surrender. Without this information, Canada is not able to accept the Commission's conclusion that it was exploitative to allow for the surrender and sale to go forward.

For these reasons, Canada cannot accept this claim for negotiation as recommended by the ISCC.

I thank you for your patience in waiting for Canada's response to your report. Although I regret that my reply regarding IR 151E could not be more positive, I would like to thank and congratulate the ISCC for its pivotal role in the successful settlement of the Duncan's First Nation's claim with respect to IR 151H.

Yours sincerely,

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