



Immediate Release

NCC Misleads Parliament – Again

Chelsea, October 28, 2009 – “The NCC has again misled Parliament on Gatineau Park, this time in broad daylight and before a House committee,” said GPPC co-chair Andrew McDermott.

The NCC’s CEO Marie Lemay and Chair Russell Mills appeared today before the Commons Transport Committee to support the Conservative government’s Bill C-37, the so-called Action Plan for the Nation’s Capital.

“Ms. Lemay has had 22 months on the job to get her act together and she should know better than to say the size of Gatineau Park has increased by some 1,700 acres,” said Mr. McDermott. “The lands Ms. Lemay refers to may be part of the National Interest Land Mass, and the NCC may wish they were in Gatineau Park, but legally they are clearly outside the park,” said Mr. McDermott.

The NCC’s own 1995 documents say “The boundaries of Gatineau Park [were] established by the Order in Council in 1960,¹” adding that “new Gatineau Park boundaries [would require] an amendment to the 1960 Order in Council which legally created the park.²” However, no new Order in Council has ever been adopted to ratify the park’s so-called 1997 boundary. In legal terms, only the 1960 boundary is valid, which means the Meech Creek Valley is legally outside the park, and that the park has suffered a net loss of 1,842 acres since 1992.

“Not only did Ms. Lemay get it wrong on the boundaries, she also misled the committee over NCC ownership of 12,500 acres of Gatineau Park, falsely claiming the titles still had to be registered,” said Mr. McDermott. “That is utter and complete nonsense, since all the NCC needs to claim ownership of those 12,500 acres is a transfer of control and management from the province, which is exactly what it got by virtue of a 1973 agreement,” said Mr. McDermott.

In 1945, the Supreme Court of Canada confirmed that federal and provincial governments do not transfer property titles to one another because the Crown is one and indivisible. In *Attorney General of Canada v. Western Highbie and Albion Investments Ltd.*, the Court ruled that no real transfer of title occurs when a province cedes land to the federal government, or vice-versa, because the Crown remains the owner in both cases. Accordingly, what takes place is merely a transfer of administrative control from one government to the other.

“For years, the NCC has made payments in lieu of taxes on the 12,500 acres Ms. Lemay claims are the subject of an agreement that still has to be finalized – 35 years after it was signed ... Why Ms. Lemay misrepresented those facts is beyond us,” said Mr. McDermott.

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¹ NCC ATIP A95/96-026, p. 135.

² NCC ATIP A95/96-026, p. 138.

Backgrounder

The Alleged Need to Transfer Titles

By virtue of a 1973 agreement, the Quebec government transferred the control and management of 12,500 acres of provincial lands located inside Gatineau Park to the federal government – “in perpetuity” according to the two accompanying Orders in Council.³ The province also transferred the control and management of the lake bottoms located in the park, committed itself not to issue mining exploration permits, stipulated that the lands it was transferring were to form part of Gatineau Park, and guaranteed that the rights it was transferring were free of all defects in title.

In such agreements, and those preceding creation of national parks, it is not ownership that is being transferred, but rather the control and management of the land and resources. As the Supreme Court has said, citing the principle of indivisibility of the Crown, and quoting legal scholar Paul Lordon, “Her Majesty is the owner of the property whether in right of Canada or the province and cannot grant to Herself. Only administrative control of the property passes. The transfer is, therefore, made by reciprocal Orders in Council and is confirmed by statute where third party rights are involved.”⁴

Moreover, according to University of Calgary Professor Nigel Bankes, a transfer of land from the provincial to the federal government for the creation of a national park is not technically a conveyance of ownership; rather, it is the administration and control of the land and resources that are being transferred from the province to the federal government.⁵

Therefore, by virtue of the 1973 agreement, and the accompanying Orders in Council, it seems that the province has essentially done what a province should do when it participates in the creation of a national park, i.e., handed over control and management of its Gatineau Park lands to the federal government, and agreed that the land it transferred be used for park purposes. As for the subsurface rights question, the Quebec government has stipulated it will not issue any mining exploration permits, and given the federal government control of the lake bottoms.

When asked why it claims the province still owns, or holds title to,⁶ 17% of the land in Gatineau Park, the NCC answered: “The issue of ownership of these lands is complex because of the nature of the agreements governing these lands [...] The NCC does not have clear title to these lands.”⁷ An answer that distorts the picture more than it informs. Interestingly, in response to a question placed on the Senate Order Paper, the NCC seems to have changed its tune on this issue. It now says that it “gained control of the government of Quebec lands and lake bottoms in

³ *Agreement Regarding the Transfer of Control and Management of Certain Public Lands in the Quebec Portion of the National Capital Region*, August 1, 1973. See also federal Order in Council P.C. 1973-4/437, February 20, 1973, and Quebec Order in Council 3736-72, December 13, 1972.

⁴ *Osoyoos Indian Band v. Oliver (Town)*, 2001, SCC 85, [2001] 3 S.C.R. 746. See also Lordon, Paul, *Crown Law*, Butterworths, 1991, pp. 29-30, 282-283.

⁵ Bankes, N. D., “Constitutional Problems Related to the Creation and Administration of Canada’s National Parks,” in *Managing Natural Resources in a Federal State*, J. Owen Saunders, ed., Carswell, Toronto, 1986, p. 220.

⁶ See *Senate Sessional Paper 1/38-461S*, April 12, 2005, pp. 1, 4, 5, and *Gatineau Park Master Plan*, National Capital Commission, Ottawa, 2005, p. 75.

⁷ Information obtained from the NCC Intergovernmental Relations Branch, September 25, 2006.

the park”⁸ as a result of the 1973 agreement. Moreover, in this latest response, the NCC says that the exchange was not of title, but of administration and control ...

Moreover, the provincial government also seems confused over the nature of the 1973 agreement. According to a newspaper article featuring Quebec Interprovincial Affairs Minister Benoît Pelletier, the 1973 agreement still needs to be “finalized,” “officialised,” and “clarified,” since the titles were never registered with the land registry office.⁹ This is utter nonsense, since, as Professor Mundell has written:

Lands held by the federal and provincial governments are both vested in Her Majesty but [...] the administration of the lands is carried out on her behalf through different representatives. It follows that no conveyance of title can be made by one government to another. Title remains throughout in Her Majesty. All that need be transferred is the authority and duty to administer the lands on behalf of Her Majesty [...] by complementary Orders-in-Council [...]. No further conveyance is necessary nor would it be proper.¹⁰

The Mysterious Boundaries Question

Gatineau Park’s boundaries were set by a legal instrument years ago. On April 29, 1960, the federal government approved Order in Council P.C. 1960-579 which included a plan “indicating the Gatineau Park boundary.” Moreover, various documents prepared by senior officials for the NCC’s executive management committee confirm that the 1960 decree set the park’s legal boundary and that any changes to it would require a new Order in Council.¹¹

Over the last two years, however, the NCC has been changing its story on the exact nature of those boundaries. For instance, it told Senator Mira Spivak in 2004 that “the legal boundary of the park [...] had been established by federal Order in Council in 1960.”¹² And then, in a complete reversal about a year later, it told Ottawa-Centre MP Ed Broadbent that “the 1960 Order in Council did not establish the park boundary.”¹³ Adding to the confusion, NCC Chairman Marcel Beaudry said in a letter of April 12, 2005 to senators that Treasury Board had approved the park’s new boundary in 1997. However, in response to a written question from Senator Spivak seeking clarification, the NCC now said that the Treasury Board decision had not established the park boundary ...¹⁴

⁸ *Senate Sessional Paper* 1/39-514S, October 18, 2006.

⁹ «‘Il n’a jamais été question d’un parc national’», dit Benoît Pelletier, *Le Droit*, le 14 décembre 2005, p. 17. This interpretation of the 1973 agreement was confirmed to us by an official in the minister’s office on October 18, 2006.

¹⁰ David W. Mundell, “Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions Between Them,” *Osgoode-Hall Law Journal*, vol. 2, no. 1, April 1960, pp. 71-72.

¹¹ For a complete review of this question, see *Gatineau Park at Risk*, prepared by the office of Senator Mira Spivak (Barbara Robson), April, 2006, pp. 10-20 (unpublished). As well, see NCC ATIP A95/96-026 (pp. 201, 204, 206, *inter alia*).

¹² *Senate Sessional Paper* 1/38-368-S, December 14, 2004.

¹³ House of Commons *Sessional Paper* no. 8555-381-204, November 14, 2005.

¹⁴ Answers provided to Senator Spivak’s office by the NCC’s Intergovernmental Affairs Branch, February 17, 2006.

And in the wake of these contradictions the NCC has also claimed that Gatineau Park's boundary was set by everything from the Meech Creek Valley Land Use Concept, to National Interest Land Mass designation, to section 10(2)(c) of the National Capital Act.¹⁵

Senator Spivak raised a question of privilege in the Senate on November 22, 2005¹⁶ in an attempt to get to the bottom of the boundaries question.

¹⁵ *Ibid.*

¹⁶ *Senate Debates*, November 22, 2005, pp. 2132-2134.