

SUBMISSION TO THE 36TH SESSION
OF THE UNITED NATIONS COMMITTEE
ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
on the occasion of the review of
CANADA'S 4th and 5th PERIODIC REPORTS
MAY 1, 2006
GENEVA

In 1998 the Committee on Economic, Social and Cultural Rights called upon Canada “to take concrete and urgent steps to restore and respect an Aboriginal land and resource base adequate to achieve a sustainable Aboriginal economy and culture (Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada, para 43)”. The following submission by the Lubicon Lake Indian Nation speaks to the failure of Canada to respect both Committee conclusions and the rights of Aboriginal people in Canada.

Background

The Lubicon Lake people are an Indigenous Nation of approximately 500 people living in northern Alberta, Canada. We have never surrendered our rights to our traditional Territory in any legally or historically recognized way. We were overlooked when a treaty was negotiated in 1899 with other Indigenous peoples in the surrounding area. In the past 25 years our traditional Territory has been invaded and ravaged by dozens of resource exploitation companies who have extracted billions of dollars in oil, gas and forestry resources from our traditional area.

These massive resource exploitation activities have devastated the ecology of our traditional Territory and decimated the traditional Lubicon hunting, trapping and gathering economy and way of life. Ninety per cent of our people have been forced onto subsistence welfare in order to survive. We suffer serious health problems including cancers of all kinds; a tuberculosis epidemic that affected a third of our population; reproduction problems which resulted in 19 stillbirths out of 21 pregnancies in an 18

month period; near-epidemic asthma and other respiratory problems and skin rashes among our young people so severe as to cause permanent scarring. In the midst of multi-billion dollar resource exploitation of natural resources from our unceded traditional Territory, the Lubicon people face severe economic deprivation and live in third world housing conditions with as many as three or four generations living in a small 900 square foot bungalow with no running water or indoor toilet facilities.

In 1984 we filed a complaint with the UN Human Rights Committee charging Canada with denial of basic subsistence as a people under Article 1 of the International Covenant on Civil and Political Rights. We provided documentary evidence that we could not achieve effective legal or political redress within Canada.

Canada responded by arguing that the Committee should not even consider our complaint contending that we had failed to exhaust all domestic remedies. Despite the fact that we existed as a distinct aboriginal society with a defined traditional Territory before the arrival of western Europeans in our part of North American -- and well before creation of the Canadian state -- Canadian officials even tried to deny our existence as a people claiming that we are only members of “a thinly scattered minority group living within the midst of a more numerous population grouping and occupying territory co-extensive with that grouping”. (The Alberta Provincial Government basically treats us as squatters on provincial Crown land with no rights -- not even rights to our own homes which at one point the Alberta government threatened to bulldoze down around our heads unless we accepted two acre plots from the Provincial Government effectively relinquishing our unceded aboriginal land rights and recognizing provincial jurisdiction over our unceded traditional Territory.)

In 1987, after a review of the evidence and a number of submissions by both sides, the United Nations Human Rights Committee agreed to hear the Lubicon complaint concluding that “there are no effective [domestic] remedies still available to the Lubicon Band”. The Committee also instructed Canada “to take interim measures of protection to avoid irreparable damage to Chief Ominayak and other members of the Lubicon Lake Band” while the Committee considered the Lubicon complaint. This decision is reported in UN document CCPR/C/30/D/167/1984 dated 27 July, 1987.

On March 28, 1990, the Thirty Eighth session of the Human Rights Committee ruled on the Lubicon complaint. In order to encompass our particular circumstances the Committee broadened the cultural, religious and linguistic rights protected under Article 27 of the International Covenant on Civil and Political Rights so as “to include the rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong”. The Committee then concluded that “historical inequities ... and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue”. This decision is reported in UN document CCPR/C38/D/167/1984.

Taking at face value Canadian government assurances that Canada was seeking to negotiate a settlement of Lubicon land rights that would respect Lubicon land rights, the Committee also found that Canada “proposes to rectify the situation with a remedy that the Committee deems appropriate within the meaning of Article 2 of the Covenant”. Article 2 basically provides that each party to the Covenant undertakes to respect and ensure the rights of all people living within its territory. Commenting on the relationship between this finding and the finding holding Canada in violation of the Covenant as long as the situation continues, a Committee official was quoted in the Canadian media as saying that Committee decision is “telling both sides to continue negotiating in good faith”.

On May 3, 1990, then Canadian Indian Affairs Minister Tom Siddon issued a news release providing Canada’s public response to the Committee’s decision. He said “The finding by the United Nations Human Rights Committee confirms what the government of Canada has acknowledged: we have an obligation to the Lubicons which must be settled” [underlining added]. He said “The government is pleased to note the United Nations considers our efforts at negotiations to be an appropriate remedy to meet that obligation”. He then went on to falsely claim that the Committee also found that a “take-it-or-leave-it” settlement offer tabled by Canada in January of 1989, which the Lubicon people had rejected primarily because it made no effective provision for us to once again achieve economic self-sufficiency, “more than meets any obligation Canada has under the International Covenant”.

Negotiations Since 1990

Since 1990 there have been three unsuccessful rounds of negotiations but at no time has Canada come to the negotiating table prepared to engage in good faith negotiations sincerely intended to achieve settlement of Lubicon land rights. Instead both levels of Canadian government have only used the pretense of negotiations to buy time and create the illusion that they were seeking to achieve a mutually satisfactory settlement of Lubicon land rights while they continued exploiting the natural resources of our unceded traditional Territory and trying to tear Lubicon society asunder so as to preclude our ability to challenge their doing so.

The first round of the subsequent three rounds of negotiations took place in 1992 and started with a Canadian government proposal to appoint an independent cost assessor to check the accuracy of the cost estimates of Lubicon settlement proposals which Canadian officials alleged were too high. The Lubicon people agreed to the appointment of an independent cost assessor to check the accuracy of Lubicon cost estimates.

Canadian officials then sought to manipulate the independent cost assessor's conclusions by surreptitiously trying to change the independent cost assessor's terms of reference from checking the accuracy of Lubicon settlement cost estimates to calculating what could be done under normal Canadian government subsistence programs and services for Indians neither designed nor intended to promote self-sufficiency. The attempt to manipulate the independent cost assessor's conclusions by surreptitiously changing the cost assessor's terms of reference was discovered and exposed and Canadian officials were forced to reinstate the original terms of reference.

The independent cost assessor went on to conclude that Lubicon settlement cost estimates were too low rather than too high. Canadian officials then refused to even discuss the conclusions of the independent cost assessor they had proposed. Instead they publicly released a re-packaged version of their 1989 so-called "take-it-or-leave-it" offer claiming that the repackaged offer provided considerably more than the 1989 version. In fact the provisions were substantially the same; the new offer still provided no effective means for the Lubicon people to once again become economically self-sufficient, and Canadian officials had cooked the numbers by, among other things, comparing the 1989 numbers with the 1992 numbers without taking the impact of inflation into account. When the impact

of inflation alone was taken into account, the 1992 settlement numbers were even lower and less adequate than the 1989 settlement offer.

A new Canadian federal government was elected in 1993. While in opposition the new Canadian Prime Minister Jean Chretien had written:

“The Liberal Party understands your concerns. For more than fifty years the Lubicon have struggled to secure a permanent land base -- and a means to preserve their way of life...We believe the (Canadian) government has reneged on its fiduciary responsibility to the Lubicon people.

“Time is wasting. Innumerable studies and reports have been prepared over past years, and they have only served to slow progress in the negotiations for a land and resource base. It is time for action.

“As a start, we (the federal Liberal Party) believe the government should proceed with recommendation number five of the Settlement Commission to hold all royalties in trust and withhold leases and permits on traditional Lubicon lands -- unless approved by the Lubicons. Moreover, future negotiations should reflect the intent of recommendation number eight, asserting that extinguishment of Aboriginal rights must not be a condition for a settlement -- a position consistent with Liberal policy. (The Commission to which Mr. Chretien was referring was a non-partisan independent Commission of prominent Canadians called the Lubicon Settlement Commission of Review which was specifically convened to assess the government’s settlement efforts. The principal finding of the Commission was that the governments of Alberta and Canada “have not acted in good faith” in Lubicon land negotiations. A copy of the Commission’s Final Report and Mr. Chretien’s statement are attached.)

Mr. Chretien concluded:

“We support the swift resolution of all claims, and consider the Lubicon claim to be a priority.”

Once elected, however -- despite pressure from the Lubicon people and Lubicon supporters -- Mr. Chretien's government did not get around to commencing a new round of Lubicon land negotiations until 1995. Neither did the new Chretien government implement the Settlement Commission recommendations Mr. Chretien said the government should implement when he was in opposition. Rather, after over a year of discussing outstanding settlement issues, and as part of the lead up to another federal election, Canadian officials proposed to settle Lubicon land rights for a package again based on normal government subsistence programs and services but with the proviso that they would seek a further mandate to negotiate remaining issues in good faith after the Lubicon people had ceded valuable Lubicon lands and resources on which negotiation of anything further would per force be based. (The Lubicon people refused to cede the rights of our children and grandchildren in exchange for a non-binding promise that after the election federal officials would seek a further mandate to negotiate key settlement items -- including economic development -- in good faith.)

The Chretien government was re-elected in June of 1997. Despite continuing pressure from the Lubicon people and Lubicon supporters, the next round of Lubicon land negotiations didn't commence until July of 1998 under a Chief Federal Negotiator who would typically arrive in our community for negotiations late in the morning, leave by 4 o'clock in the afternoon and was seldom available to meet more than a day or two a month.

In July of 2003 federal negotiators told the Lubicon people that they didn't realize that the Lubicons wanted recognition of the Lubicon right to be self-governing included in a settlement agreement, despite the fact that self-government had been on the table in writing as an essential element of any settlement agreement since 1985, and despite the fact that Lubicon self-government proposals had been given to the new Canadian Chief Federal Negotiator in writing in 1998 as an essential element of any Lubicon settlement agreement.

Canadian negotiators next told the Lubicon people that they couldn't negotiate self-government as part of a settlement of Lubicon land rights because, they claimed, negotiating self-government is very complicated and would take too long. They proposed to discuss recognition of the Lubicon right to be self-governing later -- post settlement of Lubicon land rights.

We responded by re-casting Lubicon self-government proposals in language taken directly from self-government agreements negotiated with other aboriginal people in Canada. Canadian officials refused to even discuss the re-cast Lubicon self-government proposals.

Asked why they wouldn't even discuss Lubicon self-government proposals when the Lubicons were not proposing anything different than Canadian officials had already agreed with other aboriginal societies, the Canadian Chief Federal Negotiator explained "Those other agreements are in the form of non-binding letters of intent, letters of agreement, framework agreements and agreements-in-principle". He said "Those agreements aren't binding". He said -- correctly -- "The Lubicons want a binding agreement".

Instead of negotiating recognition of the right of the Lubicon people to be self-governing as a part of settlement of Lubicon land rights, Canadian officials proposed to put some general statements in the preamble of a settlement agreement about how the Canadian government recognizes the right of aboriginal people to be self-governing and the Lubicon people assert the right of self-government. When the Lubicon people asked that some clauses be put in the body of the agreement giving force and effect to recognition of the Lubicon people to manage our own affairs, the Canadian Chief Federal Negotiator, a law professor who presumably knew better, assured the Lubicon people that such general provisions in the preamble of a settlement agreement would be as binding on the government as provisions contained in the body of the settlement agreement.

The Lubicon people continued to insist that the right of the Lubicon people to manage our own affairs be recognized in any settlement of Lubicon land rights, and that there also had to be provisions in the settlement agreement on a procedure to negotiate, post settlement -- in the manner that implementation of recognized jurisdiction is negotiated between different levels of Canadian government all the time -- how Lubicon jurisdiction would be exercised in ways which were compatible and not in conflict with the exercise of jurisdiction by other governments in Canada.

In December of 2003 Federal negotiators refused to include recognition of the right of the Lubicon people to be self-governing in a Lubicon settlement agreement, or to agree to a procedure on how to negotiate exercise of Lubicon jurisdiction post-settlement. They told the Lubicon people that all they were prepared to do in a settlement agreement was agree to talk about self-government post-settlement.

Federal negotiators told us that they didn't have a mandate to negotiate self-government as part of a Lubicon settlement agreement. They also told us that they had no mandate to negotiate financial compensation. Negotiations consequently broke down because federal negotiators did not have a mandate to negotiate outstanding settlement issues.

Following the break-down of negotiations in December of 2003, the Lubicon people obtained a copy of secret guidelines to Canadian self-government negotiators drafted by Canadian Justice Department lawyers in 1996 on how to negotiate aboriginal self-government in bad faith. It said self-government may be recognized as an inherent right of aboriginal people in the Canadian Constitution but that the Canadian government did not necessarily recognize that any particular aboriginal society has the right of self-government. It included instructions to Canadian self-government negotiators to put carefully crafted general clauses in the preamble of an agreement but nothing in the body of the agreement because clauses in preamble would not be binding on the government of Canada unless they have a referent in the body of the agreement. It instructed Canadian self-government negotiators to always refer to aboriginal First Nations in the plural instead of the singular because a First Nation referred to in the singular might be able to go to court and have the court find that they have a constitutionally protected right of self-government while a First Nation referred to in the plural could not legally assert a constitutionally protected right of self-government as part of a collective.

The language used by Canadian government representatives at the Lubicon negotiating table was taken verbatim from the 1996 Canadian Justice Department Guidelines to Canadian self-government negotiators. A copy of the 1996 Canadian Justice Department Guidelines to Canadian self-government negotiators is attached.

In March of 2004 Lubicon Chief Bernard Ominayak wrote then Canadian Indian Affairs Minister Andy Mitchell asking that Canada send negotiators to the table with a full mandate to negotiate all outstanding Lubicon settlement issues in good faith. In October of 2004 -- 7 months later -- a new Canadian Indian Affairs Minister named Andy Scott wrote Chief Ominayak rejecting charges that Canada ever negotiates in bad faith and indicating that he was reviewing the request to send federal negotiators back to the table with a full mandate to negotiate long-standing Lubicon settlement issues.

In June of 2005 -- 15 months after Chief Ominayak wrote asking that Canada send negotiators back to the table with a full mandate to negotiate all outstanding Lubicon settlement issues in good faith -- Minister Scott wrote Chief Ominayak proposing that negotiations resume "under the current mandate" -- which included neither self-government or financial compensation -- or "to jointly agree to close this round of negotiations" -- which had in fact been suspended since December of 2003 over lack of a mandate for federal negotiators to negotiate outstanding issues -- until government financed discussions on "broad policy issues" with a national Indian organization called the Assembly of First Nations are completed -- negotiations which Mr. Scott speculated would take a least a year and many informed observers doubt will ever be successfully completed. Mr. Scott speculated that these discussions with the Assembly of First Nations "may result in recommendations for changes in the [Canadian government's policy on negotiating aboriginal self-government including the Canadian Justice Department Guidelines instructing Canadian government negotiators on how to negotiate in bad faith] that could possibly address the concerns you have expressed regarding self-government". A copy of Mr. Scott's June 23, 2005 letter is attached.

Over the years a number of outstanding Lubicon settlement issues have tentatively been resolved but all of these potential agreements are contingent on reaching a final settlement of Lubicon land rights. There has been no settlement of Lubicon land rights. The bottom line is that the situation of the Lubicon people continues to deteriorate unabated and Canada's promise to the United Nations remains unfulfilled.

In October of last year we made a submission to the United Nations Human Rights Committee pointing out that 15 years have passed and Canada has still failed to comply with Committee findings or to rectify the situation. In a dismissive written response Canada acknowledged that "Land claim negotiations between the Government of Canada and the Lubicon Lake Indian Nation (LLIN) are at an impasse". Canadian officials alleged that the reason for the impasse is "The Lubicon assert that Canada's mandate is not sufficient to meet their demands, especially as it relates to the issues of financial compensation and self-government".

The Canadian government response continued to claim:

“On June 23, 2005, the Minister of Indian Affairs and Northern Development wrote to Chief Ominayak of the LLIN proposing a return to the negotiation table in regard to issues other than compensation and self-government, in order to continue progress towards a settlement agreement of the Lubicon land claim. That offer was rejected by Chief Ominayak.”

These statements made by Canada to the Human Rights Committee misrepresent both the reason for the breakdown in negotiations and the content of the exchange of correspondence between the Canadian Indian Affairs Minister and Chief Ominayak, copies of which are attached. Negotiations broke down because federal government negotiators indicated that they had no mandate at all to negotiate self-government as part of a settlement of Lubicon land rights, and because they refused to discuss financial compensation unless the Lubicons agreed to negotiate down a bottom line figure which government negotiators requested after refusing to discuss calculation of earlier agreed substantive bases for financial compensation, such as the dollar value of lost programs, benefits and services which the Lubicons should have been receiving from federal government but hadn't received - an approach to calculating financial compensation initially proposed by federal government representatives -- or to discuss some percent of the value of the billions of dollars in natural resources taken from unceded Lubicon Territory. (The Lubicon proposal regarding financial compensation for expropriated resources tabled for discussion but never discussed was ten percent of the 20 percent of the value of the resource paid to the Alberta government in royalties or 2 cents on the dollar.)

In October of 2005 the Eighty-Fifth Session of the UN Human Rights Committee made the following concluding observations regarding these latest Lubicon and Canadian government submissions: (UN Document CCPR/C/CAN/CO/5)

“The Committee is concerned that land claim negotiations between the Government of Canada and the Lubicon Lake Band are currently at an impasse. It is also concerned about information that the land of the Band continues to be compromised by logging and large-scale oil and gas extraction, and regrets that the State party (Canada) has not provided information on this specific issue. (articles 1 and 27)

“The State party should make every effort to resume negotiations with the Lubicon Lake Band, with a view to finding a solution which respects the rights of the Band under the Covenant, as already found by the Committee. It should consult with the Band before granting licences for economic exploitation of the disputed land, and ensure that in no case such exploitation jeopardizes the rights recognized under the Covenant”.

In November of 2005, leading up to still another Canadian federal election, we were contacted by intermediaries about meeting with federal officials regarding possible recommencement of Lubicon land negotiations. We agreed and a meeting occurred on November 26, 2005.

At the November 26th meeting federal officials proposed that negotiations proceed on the basis of the attached non-binding Memorandum of Intent between Lubicon Chief Ominayak and a Canadian government negotiator named Sharman Glynn. The Memorandum of Intent provided that Canada would request the Alberta government to transfer land to federal jurisdiction for purposes of creation of a Lubicon reserve. Federal officials said that Canada would not request the Lubicon people to release Canada from further obligations respecting land issues including wildlife management and environmental protection in the traditional Lubicon Territory. However federal officials acknowledged that Alberta would require such a release which would be tantamount to the same thing since Canada would need to obtain Alberta’s consent to deal with any of the other issues.

In return for the land, the Memorandum of Intent continued, “Canada would require, at a minimum, an acknowledgement from the Lubicon Lake Indian Nation that land has been received from Canada pursuant to Canada’s Treaty 8 obligation”. In this instance the treaty is tantamount to Canada’s bill of sale for the land -- the way Canada legally justifies the taking of Indian land. In fact the Lubicons are not a party to Treaty 8, which is the Treaty negotiated with other Aboriginal societies in the surrounding area in 1899, and the nature of the relationship between Canada and the Lubicon people is one of the issues on the table for resolution with Canada insisting that the Lubicons sign an adhesion to Treaty 8 as a part of any settlement agreement, and the Lubicons indicating that we will be prepared to consider signing an adhesion to Treaty 8 when and if all other settlement issues are agreed.

The Memorandum of Intent indicates that Canada will provide community construction funds but makes no provision for other outstanding issues including economic development, financial compensation, wildlife management or environmental protection in the traditional Lubicon Territory. “All other elements of the Lubicon Lake Claim Settlement Agreement”, the Memorandum of Intent says, “would remain outstanding and eligible for future negotiation”.

What the Canadian government was therefore proposing is that the Lubicons cede key settlement issues as a precondition of returning to the negotiations with no assurance that the government of Canada would ever be prepared to seriously negotiate the other outstanding issues. A copy of the proposed Canadian Memorandum of Intent is attached.

Continued Resource Exploitation

Over 400 oil wells were drilled within a 15-mile radius of our traditional community of Little Buffalo Lake between 1979 and 1982 initiating the situation upon which the UNHRC ruled in 1987 and 1990. Resource exploitation in our traditional Territory has continued to grow apace and unabated in the 19 years since the 1987 UNHRC decision instructing Canada to take “interim measures of protection to avoid irreparable damage” to the Lubicon people. Resource exploitation in the unceded Lubicon Territory has also continued to grow apace and unabated in the 16 years since the 1990 UNHRC decision holding Canada in violation of the International Covenant on Civil and Political Rights for as long as this situation continues. By 2002 over 1700 oil and gas wells and countless miles of seismic lines and pipelines have been constructed in the traditional Lubicon Territory.

In 2004 a number of companies proposed to begin large-scale heavy oil extraction projects in the heart of our unceded traditional Territory immediately adjacent to proposed reserve lands and surrounding two lakes upon which we rely for fish. The companies were issued leases to 63 square miles of traditional Lubicon Territory by the Alberta government without any consultation with the Lubicon people and over our public objections. These companies plan to drill 512 heavy oil wells in this sensitive area ultimately producing an estimated 820 million barrels of oil. Liquefying the heavy oil so it can be pumped out of the ground is done with superheated water or steam and typically requires that 3 to 6 barrels of water be injected into the subsurface for each barrel of oil produced, most if not all of which is lost forever. Where this huge volume of water will come from and the environmental

consequences of injecting it in to the fragile boreal subsurface is unknown. (Some years ago an experimental heavy oil/tar sands facility to the west of us built a pipeline to a neighboring lake to obtain the water they required. Within a few months they had drained the lake to the extent that it froze solid in the winter killing all the fish.)

This winter clear-cut logging was commenced in our unceded traditional Territory without our consent and only stopped when we challenged the logging companies. Forestry companies are now saying that they intend to proceed with logging next winter under quotas issued by the Alberta government whether we like it or not. On top of everything else we do not know how we will be able to survive the clear-cutting of the forest upon which we have historically depended to support ourselves and our families.

No “interim measures of protection to avoid irreparable damage” to the Lubicon people have ever been taken by Canada as per the 1987 Human Rights Committee procedural decision. Resource exploitation in our traditional Territory has continued to grow exponentially in the 16 years since the UNHRC ruled that Canada is in violation of the International Covenant on Civil and Political Rights as long as these developments continue. In the six months since the UNHRC urged Canada to “consult with the Band before granting licences for economic exploitation of the disputed land, and ensure that in no case such exploitation jeopardizes the rights recognized under the Covenant”, the Alberta government has sold gas and oil leases and exploration licences to over 65,000 hectares of our unceded traditional Territory, approved 50 new oil and gas wells and approved almost 50 new pipelines.

Arguably the Canadian government has never engaged in sincere settlement negotiations with the Lubicon people “with a view to finding a solution which respects the rights of the Band under the Covenant”. Indisputably there have been no negotiations at all for over two years because federal negotiators took the position that they had no mandate to negotiate key outstanding settlement issues -- although they take the inherently contradictory position for political purposes that their position does not constitute a “take-it-or-leave-it position” and they are willing to negotiate.

Current Situation

Since the UNHRC released its concluding observations last November, the Government of Canada has not resumed negotiations with the Lubicon people and has made no indication that it intends to do so at any time in the future.

In response, Lubicon Chief Bernard Ominayak has repeatedly written to the Government of Canada asking:

- 1.) That Canada renounce the attached Justice Department Guidelines in effect instructing federal self-government negotiators on how to negotiate self-government in bad faith.
- 2.) That federal negotiators be given a mandate to negotiate outstanding settlement issues including self-government and financial compensation.
- 3.) That federal negotiators be given instructions to negotiate in good faith with the objective of reaching a settlement of unceded Lubicon land rights within a prescribed period of time (as distinct from just using the pretense of negotiations to buy time while resource exploitation continues and vital Lubicon interests are systematically eroded).
- 4.) That the Lubicon people be loaned the money to do the work necessary to participate in the negotiations.
- 5.) That Lubicon land negotiations be open and public so that Canadians can follow the negotiations and judge the issues and the positions of the parties for themselves.

A new Canadian federal government was elected on January 23, 2006. Chief Ominayak has written the following four letters to the new Indian Affairs Minister Jim Prentice regarding the Lubicon situation:

- A letter on January 24, 2006 prior to Mr. Prentice's anticipated appointment, briefing him on Lubicon settlement items and issues and indicating that the Lubicon people are prepared to recommence negotiations immediately and to work full time until a mutually satisfactory settlement agreement is reached.

- A letter on February 6, 2006 congratulating Mr. Prentice on his appointment as Minister and inviting him to the Lubicon community of Little Buffalo Lake at his earliest convenience to meet the Lubicon people and start the process of finally achieving a fair and just settlement of Lubicon land rights.

- A letter on March 2, 2006 regarding an announcement by Mr. Prentice that he intended to give priority to upgrading on-reserve water systems so Indian people will have safe drinking water and pointing out that the Lubicon people have no water and sewer system at all and that all of our traditional sources of water have been contaminated by resource exploitation activity for over 18 years.

- A letter on March 27, 2006 expressing concern over lack of acknowledgement of the Chief's earlier letters and lack of mention of the Lubicon community as one of the communities that will be given priority with regard to provision of safe drinking water.

As of the date of this submission, Chief Ominayak has not received the courtesy of even an acknowledgement of receipt of any of his four letters from the new Canadian Indian Affairs Minister.

In order to meet its acknowledged obligation to settle unresolved Lubicon land rights, the Government of Canada must be willing to return to the negotiating table and to negotiate a resolution of our land rights in good faith.

Without providing federal negotiators with a full mandate to conduct good faith negotiations towards a final settlement, the Government of Canada is failing to rectify the violation that the UNHRC identified in 1990 and again in 2005. Further, the Government of Canada is not meeting its obligations under Article 1 of the International Covenant on Economic, Social and Cultural Rights.

The Lubicon people ask that the United Nations Committee on Economic, Social and Cultural Rights reaffirm earlier UN decisions on the Lubicon situation and advise Canada that it cannot continue to ignore International Covenants and United Nations decisions without risking the censure of the international community.

ATTACHMENTS TO LUBICON SUBMISSION TO THE 36TH SESSION OF THE UNITED
NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

(May 01, 2006)

1. March 1993 Final Report of the Lubicon Settlement Commission of Review
2. May 1993 letter to Lubicon supporters from then Canadian Leader of the Official Opposition
Jean Chretien
3. March 1996 Guidelines for Federal Self-Government Negotiators # 1 and 2
4. June 23, 2005 letter to Chief Ominayak from then-Canadian Indian Affairs Minister Andy Scott
5. Chief Ominayak's July 3, 2005 letter of response to Minister Scott's June 23rd letter
6. November 14, 2001 letter to then-Canadian Indian Affairs Minister Robert Nault from Chief
Ominayak attached to Chief Ominayak's July 3rd letter to Minister Scott
7. October 24, 2003 letter to Minister Nault from Chief Ominayak attached to Chief Ominayak's
July 3rd letter to Minister Scott
8. March 22, 2004 letter to then-Canadian Indian Affairs Minister Andy Mitchell from Chief
Ominayak attached to Chief Ominayak's July 3rd letter to Minister Scott
9. Memorandum of Intent tabled with Lubicon leaders by Canadian Indian Affairs officials on
November 26, 2005.

The Lubicon Settlement Commission of Review

Final Report

Edmonton, Alberta

March 1993

We thank the Association Canadienne Francaise de l'Alberta;

Dr. Roger Motut; Aboriginal Rights Coalition (Project North);

Edmonton Interfaith Committee for Aboriginal Rights;

St. Joseph's Basilica; Peace River Traveller's Motor Hotel;

Mennonite Central Committee Canada, Winnipeg;

Missionary Oblates.

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Appendix 1: Letter to Prime Minister Trudeau from the World Council of Churches, 1983

Appendix 2: Fulton Discussion Paper, 1986 (Not attached in this version at this time)

Appendix 3: Transcripts of Commission Hearings

Appendices and additional copies of this Report are available at cost from:

The Aboriginal Rights Coalition
(Project North)
151 Laurier Avenue East
Ottawa, Ontario K1N 6N8
Phone: 613-235-9956
Fax: 613-235-1302

Introduction

"We are an independent and non-partisan group who are self-sustaining. That is, we pay our own expenses. Nobody's supporting us. We want to be involved in this way because we would like to see the negotiations that have been stalled for some time between the Lubicon and the two levels of government to move again. Our mandate or terms of reference are to investigate, compare, assess and report on the presentation of the Lubicons and of the two levels of government, and to report to the three parties, but also to the public."

- Fr. Jacques Johnson

From the Transcript of the Lubicon
Settlement Commission of Review Public
hearing June 1, 1992

Commission Members:

Father Jacques Johnson Co-chair
Provincial Superior, Missionary Oblates, Edmonton, AB

Ms Jennifer Klimek Co-chair
Lawyer, Edmonton, AB

Mr. Don Aitken
President, Alberta Federation of Labour, Edmonton, AB

Dr. Michael Asch
Professor, Department of Anthropology, University of Alberta, Edmonton, AB

Mr. Wilf Barranoik
Entrepreneur, Sherwood Park, AB and former chair, Alberta Chamber of Commerce

Mr. Norm Boucher
Forestry contractor, Peace River, AB

Ms Regena Crowchild
President, Indian Association of Alberta

Ms Sandy Day
Entrepreneur/environmentalist, High River, AB

Mr. John Macmillan
Entrepreneur, Peace River, AB

Ms Theresa Mcbean
Engineer, Calgary, AB
(resigned due to child birth)

Ms Colleen Mccrory
Environmentalist, New Denver, BC

Reverend Menno Wiebe
Director of Native Concerns, Mennonite Central Committee Canada, Winnipeg, MB

Activities Of The Commission

1. Public Hearing June 1, 1992 in Edmonton, Alberta

Presenters: Chief Bernard Ominayak; Elder Edward Laboucan; Advisors Fred Lennarson and Bob Sachs.

2. Public Hearing June 2, 1992 in Edmonton, Alberta

Presenters: Chief Bernard Ominayak; Elder Edward Laboucan; Adrian Houle from Saddle Lake Band; Advisors Fred Lennarson and Bob Sachs.

3. Public Hearing June 29, 1992 in Edmonton, Alberta

Presenters: Rev. Bill Phipps, Executive Secretary of Alberta and Northwest Conference, United Church of Canada; John Stellingwerff, Chairperson of the Edmonton Interfaith Committee for Aboriginal Rights.

4. Public Hearing August 6, 1992 in Little Buffalo, Alberta

Presenters: Chief Bernard Ominayak; Elder Edward Laboucan; Violet Rose Ominayak; Dawn Hill Mohawk Six Nations; Advisor Fred Lennarson; Grade 9 student Crystal Gladue.

5. Public Hearing August 7, 1992 in Peace River, Alberta

Presenters: Dr. Heinz Lippuner, Organization of Incomindios, Switzerland; Mayor Michael Proctor of Peace River; Ian Gardiner, President of the Peace River Board of Trade; Ed Bianchi, Friends of the Lubicon, Toronto.

6. Public Hearing November 2, 1992 in Edmonton, Alberta

Presenters: The Hon. E. Davie Fulton; Chief Bernard Ominayak.

7. Public Hearing November 3, 1992 in Edmonton, Alberta

Presenters: Montreal journalist and author of *The Last Stand of the Lubicon Cree* John Goddard; Advisor Fred Lennarson; Bruce Koliger, of Koliger Schmidt Architects and Engineers,; John Krebes of Butler, Krebes and Associates.

8. Public Hearing January 29, 1993 in Edmonton, Alberta

Presenter: Sharon Venne *

Invited, but declining to make presentations or written submissions: Tom Siddon, Federal Minister of Indian and Northern Affairs, Dick Fowler, Alberta Minister of Native Affairs.

Representatives from the federal and provincial governments were invited to appear, but declined.

* S. Venne was unable to attend previous hearings and asked to address the Commission in January.

Written Submissions Received

Rev Ray Hodgson, Chairperson, Taskforce on Churches and Corporate Responsibility, Toronto, ON
Bill Janzen, Executive Director, Mennonite Central Committee, AB
Mennonite Centre for Newcomers, Edmonton, AB
Dionys Zink, Board Member, Big Mountain Action Group GERMANY
The Lubicon Lake Nation Women, Little Buffalo, AB
Western Canada Wilderness Committee, Edmonton, AB
Delia Ayers, Oxford, ENGLAND
A.J. Pollorte, Oxford, ENGLAND
Friends of the Lubicon, Toronto, ON
Frank H. Stuckert, Bright, Vic., AUSTRALIA
Turtle Island Support Group, Toronto, ON
Rosemarie Herrell, Don Mills, ON
Helen E. Coleman, Thornhill, ON
Vah Hori, Toronto, ON
Bruce Tombs for Friends of Aboriginal People, United Church of Canada, Salford, ON
Elizabeth May for Cultural Survival, Ottawa, ON
John Hamer, Red Deer, AB
Alva I. Cox Jr. A summer resident and payer of Canadian taxes, Connecticut, USA
Pedro Ceinos, Madrid, SPAIN
The Mimir Corporation, Edmonton AB
Louise A. Stanley, Bath, ME
Mennonite Central Committee, Winnipeg, MB
Chief Ernest Sundown for Joseph Bighead Reserve No. 124, Pierceland, SK
Eighth European Meeting of Native American Support Groups, Genova, ITALY
Timothy Gladue and Crystal Gladue, Lubicon Nation Youth, Little Buffalo, AB
Samson Cree Nation, Hobemma, AB
Dawn J. Hill, MOHAWK NATION
Mona Duckett for Social Justice Commission, Archdiocese of Edmonton, AB
Martina Roels (KWIA), BELGIUM
J. Williams, Oxford, ENGLAND.

Brief History Of Events To June, 1992

It is well established that the Lubicon Cree were in legitimate occupation of their territory prior to first contact with Europeans.

When Treaty 8 was signed in 1899, the Lubicon were missed. At various times during the 1920s and 1930s Lubicon who wanted to become part of Treaty 8 contacted the government. In 1933, they formally petitioned Ottawa to recognize their rights. In 1939 the federal government recognized the Lubicon as a separate band, but no treaty was made.

By 1942 a government official had removed the names of many people belonging to the interior bands in order to "cut down expenses."

In the 1970s sizable oil and gas reserves were discovered on Lubicon land. In 1973 a federal Order-in-Council was passed which legally recognized the Lubicon Lake Indians as a band. In 1975 the Lubicon, with six other isolated communities, submitted a caveat to serve notice of their unextinguished Aboriginal Rights. The provincial government responded by retroactively passing Bill 29, which changed the law and thus made the Lubicon case (with the other applicants on the caveat) without basis.

Resource development began in earnest in 1979. The ability of the Lubicon to continue their self-sufficient lifestyle was arrested by this development.

By 1983, the number of moose killed annually had decreased from 200 to 19. That year, the World Council of Churches investigated the situation at Little Buffalo and in a personal letter to the prime minister, warned of impending "genocidal consequences". From 1979 to 1989, the number of Lubicon on welfare changed from 10 per cent to 90 per cent. It was estimated that the 400 oil wells pumped \$1 million worth of oil daily; none of this revenue benefited the Lubicon.

In 1985 D. Crombie, Minister for Indian Affairs, appointed E. Davie Fulton to study the situation. The Lubicon and the federal government agreed to use the Fulton Discussion Paper as a starting point for negotiations. Fulton examined the major issues including land, band membership, wildlife management, self-government and cash compensation. He suggested ways of accommodating the interests of the Lubicon and both governments. The Paper was never made public and the government took a position in negotiations inconsistent with the (1986) Fulton Paper.

In February 1988, the province announced the establishment of the Daishowa pulp mill near Peace River, along with a timber lease of 11000 square miles, including 4000 square miles of traditional Lubicon land.

In October the band set up road blockades to their traditional territory. The RCMP took down the barricades and arrested 27 Lubicon and supporters. Later that month Premier

Getty and Chief Ominayak signed "The Grimshaw Accord" granting the band 79 square miles of land including full subsurface rights and a further 16 square miles with only surface rights.

In January 1989 the federal government tabled a settlement offer. It was rejected on the grounds that it did not ensure social or economic self- sufficiency.

The United Nations Committee on Human Rights released their report concerning the Lubicon in March, 1990. Their conclusion was without precedent in the western world. They acted on the belief that the Lubicon had exhausted all other options for internal remedies to their situation.

The Committee issued an order against Canada to stop any action that would further hinder the status of the Lubicon. They condemned Canada in the strongest possible language. The Committee concluded that, "Recent developments threaten the way of life and culture of the Lubicon Lake band and constitute a violation of Article 27 (of the Human Rights Convention) so long as they continue." In addition they stated, "The Lubicon could not achieve effective legal redress within Canada."

Lubicon negotiators presented a draft settlement agreement to provincial negotiators June 1, 1990. Negotiations with the provincial government broke down at the end of the month. In the fall, despite verbal understanding to the contrary, Daishowa confirmed that four companies would log in the disputed territory. In November some logging equipment was torched on Lubicon traditional territory. Seventeen Lubicon were arrested. Trial was set for January 1993.

The United Nations Human Rights Committee took a second unprecedented action in May 1991 by appointing a rapporteur to monitor the Lubicon situation and report to the Committee. In July the newly formed "Woodland Cree Band," some of whom had been listed as members of the Lubicon Band, accepted a settlement package offered by the federal government. In December the Indian Affairs Minister announced the creation of a second new band, the Loon River Band.

In 1992 negotiations started again between the Lubicon and federal government. The federal package offered appeared to the Lubicon to be a repeat of the 1989 offer. Despite a few meetings, nothing substantial was accomplished.

In June The Lubicon Settlement Commission of Review began hearings.

Findings

Our principle finding is that governments have not acted in good faith. They have:

- a. **passed retroactive legislation to undermine legal claims,**
- b. **appropriated royalties that, had a reserve been established at an appropriate time, would have been in Lubicon hands, and**
- c. **been in conflict of interest because they act as interested party, beneficiary of royalties, and presumed judge of the validity of Lubicon claims.**

Similar findings have been made by the United Nations, E. Davie Fulton, the World Council of Churches, individuals from Canada and overseas, and witnesses to this Commission.

We also noted the inequality among the negotiating parties. The Lubicons have had extremely limited resources. The governments' unlimited resources in terms of finances and personnel also led to abuse of power.

We heard no indication that the federal government was acting in the interest of the Lubicon Cree, despite the mandate of the Department of Indian Affairs and Northern Development. Instead, they took an adversarial stance. The government has the responsibility to act not as an adversary, but as a partner with the Lubicon people.

We feel that there is an in-built conflict of interest within the mandate of the Minister of Indian and Northern Affairs. On the one hand he is to protect the interests of the Indian people; on the other hand he is put in a situation where he is to make decisions regarding development on contested lands, decisions with negative consequences for Indian peoples. A case in point: Minister Bill McKnight, responsible for Western Diversification Funding, allowed funds for development by Daishowa on disputed Lubicon lands.

We found that the Lubicon have acted in good faith in negotiations. Having heard Chief Ominayak's report regarding deliberate avoidance of oil wells in the selection of their land, Commission members acknowledge the Lubicons' sincere efforts to facilitate resolution. The Lubicon want open and public negotiations, and have responded to invitations from the governments to negotiate. They have presented a well thought-out plan for a settlement, to which they still await an adequate government response. They have also agreed to a process of mediation.

We found that the Lubicon proposal, based on the need for community viability, represents a fairer basis for settlement than the proposals of the federal government based on fear of setting a precedent that varies from existing policy. We agree with E. Davie Fulton who said:

" ...I cannot see this being a precedent because this is an entirely unique set of circumstances. Never before in our history -- and let's hope never again -- has a situation existed where a Band was promised over 50 years ago, a settlement and a reserve that

would have given them a livelihood, set them up in that way so that they wouldn't have suffered so dreadfully from the loss of their other forms of livelihood and they would have had other benefits follow from it -- promises which have not been fulfilled, which have been stymied, which have been met with obfuscation and difficulties by the very people responsible for implementing the promise.... ***So a generous settlement recognizing the equity of the situation could not possibly serve as a precedent for other settlements, because there's no other such situation.***"

A further crucial finding is that the situation is urgent. The alternative to a just settlement is to see the Lubicon continue the downward spiral of despair and self-destruction already begun by a few years on welfare subsistence. Hundreds of thousands of tax dollars are being spent for welfare alone, not to mention health and human costs. A major concern is the on-going personal tragedies and sense of helplessness. The devastation of the community resulting from intrusive development causes severe hardship to the internal organization of the Lubicon people, to its economic basis, and to its moral fibre.

Canada has many ways of resolving issues, through various governments, through the courts, and through negotiation. Since 1939, all of these avenues have been tried by the Lubicon.

We have based our findings and recommendations on testimony presented to us. We are disappointed that representatives from the federal and provincial governments refused to appear before the Commission. We were, therefore, not afforded the opportunity to hear the rationale for their offer or reasons for shelving the Fulton Discussion Paper, for example.

We hope that the parties will adopt the following recommendations and that this will result in a mutually satisfactory resolution.

Our recommendations are made in order to create conditions under which the federal government is compelled to act fairly. **Ultimately, if these fail, we recommend turning the process of negotiations to a third party, perhaps in the international community.**

Recommendations

We Recommend:

1. **That** given the urgency and time constraints of the situation, and also the on-going frustrations of Lubicon leaders having to negotiate with government officials who have no decision-making power, **the federal government delegation be led by the Minister of Indian and Northern Affairs or the Prime Minister, and that the provincial delegation be led by the Premier or the Minister for Native Affairs.**

2. **That the Fulton Discussion Paper be used as a basis for renewed negotiation by the three parties.** Mr. Fulton spent more than a year studying the Lubicon claims. He clearly identified nine areas of dispute, including land, membership, environmental management, self-government, compensation. He analyzed the nature of each. He stated the position of the Lubicon, of the federal and provincial governments. Finally he identified areas of agreement, suggested areas of compromise or possible settlement where there was no agreement. Unfortunately the Paper was shelved soon after it was presented. (We note that this is recommended as A workable basis, not necessarily **the** basis.)

3. In issues where no resolution can be found among the parties, **that the federal government and Lubicon each appoint an independent mediator, and with a third person agreed upon by both parties, create a tribunal.** Where the provincial government is involved, it should also be a party to this, but in no case should the decision be made wherein each government has one vote, and the Lubicon have one vote.

4. **That negotiations be made in public.** It is clear from the Royal Proclamation of 1763 that the Crown must be committed to public negotiations. We urge that the government of Canada follow this policy so that the public can understand how negotiations are proceeding. We understand from their testimony that the Lubicon have already agreed to this.

5. **That beginning immediately, all royalties be held in trust.** This is to develop an incentive to conclude negotiations quickly. Further, that there be no additional permits or leases granted on traditional Lubicon lands without Lubicon approval.

6. **That the land allocation of 95 square miles as identified and agreed upon in the Grimshaw Accord, be finalized and implemented immediately,** without prejudice to the rest of the negotiations.

7. **That implementation of the Lubicon proposal to develop agriculture, wild rice harvesting, wildlife management, commercial development, sustainable timber industry, reforestation, road construction and ranching, among other things, be honoured in the negotiations.** According to the independent cost assessors, the costs for these appear to be reasonable.

8. That extinguishment of Aboriginal Rights, including land rights, not be a condition for settlement.

9. That the settlement reflect cultural considerations which include:

- a. That hunting and gathering not be regarded only as a past and currently irrelevant part of the economy, but as a contemporary and continuing part of the economy for the present and future;
- b. That language translations within the negotiations, and in the final agreement, be encouraged for the benefit of the Cree speakers;
- c. That cultural sustainability be held firm as an alternative to the usual assimilative philosophy.

10. That membership eligibility is a prerogative of the Lubicon nation. In the past when treaty commissioners negotiated on behalf of the federal government, they accepted the number of members given them by the chief or leader. They have not accepted the number of members given them by Lubicon representatives.

11. That the compensation requested by the Lubicon be paid (\$50 million from each government). The Lubicon have asked \$100 million in compensation.. In light of the Fulton Discussion Paper, compensation is a responsibility of the federal government. However, because the province has benefited from the royalties, made possible by regrettable and unfair retroactive legislation, it would be just for them to reimburse the federal government for \$50 million. This is based on uncollected revenues and uncollected benefits beginning with the promise of a reserve in 1939 and the formation of a band.

Most benefits received by recognized Indian bands were not received by the Lubicon for decades, due to government neglect. Benefits from oil and gas exploitation are nonexistent. Fifty million dollars is less than 5% of the provincial government's share of royalties, gained as a result of retroactive legislation (Bill 29).

12. That if no settlement is satisfactorily completed within six (6) months, the dispute be referred to a third party for resolution. We suggest that, given the on-going interest shown by the United Nations Human Rights Committee, it would be an appropriate forum to deal with this dispute.

The international monitoring of this Canadian issue is a reality. The Human Rights agenda is international in character. In addition, natural resources in the Lubicon area are of substantial interest to international development corporations.

The Lubicons' appeal to the international community strongly suggests the failure of the regulatory process within Canadian governmental and other networks.

Canada's apparent image as a defender of Human Rights on the international scene is seriously undermined by the federal government's failure to deal honourably with the longstanding grievance at Little Buffalo, Alberta.

A Comparison Of Approaches

The offers made by the federal government and the Lubicon, although modified at various times, always show two very contrasting underlying approaches. The federal proposal(s) generally favours an approach that compares the Lubicon situation to the settlement of other "claims" by First Nations. They seem to be looking at whether or not the Lubicon settlement is "fair" with respect to their own policy and with the circumstances of others presumed to be in similar circumstances. The Lubicon, generally, are in favour of a resolution that is related specifically to their circumstances -- that is, based on their needs.

The Needs Approach:

Do the proposals meet the "needs" test? This discussion is limited to one area -- economic self-sufficiency. This question is posed in the Terms of Reference: Does the settlement provide the Lubicon with the resources to "once again become economically self-sufficient"?

We begin by looking at the federal offer from the perspective of "needs." As there were no government witnesses, it is impossible to know whether or not government believed that their offers provided the means for economic self-sufficiency. Clearly, the Lubicon said the proposals do not. The testimony heard indicates that the Lubicon are correct.

As it emerged from testimony, the Lubicon believe that their future economic self-sufficiency must be based on changing from a reliance on hunting and trapping to agriculture. The rationale for this approach appears to be that, as the wildlife had been disturbed and to a large extent destroyed, it is reasonable to develop an agricultural base. Their proposal to the federal government was based on this assumption. Although there may be other alternatives, finding them falls outside the mandate of this Commission.

A key section of the Lubicon position is the costing of their needs to develop agriculture. At the same time, they also costed needs for community construction, trapper support and commercial development. These funds, along with some dollars for compensation related to the extraction of non-renewable resources from their lands, represented the basis for the global dollar amount they presented in their offer. This amount in the Lubicon offer, according to Koliger and Schmidt (architects and engineers) was around \$27 million (in 1988 dollars and without contingency provisions).

The federal offer(s) also include dollars for community development, for an economic development fund (schedule D 1989), some support for agricultural development and the *opportunity to apply for additional funds*. It really does not provide for the degree of agricultural or commercial infrastructure found in the Lubicon proposal. As well, in all cases, the dollars provided in the federal government proposals are lower than those indicated in the Lubicon proposal. Given that the federal government offer does not speak either directly or indirectly to the question of economic self-sufficiency, and does not ensure funding for infrastructure to enable self-sufficiency to take place, it is evident that

the federal plan does not meet the needs of the Lubicon to shift their economy to agriculture.

At the same time, it is fair to ask whether the Lubicon figures represent a reasonable estimate of the costs. Evidence was provided by Koliger and Schmidt that the global dollar amount provided by the Lubicon was significantly lower (in 1992 dollars) than what would be required to construct the infrastructure identified in their proposal. This was about \$42 million (without contingency). Thus, the Lubicon proposal is perhaps unrealistic to achieve their objectives, because their figures are too low.

The Fairness Approach

Are the government proposals "fair?" It appears that governments utilized this approach in preparing their offers. Some witnesses suggested that "fairness" ought to be a crucial criterion upon which to evaluate the proposals. Fairness may be measured in various ways. It is our view, based on information extraneous to these hearings, that government sees "fairness" as an aspect of consistency with respect to existing policies, and "even-handedness" with respect to treatment. It appeared that for some witnesses, fairness related to even-handedness with respect to treatment of others, both Aboriginal and non-Aboriginal.

It is far beyond the scope of this document to present a discussion of current government policy or implementation of it respecting treaty rights, "land claims" (both specific and general) and services. Generally speaking, however, the proposals advanced by the federal government fit within one or another policy. One question, which we will not address in detail, is whether the way they are combined in any given proposal represents the "fairest" way to proceed. In at least one case, it does not.

In one proposal, the government *merely provides the opportunity to seek funds from existing programs*. The Lubicon could do this without it being in the proposal. It is inappropriate to have such a provision contained within it or to count it as a part of the settlement package. Clearly, such an approach is only consistent with policies that stand outside of the normal "land claims" approach.

Even more crucial, is whether the government's idea of "fairness" as it relates to consistency and even-handedness, is in fact fair to the Lubicon. It seems not. When policies are to be "consistent" and "even-handed" with respect to certain abstract generalizations about the parties with whom one is negotiating, it seems that the whole point of the exercise is lost. One must ask specifically about the circumstances of each individual case and provide appropriate redress according to that context. How then, should the concept of "fairness" be applied to the Lubicon and the other isolated communities? We offer examples regarding relations with the federal and provincial governments as illustrations of what a contextualized use of "fairness" might imply. We begin with the federal.

It is reasonably well known that the Lubicon were "missed" when Treaty 8 was signed in 1899. It is also accepted fact that the Lubicon petitioned Indian Affairs for a reserve beginning in 1933 and that, in 1939, Indian Affairs agreed they were a separate Band and that a reserve should be established for them. This reserve was to be approximately 25.4 square miles in area. It is known that no survey was done then and that the Alberta government removed any reserve on this land in 1954 when the federal government did not comply with requests for survey data to remove the land from the provincial inventory. It therefore seems appropriate to conclude that it was through no fault of their own, that the Lubicon and other isolated communities did not have a reserve by the time oil and gas were discovered on their traditional lands.

It is estimated (through an extrapolation of government supplied data) that \$1 million per day was extracted in energy from traditional Lubicon lands in the year 1988 alone. Had the federal government acted in a timely and appropriate manner in the 1940s and 1950s, there would have been a reserve in place by the time of this discovery. It is agreed that some, if not all, of the non- renewable energy supplies extracted would have been from that reserve and perhaps from lands set aside for other isolated communities.

Given these circumstances, it seems logical that a "fair" approach would necessitate that the settlement reflect the situation that *ought* to have existed when oil and gas were discovered and extracted from Lubicon lands. It is clear that, given existing federal policy respecting royalties to resource- rich Bands, monetary settlement based on this view of "fairness" would far exceed the Lubicon proposal which is based on need.

We turn now to the question of "fairness" with respect to actions of the government of Alberta. In 1975, the people of the isolated communities (including the Lubicon) filed a caveat that served notice that, notwithstanding the existing language of Treaty 8, they still have certain unextinguished Aboriginal Rights in their traditional territories. The filing of such a caveat was important in that it would provide certain protection against their rights being alienated through third party interest.

The Alberta case was based on a similar case in the Northwest Territories which was filed by the Dene in the late 1960s. The trial in the Northwest Territories produced a judgment that asserted that the Dene may well have unextinguished rights, notwithstanding the language of the same treaty. It allowed for the filing of a caveat. At the time the Lubicon case reached the courts in Alberta, the NWT case was in the Appeals Court of Alberta (which acted at that time as the Appeals Court for the NWT). During the Lubicon trial, the Appeals Court stated that, given the way the law was written in the NWT, it was not possible to file such a caveat, but that given the land legislation in Alberta, were the case to be filed here, they would have to uphold it. As a consequence, the lawyers for Alberta asked for a stay in that trial. The government of Alberta *introduced legislation that changed the land titles act* in Alberta in such a way that no caveat could be upheld here.

What is crucial is that the government made this legislation **retroactive**, and as a result, the trial was rendered null and void. Thus, an important legal tool, the caveat, was taken from the Lubicon and other isolated communities.

The passage of retroactive legislation is generally repugnant to English legal thought. It is especially repugnant when a consequence of this action is to deny access to legal remedy. This was done in the Lubicon case. It would thus follow that a policy based on fairness would operate within a context that assumed the existing case of the Lubicon is exempt from the impact of the legislation. Such a conclusion would have an extremely important impact on the balance of power between the parties even now and its application retroactively (which would be fair) would create a sufficient legal tangle so that governments probably would be quite willing to resolve the monetary questions on the Lubicons' premise, based on need.

In sum, when the context of the Lubicon is included within the scope of "fairness", that concept would likely lead to a higher [monetary] settlement than the one based on "need." We are therefore drawn to conclude that, whether based on "fairness" or on "need," the Lubicon position represents the more appropriate settlement proposal than do any we have seen advanced by the federal government

The People Speak

Following are excerpts from a variety of oral presentations heard by Commissioners:

We live our lives in constant danger. Since the blockade we have been afraid to go certain places in town [Peace River]. Our sons have been beaten by white men when they say they are Lubicon.

The roads are dusty and dangerous to travel. The logging and oil trucks run us off sometimes. We have lost many young ones because of the horrible roads.

The Lubicon women demand an end to the physical, emotional, economic, cultural and spiritual destruction. Hear our voice and our message - we don't know if we'll be here tomorrow.

- Violet Ominayak
witness Little Buffalo August 06/92

Most people who are knowledgeable in the area of Human Rights in the UN know about the Lubicon case.... if you look at all the other atrocities in the world, the Lubicon case stands out as a big beacon. It's not a very pleasant thing that has happened... And they know it's an on-going situation. That's the most significant thing. It's on-going. It's not something that has stopped.

I think that what has happened is that it's brought the attention of the world to the fact that what's going on in Canada is not very pretty, their relationship to indigenous people. And the Lubicon have done that.

... [At the UN] you have to be super-polite, super diplomatic ... what happened was the Committee [for Human Rights] came out with a ... decision condemning Canada in the strongest possible language that they could, within the parameters that they work in. The other thing that the Committee did, which is another unprecedented thing in relation to the Lubicons in this particular instance, is that they wanted to maintain an on-going hands-on in the Lubicon case. Usually what happens is they make a decision, issue it and then it's finished. There's no usual follow-up because there are so many cases. But in this case they appointed a special rapporteur who's to report to the Committee in an on-going basis as to the situation of the Lubicons.

To me, it signals within the United Nations and other people I've talked to, that the Committee knows that Canada was not playing fair with them and they wanted to say something about the Lubicon case ... "OK, Canada, you say that you're making fair and equitable efforts to settle this issue ... We'll give you the benefit of the doubt publicly, but

we're also appointing a rapporteur." And that's the killer because the rapporteur is totally independent of Canada. He's from Hungary. There's no way that the Canadian government can influence the guy ... so in fact, what the UN has done is kick the whole Lubicon thing up one more step ... it's unprecedented for the UN to do that.

- Sharon Venne
witness Edmonton January 29/93

So people say to me, "What's it like?" I say, "What would Edmonton look like 10 years after everybody had been forced onto welfare and had to stand in line with their hand out in order to survive? What would that do to relationships between men and women and parents and children and the old people?"

During one 18 month period there were something like 21 pregnancies; 18 children were still-born...

There is not one single Lubicon here who has not experienced unnatural death in his own family through alcohol-related incidents -- a man freezing to death on his trapline, a man killing himself with his hunting rifle [the first known suicide in Lubicon history], still-born children, kids running head-on into an oil company truck. .. They didn't even know which bones went with which child.... This has been rightly described by the World Council of Churches as (a word has been deleted here in order not to possibly contravene a court order against FoL).

... that's the consequence on this society of what's been done to them while the Alberta government and the oil companies and dominant Canadian society -- all of the rest of us -- have benefited to the tune of an estimated \$8 billion in oil revenues. Now they're proposing to go in and chop down something like 11 000 trees a day, dehydrate them and send them to Japan as part of supposed diversification of the Alberta economy.

- Fred Lennarson
witness Edmonton June 01/92

I don't think there's any amount of dollars that would be able to put back in place what we lost by way of our traditional way of life. Rather, we've concentrated on trying to put something together that would enable us to build some kind of a future for our people, especially for our younger generation.

Early on ... a lot of our trappers were out there ...The guys who were in the oil fields would have their cat and go out of their way to destroy traps. A few of the people had tried to get compensation for some of the damage that was done to the traplines... but the whole issue is not the \$5.00 trap or anything. We were losing a way of lifewe were trying to

hang on and hang on and hang on ... That wasn't possible because they kept coming. There was no response even to the complaints... On one hand while the trappers were out there and we were trying to keep them from shooting the guy running the cat, these were all things we were dealing with very early on, and at the same time to try and keep our people from going to jail, because we kept telling them if you kill this guy they'll just put more in. It's not these guys... We've fought a battle and I don't think we were expected to be here today, or even this year. But we hope that we're going to be able to withstand what may come in the future as long as we don't have a settlement.

With the billions of dollars that have been extracted by way of natural resources off our traditional territory, there has not been a red cent that has been coming back to the community other than welfare from the federal government.

There have been a lot of claims by the governments that they can't be handing out tax dollars to Native people like the Lubicons all the time. I don't think we're talking about any tax payers' dollars when we're talking about a settlement ... considering the amount of money that's been extracted through various oil development and also the logging companies up to this point.

During the blockade when we blocked those roads and stopped the oil development from coming in [October, 1988] they were all crying that their kids were going hungry and that we were taking bread and butter off their tables. They never once considered the fact that they were taking everything away from us.

Along the road you don't see any of the clearcut logging, but the minute you get behind the scenes there's a hell of a mess back in there. That holds true in a lot of these things. I think that's the same problem we faced with the oil development. It seems like the bigger the oil company, the less regulations there are, if there were ever any in the first place. Supposedly there are, but they're not followed. There are a lot of things -- for example, around those pump jacks, around those battery stations where there's a lot of oil spilled and it gets into the water stream. The ducks get it in their feathers and then they can't fly. All the drilling mud and stuff, the toxins that are being used in the drilling, the bears, the coyotes get into that and their fur starts falling off and it gets into their system and eats out their insides. So all these things have to be looked at any time any kind of development is going to take place in order to try and preserve.

There must be a reason why the Creator put us in the area that we're in. So I guess from that perspective the onus is on us to try and protect the Earth, the environment and the wildlife as much as possible.

- Chief Bernard Ominayak
witness Edmonton June 01 & 02/92

Long time ago, when people first arrived at Lubicon, everything was in harmony. There were lots of forests, lots of animals, lots of resources for them. It went on that way for a long time. But eventually they started to see a lot of their traplines and forests disappear, mostly because of development coming into the region. These developers had absolutely no regard for their existence.

[We] should be compensated for all that [we've] lost in general damages, because the resources of the land that had been passed on have been stripped and [we] have nothing to pass on to [our] children and grandchildren for future livelihood.

- Elder Edward Laboucan
(translated from Cree)
witness Edmonton June 02/92

I started to imagine what it would be like for myself. I think of myself as a totally urban person; Edmonton's the smallest place I've lived. And if I was taken from my job and ...everything that I know .. taken out of all my socialization, all my contacts, everything that gives meaning to my life, the whole bit, and just dropped in the middle of Little Buffalo..and I had to survive ...I don't think I'd last. It's that kind of total change of environment and context that we are witnessing. By some people's definition it would be (a word has been deleted here in order not to possibly contravene a court order against FoL). And it's a very slow process. We're not lining them up by the trees and executing them. We're just slowly doing it ...drip by drip by drop....

Personally, I think the churches feel that the delay in settling this has been a total disgrace, not just on behalf of the governments, but on behalf of all of us, for somehow not having the political will to settle.

The [Lubicon proposal] seems to make sense to me. I guess what I don't understand is why we have not seen a valid government response to it.the public has a right to know these specifics. What is specifically wrong with the Lubicon proposals? What specifically happened with Fulton's Report and why was it not accepted? What were the problems with it?

I know one of the things the government says is they're concerned about a precedent and paying the Lubicon people more than the "going rate." Well, first of all, I don't think in my limited understanding of how the land claims process is going throughout Canada, I don't think there is such a thing as a "going rate."

Now, I can understand where the government is saying they do have relationships to each [land claim].... but that shouldn't be that hard to do... It doesn't take 7 years or whatever it is to sit down and look at the agreements publicly, and say -- all right, these folks got these under these circumstances with these proposals and why. I mean, you put a wall

chart there and you start looking at it and you start making your comparisons and you try to be just and fair. It doesn't take a genius to do it. Why hasn't it been done?

As I calculate it, \$170 million is 2.3 per cent of \$6 billion. Now, in investment terms, [the Lubicon] are therefore asking very little. Who accepts 2.3 per cent return on their money? Nobody. And that's strictly financially - - forget about human lives and all the things that are far more important than money. [The money] is peanuts compared to what the resource companies have achieved and what we as taxpayers have achieved.

I would like to know why [government representatives] have not appeared before this Commission. The public is entitled to know, in detail, why they are not here. It seems to me that their appearance would confirm their good faith.

- Rev Bill Phipps
United Church of Canada
witness Edmonton June 29/92

I'm living in Switzerland. I represent one of the biggest support groups for Native people in the Americas. I have a resolution on the Lubicon Lake Indian Nation. Representatives from 13 European countries including Austria, Belgium, Denmark, France, Germany, Italy, Luxembourg, the Netherlands, Norway, Poland, Sweden, Switzerland and the United Kingdom do hereby resolve:

1. to continue pressing in every imaginable way the governments of Canada and Alberta to negotiate with the Lubicon people a fair and just settlement of Lubicon land rights;
2. to continue pressing European governments and national and international political organizations to keep raising the issue of outstanding Lubicon land rights with Canadian politicians and representatives of the Canadian government, such European political organizations to include the United Nations, the European Parliament, the Conference on Security and Cooperation in Europe (CSCE), European political parties, Aboriginal Rights organizations, Human Rights organizations and environmental organizations;
3. to accelerate the international STOP DAISHOWA campaign until there is a settlement of Lubicon land rights and an agreement negotiated between the Lubicons and Daishowa respecting Lubicon wildlife and environmental concerns;
4. to establish a Lubicon Monitoring Committee of concerned European organizations to enable a speedy and effective response to any changes in the evolving Lubicon situation, including the possibility of another effort by Daishowa this fall to clearcut Lubicon trees.

Dated the 25th of July, 1992, in Genoa, the town that Christopher Columbus originated from.

I would like to add two sentences to the Lubicon people. You are not alone. There are European people who are with you in your struggle for a fair and just settlement of your concerns.

- Dr. Heinz Lippuner
witness Little Buffalo August 06/92

Overall, we hope that the land claim will be settled before we graduate from high school (my brother Timothy is in grade 10 and I'm in grade 9), so that our future will seem brighter soon. So that there will be something to keep us here. Even if we decide to go to university, we want there to be something to come back to, some place with jobs and a sense of community. There are things we don't have, or are losing now.

In the last few years, since we were young, we have seen more troubles here. More alcohol and with it, fights and accidents. People don't get along any more as well as they used to. People from outside come and sell booze and it breaks up families and causes violence.

This is our land, and none of this should have been going on in the first place. we would like to settle down and stay in this community, but what will remain?

- Crystal Gladue, 14
witness Little Buffalo August 06/92

I held the necessary meetings and prepared a discussion paper which I think you have.... which was supposed to serve as the basis for that final meeting with the representatives of the parties. To my amazement and disappointment, although the discussions had proceeded amicably and constructively, the Alberta minister, Mr. Pahl, took the position that he wasn't going to go any further with these inquiries, that it was a waste of time, that I had no authority in the matter, and that Alberta was not going to take any further part. After discussion with the band and with Mr. Crombie, it was agreed that if Alberta would not take any part -- Alberta being so vitally affected and a concerned party -- there was really not any point in continuing my inquiry. That was where the matter was ended then.

The band asked if I would be prepared to serve in some capacity in the mediation process and I said yes, I would. Then, I gather, it was put before the federal government, about the possibility of my being chairman of a mediation panel. Mr. McKnight's position was, "Never, Mr. Fulton is prejudiced." He used the word publicly. He made that statement publicly, that I was prejudiced in favour of the band. He said, "We couldn't possibly have him as a mediator." To which my answer was, and I put it in a letter to Mr. McKnight, "You apparently don't understand the proper sense and meaning of the word "prejudice", because prejudice is a position you take based upon a lack of the knowledge of the facts or deliberate disregard for the facts and you come to a conclusion notwithstanding what the facts may be; whereas sympathy on the other hand, is a conclusion you arrive at

based upon knowledge of the facts. And I'd be guilty of sympathy because I know the facts now. But I am not prejudiced." I never had an answer to that letter. But apparently the position then of the federal government became, "What Fulton said in the discussion paper was not very useful."

- E. Davie Fulton
witness Edmonton November 02/92

I went to Lubicon country a few weeks ago and came back completely appalled and overwhelmed at the conditions that the Lubicon people are living in. ...in my work as pastor I've been...talking with missionaries and hearing about conditions in Third World countries and never realized that the poverty and despair and conditions would be so poor as they are in this country -- one of the richest nations in the world. I came back with a better understanding and more compassion and a sense of urgency that this situation needs to be resolved.

I personally am becoming more and more ... agitated and upset that we have a government that allows this kind of thing to happen.

I think that if the Lubicons lose, and if this continues, we'll all lose as Canadians.

What is frustrating for me is to see our tax dollars going to high salaries and perks for politicians, to American companies [and] being misused ... in many ways. But if it goes to promoting justice for the oppressed people, for poor people... in my opinion, taxpayers are willing to dig deep and pay for that.

- John Stellingwerff
Edmonton Interfaith Committee for
Aboriginal Rights
witness Edmonton June 29/92

It has been an incredibly enriching experience for me to have been able to spend time in Little Buffalo, being taken around, spending time on the trapline, getting to know the people there. But of course it's also been a very painful experience as well, watching the community change under the really severe oppression that they've been subjected to since about 1982.

There were lots of times where I couldn't believe the material myself. That was one of the big struggles. I think for about two years I struggled to believe this material myself. It just did not conform to my view of the country. It kind of ripped me apart at some levels. And lots of things I was afraid to say because I thought, surely I'm wrong. And somebody is going to prove it wrong and [then] I'll have to dig up other evidence. But nothing. There's no response. [I wrote] Globe and Mail articles on the plebiscite. I outlined the Woodland Cree case in Saturday Night Magazine and Tom Siddon wrote a very weak reply that had

no substance at all. That was a further shock, that there's just no defence on the part of the federal authorities for what they've done here. I don't see much sign that they're willing to rectify it.

I found it helpful in my whole understanding of this case to go to the Penan jungle and watch those people being forced from the land. Some of the images come to mind as I'm speaking. People lolling about these longhouses, destitute, no future. It's just pathetic. It helped me to see that this sort of thing does go on in the world and it helped me to ask the question -- is there any reason why it should not have happened in Canada? Are we any better people? This is a question that Canadians find really hard to face. We like to think of ourselves as good, upstanding and fair people, sympathetic to Native issues and Native Rights and so forth.

On one level every Canadian knows that Indian people of this country are getting screwed. Everybody knows that. And that they're marginalized, they live in terrible conditions, and that all the programs that this new federal offer is trying to impose on the Lubicon people have failed everybody ... And yet on another level, we have to maintain this belief in ourselves that we are good, that we are better than other North Americans ...

- John Goddard, author of
Last Stand of the Lubicon Cree
witness Edmonton November 03/92

Our people are prepared to support [the Lubicon] in any way possible, in any way that they ask. So far they have asked for moral and spiritual support which we have tried very hard to provide ... right now these people are hanging on with their heart and soul. That's about all they have to work with. There is nothing. There are no services. All there are is good-hearted people to come out here and hold their hand and get through one more day of what's put on them. I've sat with people who have lost a great deal and listened to their stories and they are so tragic that I probably wouldn't be able to tell you even one of them. I can tell you that every person here has been touched by tragedy again and again. They don't even have time to recover from the last one when another happens.

It's all because of greed. There're billions of dollars; this land has more than enough to provide for what they're asking. It's absurd that they're forced to live through what they are. As a Native person, a Native woman, I for one will stand by them in any decision that they make, and I will try to help them because I believe it's a Human Rights struggle. From my perspective it has to be one of the worst cases of Human Rights abuse that I've ever witnessed or I've ever documented. What I want to highlight is the human cost.

They have a lot more things to do here than to run around the country and tell the story of their tragedy. That's not the easiest thing to do... They should be able to have some kind of resources to start building their future rather than social services to put a band-aid on a very big wound. I think it really is up to people like you to make that difference because I think as Aboriginal people we have done just about everything within our means to get

these people some help, to get them recognition world-wide, and it's gotten nowhere. It's up to Canadians and it's up to the Canadian government and it's up to your Commission to see how quickly they can get a fair settlement, not a settlement that will leave them on welfare and leave them absolutely no economy, but a settlement that is fair.

- Dawn Hill
Mohawk Nation
witness Little Buffalo August 06/92

The settlement that should be signed with the Lubicon band must be fair, but it must be fair to all people. It must be fair to the many other Native bands who have signed agreements. It must be fair to those who are paying the settlement in land and money. It must be fair to the Lubicon band. The town of Peace River council urges the parties in negotiation to resume talks immediately and to come to a fair and just settlement.

In the meantime, it is manifestly unfair to involve Daishowa or any other group that is not a party to the negotiations in lobbying for a settlement. In discussions we hear about Native land claim settlements, the word "fair" is very often used. We must remember that "fair" has to apply to both sides.

- Mayor Michael Proctor
witness Peace River August 07/92

The Commissioners Speak

Following are excerpts from statements made by Commissioners:

I don't have the formal education of some of the other Commissioners, but I was born and have lived my whole life in the Peace River country. I know the people here, including the Lubicons. I know how the Lubicons lived off the land in the past and how they live today. I know the country and what's possible to do here. I know the cost of doing things here and I know the value of the resources which have been extracted from the disputed Lubicon territory, especially over the last ten to twelve years. I also know what's right.

It's been suggested by some that the Commission is just a bunch of New Democrats trying to embarrass the government. I want to make the point that I'm not a New Democrat. I'm not trying to embarrass the government and I've not participated in any discussions with my fellow Commissioners about party politics or ways to embarrass the government. My reason for participating in the Commission is simply to try and help get the Lubicon situation settled fairly and honourably.

Nobody is talking about giving the Lubicons anything. We're talking about settling a long-standing dispute over thousands of square miles of land which the Lubicons have never given up but which others have moved into and exploited to the tune of an estimated \$7 billion. Lawyers and politicians can argue forever about the legalities of all of this, but several things are certain.

It's certain that this multi-billion dollar development activity has destroyed the traditional Lubicon hunting and trapping economy and all but destroyed the Lubicon society. It's certain that the value of the settlement which the Lubicons are asking for is only a tiny fraction of the value of the resources which have been extracted and continue to be extracted from these disputed lands -- perhaps 2 per cent of the value to date. It's certain that we're not talking about spending taxpayers' money to settle with the Lubicons, but rather investing a small portion of the value of the resources taken from this disputed land so that the Lubicons can try to rebuild their society instead of being forced to live on welfare -- to the everlasting shame of the rest of us. And it's certain that all interests in the area -- not only the interests of the Lubicons -- will be continually at risk until this dispute is fairly and honourably settled.

John MacMillan

I am a professor of anthropology at the University of Alberta. I teach in that department and also have taught in the School of Native Studies and in the faculty of law.

One of my primary areas of specialization is Aboriginal Rights. I have written a number of articles and a book on this topic, especially as it relates to political rights, and have been involved in the process of constitutional development. I also served as an expert witness in one court case that pertained to this topic. I have taught courses in Anthropology, Law and Native Studies and topics arising from this area of research interest. Another area is what is known as Land Claims. In addition to researching, writing and teaching on that topic, I have been involved in "land claims" directly when I became involved with the negotiations undertaken by the Dene Nation that began in the early 1980s. I remained involved, at least peripherally, until the collapse of those negotiations about two years ago. A third area is what is often referred to as "The Native Economy." I have also written, researched and taught in this area. Additionally, I served as an expert witness during the Mackenzie Valley Pipeline Hearings. My primary geographical area has been the North and in particular the Mackenzie Valley. I work primarily with [the] Dene.

I have had a long acquaintance with the situation of the Lubicon. As I recall, early in the 1970s I was approached by one of the Chiefs of the "isolated communities" - one of which is Lubicon Lake - regarding work needed to be undertaken to support their assertion that there were outstanding issues to be addressed regarding their treaty rights. I was also heavily involved in supporting the position of the isolated communities when, in the mid-1970s, their court case was undermined by the passage of retroactive legislation in the Legislative Assembly of Alberta.

I met Chief Bernard Ominayak about ten years ago and have been in communication with him and other individuals involved in the Lubicon case for at least that long. I have been frustrated greatly by the lack of progress in settling this Lubicon treaty issue.

I am struck by the fact that the governments of Canada and Alberta refused to appear [before the Commission]. We are citizens of the country and as such, ought to have the opportunity to hear our elected government officials state their policies and answer reasonable questions. Their refusal only adds to the doubt I must carry with me about the honour of the Crown and its intentions.

Michael Asch

Last year, I was asked to sit on the Lubicon Settlement Commission established by the leader of the New Democratic Party. I am not a member of the New Democratic Party. On the contrary, as the President of the Indian Association of Alberta, I urge our citizenship to maintain our rights as citizens of our First Nations and to not participate in governments which are not our governments.

Until I was asked to sit on the Commission, I had never really looked closely at the details of the various offers made by the federal and provincial governments concerning the Lubicon People. When the Lubicon Peoples rejected various offers based upon their analysis, we supported them. This is each nation's right. The chief and his people make decisions for themselves. No other nation or peoples have a right to interfere with their decisions.

The details and the information which were presented to the [Commission] during the review has led me to analyze and review the whole process of having our rights recognized as Indigenous Peoples in Canada. How are the rights of the Indigenous Peoples going to be protected? It is a challenge to the non- Indigenous Peoples. In the rush for material wealth, are governments and multi-national corporations prepared to sacrifice peoples? The sad answer which returns from all over the world where Indigenous Peoples come in conflict with so-called civilization is the loss of the Indigenous Peoples. Is this going to happen in the Lubicon's case? Or are people going to stand up and say, enough is enough? Indigenous Peoples have been saying that for five hundred years, but who is listening?

One of the things that must be included in this report is the Indigenous Peoples' philosophy of life. We are not here on this Earth to make ourselves wealthy, to make ourselves known or famous in our own time. The future of [our] children's children must always be in front of our minds. What are we going to leave future generations? This is not a rhetorical question. This is the basis of our philosophy.

When the federal government makes these ridiculous offers of cash compensation to the Lubicon Cree without recognizing the fundamental rights to the land and resources, they insult all Indigenous Peoples. What is for the future generations?

What is going to be on the land for the children of the future? What are they going to feed their children and their children's children? We must think in terms of seven generations. This is the teaching which has been told to us by the Elders, never to think about ourselves, but to think into the future. This is the way that the Lubicon Cree have approached this whole negotiation with the federal government.

The Lubicon approach and process must be respected and honoured by all Peoples. It is a very valuable lesson which is being shown to us by the Lubicon Peoples. All Peoples who believe in justice must support them.

Regena Crowchild

I'm originally from Quebec and I've lived in the Peace River country for the last 41 years. I'm married and we have 4 children. As a youth I quit school after I reached grade six: that's as far as the local school went. Then I started helping my father in the logging industry at Keg River, some 120 miles north of Peace River.

I'm presently owner and president of Boucher Brothers Lumber with headquarters in Nampa some 20 miles south of Peace River. The lumber industry has been my life. Over the years we've had Native people working for us and still do. I'm presently advisor to the Aboriginal Logging in Peace River and sit on the Board of Directors for Alberta Forest Product Association which oversees forestry concerns such as wild life, the environment, transportation, logging, marketing, etc. I'm also president of Manning Diversified Forest Products, a new company that includes business people in northern Alberta among whom are two Metis groups, Paddle Prairie Metis and Zone Six.

I accepted to serve on the Commission because I feel that the Lubicon should be treated no less fairly than any other Native community in this country. They should have their own land, and good economic opportunities. I hope this Commission can further their goals.

Normand Boucher

I guess the next step is an acknowledgement by both the federal and provincial governments officially that there has been an injustice done and that there will be a resolve to it. It seems that ... they often want to deny there's a problem. I think that perhaps there have to be ... stages... recognize who you're talking to, [and] recognize what you're talking about. And ... recognize the injustices done, the loss of the economics and way of life, and in particular the exploitation of their land, the fact there was so much profit made off it at the expense of these people. Not to mention the erosion of their livelihood due to the geographical and structural changes.

Are there reasons for the government not achieving a result? It seems that this has been going on back to 1899. Do they have a hidden agenda? If they do, then perhaps that needs to be talked about. Because it just seems that negotiations don't normally go on forever, and yet that seems to be the case here.

Don Aitken

I'm a priest, a member of the Oblate Missionaries who have worked in Lubicon country since the 1850s. I'm presently provincial superior of some 145 Oblates belonging to Grandin Province serving in Alberta and the NWT. I'm also president of the Oblate Conference of Canada.

Originally from the Peace River country in northern Alberta, I first came into contact with the Lubicon while pastoring in Grouard from 1978 to 1986. Bernard Ominayak became chief back then and I got to know him and his people gradually over the years.

In my various contacts with the Lubicon I saw vividly the social breakdown resulting from government neglect: destruction of a traditional economy, poverty, lack of decent housing and facilities, unemployment, dependency on government handouts, alcoholism, violence, tragic deaths, family breakdown, divisions in the community, despair, high level of still births, tuberculosis, etc. I feel that such disastrous results on a people is a severe indictment on the Indian Affairs Department whose responsibility is the protection and welfare of Indian people in this country.

When asked to serve on this Commission, I had little hesitation in accepting, hoping to help a downtrodden people obtain justice at last if I could.

I wish ... to use the voice of one who has some moral authority in our world, Pope John Paul II. In his 1987 Fort Simpson visit to the Aboriginal Peoples of this land [he] declared: "Once again I affirm your right to a just and equitable measure of self governing, along with a land base and adequate resources necessary for developing a viable economy for present and future generations ... I pray that the Holy Spirit will help you all to find the just way so that Canada may be a model for the world in upholding the dignity of the Aboriginal Peoples."

The Lubicons after 54 years of waiting are still hoping to have a just and equitable measure of self governing. There are good prospects for an adequate land base. Their struggle to develop a viable economy has been the stumbling block in most of their negotiations with the government. Canada, far from being recognized as a model for the world in upholding the dignity of the Aboriginal Peoples, has been condemned by people around the globe for the way it has dealt with the Lubicons. We pray for the sake of the Lubicon people and Canada that the work of this commission may be instrumental in bringing this important issue to a fruitful and just conclusion.

Jacques Johnson

I live with my husband and two teenage daughters on a small farm near High River. I have been actively involved in promoting a healthy environment both as a volunteer and as a businesswoman.

Since 1988 I have been encouraging others to Reduce Reuse and Recycle in my community. This led to the formation of the Foothills Recycling Society and working with my MLA to successfully establish two permanent recycling depots.

I am the owner of earthcycle paper corp., one of the first companies to bring recycled paper into Alberta for resale. A good part of my energy has gone into public education.

I believe that each of us can make a difference.

When asked to be a member of the Lubicon Settlement Commission of Review, I came with no preconceived ideas and with only a small amount of information of the situation which I had gleaned from the media. At first I thought that the asking amount for settlement seemed high. However, after learning more about the Lubicon situation, I have changed my thinking. It is not too much, in fact, it is a fair and reasonable amount considering the hardships the Lubicon people have faced. It also seems to be a fair and reasonable amount considering that estimates put oil revenues taken from the Lubicon area about \$7 billion and that settlement would be a small percentage of this amount.

Some of the findings were unbelievable. Particularly troubling was how our government officials have negotiated with the Lubicon people.

Government officials are elected to represent the people. Yet I found their actions (or inactions) were not done in good faith on behalf of the Canadian people. It is unfortunate that the government did not appear before the Commission to clarify some of these matters. I would have welcomed the opportunity to hear the government prove these findings incorrect. They did not appear. Therefore, I am left to draw my own conclusion from what was reported to me.

[Mr. Fulton] stated that "prejudice is the position you take based upon a lack of knowledge of the facts, or deliberate disregard of the facts... whereas sympathy ... is a conclusion you arrive at based upon knowledge of the facts."

I couldn't help but feel sympathy for the Lubicon people when I found out what their history has been.

Sandy Day

I believe the money asked for by Lubicons does not necessarily have to be what they receive, but the government's offer is extremely low.

The Lubicons should not have to be held to spend the money the way the governments have demanded in their offer to the Lubicons.

I believe that any settlement will be a political one, and not one that is generated and influenced by government bureaucrats.

With federal and Alberta provincial elections looming in the horizon of 1993, it is very important that this report help to form parts of election platforms. If this does not happen, it will again be shelved and the bureaucrats will play games with it.

Wilfred Barranoik

I would like to comment that I find both [government] proposals to be very paternalistic, especially with respect to the compensation. I can accept that the Lubicons may have to justify the amount of funding they require for infrastructure or economic development as this amount is based on need. This amount should be settled now and not be the subject of future applications for funding. However, the Lubicons should not have to justify what they are going to do with the money they receive as compensation for past losses. It is theirs to do with as they like. No one tells me how to spend my money.

I, for one, came with a fresh mind as I had not, prior to sitting on the Commission, looked into this issue in any detail. As such, the hearings were an eye opener for me.

The Lubicons were missed in the original treaty settlements in 1899 and 1939. In 1939 they were promised a reserve and to date this promise has not been fulfilled. It is therefore clear that they should be dealt with at this time, in a manner that compensates them for this delay as well as providing them with the resources to establish a self-sufficient society.

Jennifer Klimek

I am an ordained minister, directing the Native Concerns portfolio of the Mennonite Central Committee Canada (MCC). This includes extensive involvement with Native peoples across Canada on a community level, with Native organizations, and with a large number of individuals. Through the direction of MCC work, I help provide volunteer personnel in needed areas of education, health, social work, research and advocacy.

Advocacy for land rights in the face of extensive development has become a major inter-Mennonite focus. MCC responds to Native communities in a combination of advocating honourable settlement of land issues, fair inclusion in the constitutional process, and with locally based, culturally viable economic development programs.

I am a representative of the Aboriginal Rights Coalition (ARC), an interchurch venture which has addressed Aboriginal Rights across Canada. MCC's connection with the Lubicon community is taking place through the support of local gardening ventures, the conducting of a health program during the TB outbreak, and through MCC's participation in ARC.

Resolution of the Lubicon case is not only in the interest of the Lubicon Cree. It is also in the interest of other Canadians. Native and nonNative peoples want to live within a country that deals fairly with all peoples.

The year 1992 has focused specifically on the 500 year history of conquest. Having inherited that history of conquest does not validate its continuation. The industrial conquest of the Lubicon community and its territory represents an ongoing conquest mindset that has gone largely unchecked and has happened at the terrible expense of the Cree peoples.

The dramatic contrast between the wealth of the corporations who harvest the resources in the Lubicon region and that of the local Lubicon community is astounding.

Menno Wiebe

Mandate And Establishment Of The Commission

On May 21st, 1992 the Leader of the Official Opposition in the Alberta Legislature, Ray Martin, established the Lubicon Settlement Commission of Review with the following Terms of Reference:

Whereas negotiations between the federal government and the Lubicon Lake Indians have been stalled without progress since January 1989;

And whereas talks between the Lubicon Lake Indians and the provincial government of Alberta collapsed in June 1990;

And whereas the public interest requires an independent, objective review of both the federal government proposal and the Lubicon Lake Indian proposal for settlement of Lubicon Lake land rights;

And whereas the federal government's most recent offer of March 1992 has not advanced negotiations;

And whereas because of the lack of progress Lubicon society continues to deteriorate at an alarming rate;

Now therefore, this Commission of Review that has been convened will have responsibility to investigate, compare, assess and report publicly on:

1. The federal government's offer of January 1989 as modified by the public exchange between federal representatives and Lubicon representatives in September 1989 and further modified by federal proposals presented in March 1992;
2. The proposed Lubicon comprehensive draft settlement agreement;
3. The relative merits of each proposal, including the likelihood that each proposal would allow the Lubicons to once again become economically self sufficient;
4. Any other matters pertaining to the proposed settlements which the commissioners may deem necessary or relevant in assessing the proposals.

The report of the Commission shall be completed and released before July 31, 1992.



HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Leader of the Opposition
Chef de l'Opposition

Ottawa, Ontario
K1A 0A6

MAY 27 1993
MAI

Dear Group Members:

Thank you for your letter regarding the final report of the Lubicon Settlement Commission of Review.

The Liberal Party understands your concern. For more than fifty years, the Lubicon have struggled to secure a permanent land base - and the means to preserve their way of life. Unfortunately, negotiations between the Lubicon and the federal government have been suspended since 1989. We believe that the government has reneged on its fiduciary responsibility to the Lubicon People.

Time is wasting. Innumerable studies and reports have been prepared over past years, and they have only served to slow progress in the negotiations for a land and resource base. It is time for action. As a start, we believe the government should proceed with recommendation number five of the Settlement Commission report to hold all royalties in trust and withhold leases and permits on traditional Lubicon lands - unless approved by the Lubicon. Moreover, future negotiations should reflect the intent of recommendation number eight, asserting that the extinguishment of Aboriginal rights must not be a condition for a settlement - a position consistent with Liberal policy.

.../2

Group Members
Friends of the Lubicon (Toronto)
485 Ridelle Avenue
Toronto, Ontario
M6B 1K6

Ethel Blondin-Andrew, Liberal Critic for Aboriginal Affairs, has urged the government to renew negotiations with the Lubicon and resolve this issue, once and for all. While it is doubtful whether the current government possesses the will to do so, you can be assured that Liberals will continue to press the Conservatives to respond to the recommendations of the Settlement Commission and resume negotiations.

We support the swift resolution of all claims, and consider the Lubicon claim to be a priority. As Leader of the Opposition, I appreciate the time you have taken to write and bring your views to my attention.

Sincerely,

A handwritten signature in blue ink, reading "Jean Chrétien". The signature is written in a cursive, flowing style with a long, sweeping tail on the final letter.

5

(Re-Typed from the Original)

Secret

**GUIDELINES FOR FEDERAL SELF-
GOVERNMENT NEGOTIATORS
(NUMBER 1)**

**Language for Recognizing the Inherent Right
of Self-Government in Agreements and Treaties**

Department of Justice and
Inherent Right Directorate
March 22, 1996

1

LANGUAGE FOR RECOGNIZING THE INHERENT RIGHT OF SELF-GOVERNMENT IN AGREEMENT AND TREATIES

I. Recognition of the inherent right: legal and policy considerations

(i) Introduction

This paper has two objectives: to help federal negotiators understand the legal and policy considerations surrounding recognition of the inherent right of self-government in a wide range of agreements and treaties with Aboriginal groups, and to provide them with approved recognition language for these agreements. There are essentially three broad types of agreements in which recognition language may be required: (1) comprehensive self-government agreements covering a range of aboriginal powers and related arrangements; (2) sectoral agreements dealing with discrete subject matters only (e.g., an education agreement); and (3) administrative arrangements involving no law-making authority, but rather, the devolution of administrative control over federal or provincial programs or services. It can be anticipated that most, if not all, Aboriginal parties to negotiations of such agreements will insist that language be included to recognize the existence of their inherent right of self-government. Whether they are responding to recognition clauses proposed by Aboriginal groups, or putting forward preferred federal language, negotiators should be aware of the legal and policy considerations surrounding the choice of recognition language, and of the type of recognition language deemed acceptable by the federal government.

In essence, the debate over how to recognize the inherent right centers around two broad approaches, which we refer to as the *specific recognition* and *general recognition* approaches. *Specific recognition* entails recognizing that a particular group of Aboriginal people have an inherent right ("Canada recognizes that First Nation "X" has an inherent right of self-government..."). *General recognition* involves recognizing that the inherent right is an existing right within the meaning of section 35 of the *Constitution Act, 1982*, without actually acknowledging that specific Aboriginal groups (i.e., the Aboriginal parties to the agreement) have an existing inherent right. In almost all cases Aboriginal groups can be expected to insist on the *specific recognition* approach and will likely argue forcefully that anything less than specific recognition is inconsistent with the federal policy on implementation of the inherent right.

What follows is a summary of the legal and policy concerns raised by the *specific* and *general* recognition approaches, accompanied by several draft clauses representing the federal government's position on acceptable recognition language for inclusion in self-government agreements.

(ii) Legal Considerations:

The inherent right implementation policy is in all respects consistent with the Department of Justice's legal theory in support of the government's position that the inherent right is an existing right within the meaning of s.35 of the *Constitution Act, 1982*. Of course, the policy goes considerably beyond what the government would be prepared to accept as a strict matter of law, if it were forced to litigate the matter before the courts. The purpose of this brief legal discussion is not to suggest that negotiators should be focused on the legal theory: on the contrary, they are to be guided by the policy, as supplemented by decisions of the Interdepartmental Steering Committee. Indeed, the policy has been designed to set legal questions aside with a view to reaching consensus on the way in which self-government will be exercised in various contexts. Nevertheless, it is important for negotiators to bear in mind that, because negotiated agreements will have legal effect and legal consequences for the federal government, the precise language used must be carefully chosen so as not to undermine the government's legal options in the event of litigation. ||

By way of background, there are two key elements in the legal theory underpinning the policy. The first element relates to the ability of individual Aboriginal groups to establish that they have an existing inherent right of self-government, while the second element deals with the potential scope and content of such a right in individual cases. In a nutshell, the existence, scope and content of an inherent right in specific cases will be tied to a complex set of variables (the most important of which relates to the history of a claimant group) which would have to be examined individually before the government might be in a position to recognize, first, that a particular Aboriginal group had an inherent right at law, and second, what sorts of powers were likely encompassed by that right.

With respect to the first element, establishment of an existing inherent right, some Aboriginal groups, such as First Nations situated on a land base, would likely be able to establish in a court of law that they have an existing inherent right of self-government. Other groups, most notably the Metis and urban Aboriginal groups, would likely have considerable difficulty meeting the legal tests for establishing the existence of this right. In the case of First Nations residing on a land base, even where they were able to meet the legal tests for establishing an inherent right, the specific powers that flowed from that right would differ considerably from group to group, depending, once again, on a number of factors, including the individual history of the group in question.

M Negotiators will have noted that the policy contemplates negotiations with all Aboriginal people, regardless of the relative strength of their legal claims. This does not mean, though, that the same wording can be used in all agreements, any more than that the same arrangements can be considered for a group of urban Aboriginal people residing in downtown Winnipeg as might apply to a land-based First Nation. The precise wording chosen to implement the policy through negotiated agreements must be true to policy, while not compromising the government's legal interests.

EXTINGUISHMENT POLICY

(iii) Policy Considerations

The policy recognizes that there are differing views as to the existence, scope and content of an inherent right. Indeed, most provinces and Aboriginal groups could not be further apart in their positions on these points. At one end of the spectrum are Aboriginal groups, virtually all of whom argue for an unlimited inherent right of self-government, and reject any suggestion that this right is in any way "contingent", that is, subject to negotiations with federal or provincial governments to give it effect. On the other side of the divide are the provinces, many of which categorically reject the legal view that s.35 includes an inherent right, or have legal views on the scope of the inherent right that differ from those of the federal government, but which are nevertheless prepared to negotiate practical self-government arrangements with Aboriginal groups. The challenge for federal negotiators is to propose recognition language that can accommodate these divergent points of view, while not scuttling the negotiations at the outset.

(iv) Specific vs. General Recognition

The specific recognition approach is one that would be desirable from the point of view of all Aboriginal groups engaged in negotiations, but poses significant risks for the government. Although all groups can be expected to claim that they have an existing inherent right of self-government within the meaning of s.35, the legal claims of these groups are not equal. At a minimum, then, adoption of the specific recognition approach in relation to First Nations and Inuit people would require that the government differentiate among Aboriginal groups in terms of the relative force of their legal claims to an inherent right, given that Metis and urban Aboriginal groups' claims are not tenable and the specific recognition approach would not be feasible for them.

In the case of land-based First Nations and Inuit peoples, although many of these groups would have well-founded legal claims to an existing inherent right, specific recognition of that right in an agreement remains problematic for two main reasons. The first reason relates to the government's legal interests in future litigation. Although the Department of Justice has some sense of the likely legal parameters around an inherent right, it is not yet in a position to provide a definitive list of powers for each Aboriginal group in negotiations, due to the lack of case law in this area. To admit specific recognition of a group's inherent right in a self-government agreement, without a firm legal view on the scope and content of that right, would risk committing the government to a particular interpretation of the right with which it might not be in agreement. Specific recognition in this context could be used by an Aboriginal group, in subsequent litigation over the agreement, or possibly even in contexts unrelated to it, to argue for a more expansive interpretation of the inherent right than that set out in the agreement. Having recognized that particular group's inherent right, the federal government could be prevented from arguing that the scope of the inherent right was restricted to the terms of the agreement. This difficulty is exacerbated by the fact that, unlike the comprehensive claims context, we are unlikely to be able to obtain absolute certainty in self-government agreements.

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The second difficulty relates to existing provincial positions on the inherent right. Acceding to Aboriginal demands for *specific recognition* that they actually have an inherent right would place the federal government in the position of having to confront the strong provincial opposition to recognition of a legally-enforceable inherent right, with the risk of, at best, entangling the parties in unfruitful legal debates at an early stage of negotiations, and at worst, losing provincial participation in self-government negotiations in many cases.

The general recognition model begins with a clear, and unambiguous statement recognizing that the inherent right of self-government is an existing right within the meaning of s.35 of the *Constitution Act, 1982*. Under this approach, recognition of the inherent right is explicit, but we remain agnostic as to which groups actually have such a right. This approach is entirely consistent with the inherent right policy, which is designed to avoid endless debates on intractable legal issues (such as, who has an existing inherent right) by focusing on how self-government will be exercised in practice. As demonstrated by the draft clauses below, the general recognition approach can be tailored to meet a wide variety of negotiating contexts, and can be used to accommodate the positions of Aboriginal groups, without compromising the federal government's interests in the event of court challenges.

II. Suggested Clauses to Deal with Recognition

(i) Introduction:

What follows are approved clauses that federal negotiators can use to deal with recognition of an inherent right of self-government, as well as certain attendant issues. While negotiators are free to choose from among the suggested clauses those that they feel are necessary and appropriate in any given context (they need not use all of the suggested clauses - that would likely be redundant), they are advised not to make substitutions or alterations to the wording provided, which has been very carefully crafted to address both Aboriginal aspirations and federal legal and policy concerns. Moreover, it will still be necessary to review the precise combination of clauses adopted to ensure that, taken together, the provisions do not have unanticipated consequences. 11

Certain modifications will have to be made to reflect the nature of the agreement involved. For example, wording that is appropriate for a Framework Agreement may not fit perfectly in the case of an Agreement in Principle, or a Final Agreement. In the case of Framework Agreements, the language will have to be prospective to reflect the fact that such an agreement merely established the parameters within which the substance of self-government is to be negotiated. Agreements-in-Principle, while far more detailed than Framework Agreements, need to be worded so as to retain some flexibility for drafting the Final Agreement.

Another important factor to consider will be whether the self-government arrangements are set out in a stand-alone agreement or in an agreement dealing simultaneously with land claims and self-government. Language that might be appropriate in a self-government agreement will not necessarily work in the context of comprehensive claims matters. An attempt has been made in the text that follows to indicate some of the more obvious wording adaptations to reflect the specific context, but negotiators should bear in mind that further modifications may well be necessary upon review of individual agreements.

In determining where best to place a given clause, negotiators should bear in mind the different legal effects of including wording in the preamble to an agreement as opposed to the body of the agreement itself. Preambular language serves to set the stage for the substance of the agreement which follows, and may help to establish the context in which an agreement has been reached. Preambles are given less legal weight than the substantive provisions of the agreement (where the "meat" of the agreement is reflected) and are generally only referred to by the courts to assist in interpreting ambiguous substantive provisions in the body of the agreement. For these reasons, preambles have become a very popular mechanism for reflecting some of the more controversial issues that arise in negotiations. It is where one often finds statements of parties' respective "positions", or "assertions" on matters about which there may be no consensus.

(ii) Clauses:

(A) Preambular Clauses:

The clauses that follow constitute a template of options from which to choose, a sort of "menu" of clauses that might be used depending upon the particular context of a given set of negotiations. The intention is not to suggest that all of these clauses ought to be used in agreements; on the contrary, use of all of the clauses together in one agreement would be redundant, confusing and possibly contradictory. Negotiators should select from the options the ones that appear to them to be the most appropriate to the situation at hand, while bearing in mind the distinctions that have been made between those clauses that are clearly preferable from a federal government perspective, and those that are to be put forward only where absolutely necessary to the success of negotiations.

1. **WHEREAS the Government of Canada recognizes that the inherent right of self-government is an existing aboriginal right within section 35 of the Constitution Act, 1982;**

This will likely be a "must" clause for most Aboriginal groups and would be acceptable provided the negotiations in question come within the scope of the federal inherent right/self-government implementation policy.

This clause would be suitable for Framework Agreements, AIPs, or Final Agreements.

2. (i) WHEREAS the members of the First Nation "X" are Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982*;

OR

- (ii) WHEREAS the members of First Nation "X" [assert] **or** [believe] that they are an Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982*;

There may be pressure from some Aboriginal groups to make reference to their being a "distinct people" within the meaning of s.35, a reference which would be unacceptable for the federal government. They may believe that, in the absence of specific recognition by the federal government that they actually have an inherent right, references to their being "a people" within the meaning of s.35 somehow enhance their position that they do, in fact, have such a right.

There are, however, a number of serious difficulties with referring to groups as "peoples", which difficulties are exacerbated by using the adjective, "distinct". We will generally not be in a position to know if the Aboriginal parties to an agreement capture all or some of the named collectivity. The reference to "a distinct people" implies the existence of a unique group, a fact which may not be accurate in all cases. There is also a concern about whether "a people" has the authority to represent or bind all of the members of that group. And finally, there are several concerns about the implications of this language for the government's position in international fora, as well as for Canadian Unity issues. (These concerns are explained more fully in a companion document dealing specifically with requests for recognition as "distinct people(s)".) References to "a people", or "a distinct people" should therefore be resisted by federal negotiators.

Where negotiators deem it critical to obtain an agreement it would be acceptable to include either clause 2(i) or 2(ii), above. In the case of 2(i), we would simply be admitting that the parties are Aboriginal people, a statement that is likely obvious, but not harmful. In the case of 2(ii), we would be including an expression of the First Nation's views, while remaining silent as to the federal position on this point.

This clause would be suitable for Framework Agreements, AIPs, or Final Agreements.

3. . WHEREAS First Nation "X" asserts that it has an inherent right of self-government and believes that this Agreement represents an expression of its inherent right;

As a general rule, there are risks in including assertions of position in any legally-binding agreement where those assertions are not countered by a different position. An absence of any opposing position (in this case, that of the federal government) could imply that the silent party somehow agrees with the assertion. In this case, however, it is obviously not possible for the federal government to express clear opposition to the assertion that a given First Nation actually has an inherent right. For this reason, it would not be advisable for federal negotiators to be the first to suggest this clause. Having said that, the language of clause 3 could be used if it is deemed critical to Aboriginal groups who take issue with our refusal to include specific recognition of an inherent right.

This clause would be suitable for Framework Agreements, AIPs, or Final Agreements.

4. (a) WHEREAS the parties to this Agreement acknowledge that there are different legal views as to the [existence,] scope and content of an inherent right of self-government, but nevertheless wish to set aside their legal differences for the purpose of implementing self-government arrangements [for First Nation "X"];

(b) WHEREAS the parties' adherence to the terms of this Agreement does not necessarily represent an expression of their legal views as to the [existence], scope and content of the inherent right of self-government as they may ultimately be defined at law.

Note that the word "existence" has been square-bracketed. This is intended to indicate that, while the federal government would not seek to use this word - given federal recognition of the existence generally of an inherent right, that would clearly not be appropriate - we recognize that provincial governments may expect the clause to include a reference to "existence" of the inherent right, to reflect their basic disagreement with the general proposition that it is included within s.35. If that is the price of provincial agreement, the federal government would certainly not take issue with using the word "existence", although Aboriginal groups can be expected to object to it.

This clause would be suitable for Framework Agreements, AIPs, or Final Agreements.

OR
5. (a) WHEREAS the parties to this Agreement acknowledge that they may have different legal views as to the [existence,] scope and content of an inherent right of self-government;

(b) WHEREAS the parties nevertheless intend by this Agreement to

(i) [reflect their understanding on how self-government will be exercised by First Nation "X"]

OR

(ii) [reflect their agreement with respect to self-government arrangements for First Nation "X"]

OR

(iii) [set out the terms by which self-government will be implemented for First Nation "X"]

OR

(iv) [implement] or [develop the principles for implementation of] the inherent right of self-government for First Nation "X"

without taking any definitive positions with respect to how an inherent right of self-government may ultimately be defined at law.

The objective of clauses 4 and 5, which represent alternatives, is to characterize an agreement as reflecting practical arrangements, rather than expressing the parties' ultimate legal views on the inherent right, something about which we would never be able to achieve agreement in any event.

Clause 5(b)(iv) is problematic from the government's perspective, but may be preferred by some Aboriginal groups, since it tends to suggest that they have an inherent right of self-government, and may therefore be seen as offsetting their concern about the federal position on specific recognition. This latter clause should not be suggested by federal negotiators because of the legal risks that it poses for the government's position on specific recognition, but if it is deemed vital to reaching a deal, clause (iv) can be agreed to with the important proviso that the last part of the sentence must be included as well ("without taking any definitive positions with respect to how an inherent right of self-government may ultimately be defined at law"). This latter part of the sentence is desirable in the case of clause 5(b)(iv).

This clause would only be suitable for AIPs or Final Agreements.

6. WHEREAS the provisions in this Agreement were negotiated in accordance with a government-to-government relationship within the framework of the Constitution of Canada [and from the perspective that the inherent right of self-government is an existing aboriginal right within section 35 of the *Constitution Act, 1982*];

Once again, this language need not be suggested by federal negotiators, but would be acceptable to us if it is deemed important by the Aboriginal group in question to make reference to a "government-to-government" relationship. The square brackets indicate language that may not be appropriate in an agreement dealing with both comprehensive claims and self-government matters.

This clause would be suitable for use in Framework Agreements, AIPs or Final Agreements, but would need to be modified, depending upon the context. In the case of a Framework Agreement, for example, negotiators would want to tailor the language to reflect the fact that the Agreement is prospective in nature. The reference in this case would therefore be to negotiations that will be conducted toward conclusion of an AIP, and eventually a Final Agreement.

(B) Purpose Clauses

7. (a) The purpose of this Agreement is to

(i) reflect the parties' understanding on how self-government will be exercised by First Nation "X"

OR

(ii) reflect the parties' agreement with respect to self-government arrangements for First Nation "X"

OR

(iii) set out the self-government arrangements that have been agreed to by the parties [and which are intended to be implemented by a Final Agreement between the parties]**

OR

(iv) set out the terms by which self-government will be implemented for First Nation "X" [which terms are intended to be implemented by a Final Agreement between the parties]**

OR

(v) [implement] or [develop the principles for implementation of] the inherent right of self-government for First Nation "X"

[based on the premise that] or [consistent with the principle that] the inherent right of self-government is an existing aboriginal right within section 35 of the *Constitution Act, 1982*.

(b) This Agreement is not intended to constitute an expression by the parties of any definitive legal views with respect to how an inherent right of self-government may ultimately be defined at law.

***Language to be inserted in an AIP*

Clauses (i)-(iv), which represent alternatives, would be equally acceptable to the federal government. For the reasons explained above, in relation to clause 5(b)(iv), clause 7(a)(v) is problematic for the government, but may be preferred by some Aboriginal groups. It should be used only if deemed vital to reaching a deal, and must then be accompanied by clause 7(b) ("This Agreement is not intended to constitute an expression by the parties of any definitive legal views...") As in the case of clause 5(b), this last sentence is a desirable accompaniment to any of clauses 7(a)(i)-(iv), but is imperative in the case of clause 7(a)(v).

This clause would only be suitable for AIPs or Final Agreements.

(C) *Without Prejudice Clauses*

8. This Agreement is without prejudice to the parties' respective legal views as to the [existence,] scope or content of an inherent right of self-government.

Technically speaking, this clause would be unnecessary where an agreement already makes reference to the parties' different legal views as suggested above. If Aboriginal groups deem it essential to include a without prejudice clause, the above wording would be acceptable to the federal government.

This clause would not be appropriate, however, in the case of a joint land claims and self-government agreement. Where an Aboriginal group wishes to include a "without prejudice" clause in a joint land claims and self-government agreement, negotiators should consider whether there might be a more general formulation that could capture the group's concerns in relation to both the land claim and the inherent right, without compromising the government's general approach to such clauses in land claims agreements.

This clause would be suitable for Framework Agreements, AIPs, or Final Agreements.

9. This Agreement is without prejudice to any treaty rights of First Nation "X" that may flow from Treaty #__.

Once again, we would not want to suggest this clause, but if it is considered important for Treaty First Nations, it would be acceptable to the federal government. Obviously, this clause would only be applicable where the agreement in question is clearly not intended to affect treaty rights. The clause would not, for example, be appropriate in the case of a combined land claims and self-government agreement, in the sense that land claims settlements may well affect treaty rights.

This clause would be suitable for Framework Agreements, AIPs, or Final Agreements.

(D) Non-derogation Clauses

10. Nothing in this Agreement shall be construed so as to abrogate or derogate from any aboriginal or treaty rights of First Nation "X" or its members/citizens, including any inherent right of self-government, recognized and affirmed by section 35 of the *Constitution Act, 1982*.

11. Nothing in this Agreement shall affect the ability of First Nation "X" or its members/citizens to enjoy or exercise any existing or future constitutional rights of the Aboriginal peoples of Canada, or to benefit from any other arrangements or Agreements that may be applicable to them.

As a general rule, non-derogation clauses are quite problematic and we caution negotiators not to use them unless absolutely necessary. The difficulty is that agreements almost inevitably do have some effect on aboriginal or treaty rights (although such effects would not necessarily be negative ones) and we may not be in a position to know, upon signing an agreement, the precise nature of those effects. Moreover, we are concerned about the potential for non-derogation clauses to undermine the binding nature of self-government agreements. The risk posed by non-derogation clauses is that they may imply that the contents of the agreement, i.e., the agreed-upon Aboriginal powers set out therein, do not take away from the inherent right, which may in turn mean that the inherent right somehow entitle the Aboriginal parties to something more than what is provided for in the agreement. And, as noted in the discussion on the "specific recognition" approach, above, this risk is exacerbated by the fact that, unlike the comprehensive claims context, we are unlikely to be able to obtain absolute certainty in self-government agreements.

Having said that, we recognize that many Aboriginal groups may demand some form of non-derogation, if only to ensure that the agreements do not prevent them from enjoying the benefits of future constitutional change or generous court decisions. In light of the cautions expressed above, negotiators are advised to only include either or both of clauses 10 and 11 where absolutely essential to

achieving agreement, and where they have obtained specific instructions from the government to put those clauses forward.

Where it is deemed essential to use either or both of clauses 10 and 11 such use would only be suitable for Final Agreements, or possibly as a principle in an AIP designed to be expressed in the Final Agreement. Expressions of non-derogation are clearly not suitable for use in Framework Agreements.

In the particular case of agreements dealing with both self-government and land claims clause 10 would not be suitable, because it is clearly the intention of land claims agreements to affect aboriginal or treaty rights. Clause 11 might be acceptable in this context, but only where the word "existing" is deleted from the phrase "any existing or future constitutional rights". Once again, the reason for this modification is that land claims agreements do affect existing rights. In this case, then, the phrase would simply read, "any future constitutional rights of the Aboriginal peoples of Canada..."

Finally, negotiators should be aware that, at the time of writing a paper is currently being prepared that will set out a more comprehensive expression of the government's position on non-derogation clauses generally. Negotiators are therefore further advised to consult this document as soon as it becomes available.

JUN 23 2005

Chief Bernard Ominayak
Lubicon Lake Indian Nation
PO Box 6731
PEACE RIVER AB T8S 1S5

Dear Chief Ominayak:

This is further to my October 15, 2004 letter, in which I informed you that I would review the Lubicon file, the federal mandate and the progress achieved to date on the file, and provide you with a response.

I have completed my review of the file and am pleased with the progress that was achieved at the table from 1998 to 2003. I note, however, that there are still a significant number of outstanding issues, which were outlined by the parties at the last negotiation session, that must be addressed to achieve a final settlement.

As you are aware, I met with National Chief Phil Fontaine several times in the past six months to discuss possible options on how to move forward with the negotiations. We discussed the possibility that the Negotiation Roundtable work may result in recommendations for changes to the Inherent Right Policy that could possibly address the concerns you have expressed regarding self government. I am pleased with the progress that was made at the Roundtable meeting; however, the changes to the Inherent Right Policy will come about only after exploratory talks with First Nations and must be approved by my Cabinet colleagues. The process would take at least a year, as follow up to the Roundtable Process would have to take place in order to determine the recommendations that would be put before Cabinet for approval. Given this, I do not see the Roundtable Process as providing an immediate solution to getting negotiations resumed.

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I would therefore suggest two possible alternatives for the parties to consider. As a first option, I suggest we give consideration to resuming negotiations, under the current federal mandate, to address the remaining issues unrelated to compensation and self-government. This would allow us to complete the negotiation of issues that are essential for a final settlement and which fall within the current policy. It would also allow us to take advantage of the time required to complete the Roundtable follow-up work and implement any possible changes that stem from this process. A second option would be to jointly agree to close this round of negotiations until the Negotiation Roundtable work is completed and recommendations are implemented.

I sincerely hope that one of these options provides an acceptable approach to the Lubicon people. I look forward to receiving your response.

Yours sincerely,



The Honourable Andy Scott, PC, MP

Lubicon Lake Indian Nation

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July 3, 2005
The Hon. Andy Scott
Minister of Indian and Northern Affairs
Government of Canada
Ottawa, ON K1A 0H4

Dear Mr. Scott;

I am in receipt of your letter of June 23, 2005 responding to my earlier letters of March 22, 2004, and August 29, 2004. Needless to say a 15-month delay in responding to my letter of March 22, 2004 asking for appointment of a negotiator with a mandate to negotiate outstanding Lubicon settlement issues in good faith is hardly consistent with statements by the Prime Minister that settlement of Lubicon land rights "has been a priority of the Government of Canada and must be effectively pursued until a mutually acceptable solution is negotiated".

Your estimate that it will take "at least a year" to explore the "possibility that the Negotiation Roundtable work (with the AFN) may result in recommendations to the Inherent Rights Policy that could possibly address the concerns (the Lubicon people) have expressed regarding self-government" is not only highly qualified but, given past history and numerous failed past attempts to re-structure the relationship between the government of Canada and aboriginal people in Canada, is obviously optimistic in terms of both timetable and likelihood of success. Current talks with the AFN cannot be used as a tactic for the federal government to duck responsibility for a federal government position on Lubicon land negotiations based on flagrant misrepresentation of outstanding Lubicon settlement issues and indefensible federal Justice Department instructions to federal negotiators on how to negotiate the constitutionally recognized "inherent right" of self-government in bad faith.

There is nothing which should prevent a sincere federal government from successfully negotiating a settlement of Lubicon land rights except perhaps a duplicitous "inherent rights" policy which is clearly inconsistent with both constitutional recognition of the inherent aboriginal right of self-government and the honor of the Crown. Such a policy can easily be renounced and must be renounced if the Martin government has any respect for the Canadian Constitution or concern for the honor of the Crown. All that would then be required to achieve a settlement of Lubicon land rights is for federal negotiators to be given a mandate to come to the table and negotiate well-known and long outstanding Lubicon settlement issues in good faith. Self-government and financial compensation have both been on the table from the very beginning and successive federal negotiators, starting with the Hon. E. Davie Fulton in 1985, have been prepared to negotiate both of these issues. Good progress has in fact been made on all settlement issues at one point or another, including self-government and financial compensation, only to have one level of Canadian government or the other then backpedal when political pressure to behave honorably lessened and behaving honorably was no longer politically required or expedient.

Refusal to renounce Justice Department instructions to federal government negotiators on how to negotiate self-government in bad faith makes good faith negotiations on anything with the government of Canada almost unimaginable. Refusal to negotiate well-known and long outstanding Lubicon settlement issues pending the "possibility" that indeterminate discussions with the AFN "could possibly" address Lubicon "concerns" at some unspecified future date is tantamount to abdication of the federal government's constitutional responsibility for dealing with unceded Lubicon aboriginal land rights and is neither workable nor acceptable. Facing the awful consequences of the systematic and deliberate destruction of our traditional economy and way of life by dominant Canadian society, the Lubicon people need a settlement of Lubicon land rights now -- and no settlement of Lubicon land rights is possible unless and until all of the outstanding settlement issues are resolved (or, to quote Prime Minister Martin, "until a mutually acceptable solution is negotiated").

With regard to your review of the Lubicon file, materials obtained under an Access to Information request make clear that the information you are being provided by your officials is, to put it politely, selective, slanted, inaccurate, incomplete and misleading. On numerous occasions we caught Chief Federal Negotiator Brad Morse misrepresenting things said and agreed at the negotiating table. Everyone at the negotiating table, including other federal negotiators, was well aware of this continuing problem. Twice -- once regarding the provision of social services to Lubicon members and once regarding the issue of construction cost increases resulting from changes in construction codes and standards -- we caught Professor Morse providing purposefully inaccurate and deliberately misleading information to then Minister Nault. (Mr. Nault addressed this problem to some extent by establishing direct communications with us when problems arose -- an arrangement which we proposed to both you and Mr. Mitchell but which neither of you deigned to even acknowledge -- presumably on the advice of those selfsame officials.)

The Access to Information materials are too voluminous to review here in detail but a few examples serve to illustrate the point. On August 31, 2004 Departmental staff prepared a "Question Period Card" for you which reads, in part:

"In June of 2003 former Minister Nault proposed to Alberta Minister Hancock and Chief Ominayak and the Lubicon Elders the beginning of an intense level of negotiations with the goal of initialing an agreement-in-principle (AIP) by Christmas 2003. All parties agreed with this time line and negotiations immediately moved to compensation, which at the time Canada believed was the last major outstanding item...(section blacked out)...the Lubicon raised the issue of self-government, citing it as a priority, and insisting that agreement on how to deal with it would have to be part of an AIP."

In fact our agreement with Mr. Nault was not to negotiate an AIP by Christmas but to try and negotiate a full settlement agreement by Christmas. To that end the Lubicon people were prepared to engage in full time negotiations. Chief Federal Negotiator Morse was unprepared to commit more than a day or two a month to negotiations and wanted the agreement to be in the form of a non-binding AIP arguing that it would not be possible to negotiate a full settlement agreement by Christmas.

After twenty years of vetting Lubicon settlement issues from every imaginable angle the Lubicons were and are convinced that it should now be possible to put together a settlement of Lubicon land rights in short order. We insisted on at least trying to negotiate a full settlement agreement by Christmas. Contrary to your August 31st "Question Period Card", we never at any point agreed to negotiate an AIP. Professor Morse then proceeded to conduct negotiations in such a way so as to make it impossible to negotiate anything other than a highly general, non-binding AIP by Christmas. (I enclose for your information a copy of a November 14, 2001 letter to Mr. Nault describing, among other problems, the lackadaisical federal negotiating schedule.)

By October of 2003 it was clear that it would not be possible to negotiate a settlement by Christmas unless something was done about the way Professor Morse was conducting negotiations. I therefore wrote Mr. Nault the attached October 24, 2003 letter expressing concern about what was going on at the negotiating table. (It was not until December of 2003 that we obtained a copy of the Justice Department Guidelines to federal self-government negotiators and realized that Professor Morse had flat-out lied to us about drafting "preambular" self-government clauses in Peace River overnight, supposedly without consulting the self-government experts in Ottawa, and that he was rather following a pre-prepared script drafted by federal Justice Department lawyers in 1996 carefully calculated to ensure that any negotiated self-government agreement would not be legally binding.)

In a Briefing Note sent to you on February 3, 2004, current Chief Federal Negotiator Sharman Glynn makes the following statement:

"Discussions focused on outstanding land issues, third party interests, compensation and self-government, which had not been identified by the Lubicon as a priority issue until July of 2003."

In fact, as detailed in the attached October 24, 2003 letter to Mr. Nault, self-government had demonstrably been on the list of essential Lubicon settlement items from the very beginning; had been on the table in writing as an essential settlement item in every round of negotiations since at least 1984; was presented to Chief Federal Negotiator Brad Morse in writing along with other essential settlement items when the last round of negotiations commenced in July of 1998, and was referred to periodically during the five year long course of negotiations with Professor Morse as an item that had to be resolved for there to be a settlement of Lubicon land rights.

Ms. Glynn continues:

"Both Canada and Alberta tabled compensation offers in July. The Lubicon's (sic) only response was to elicit (sic) demands for more money or our bottom line. The department fleshed out the value of the entire package arguing that (the Lubicons) have been extremely conservative in assessing future returns on their investments, thereby undervaluing our offer. The department also refused to offer more money until we get a response on the existing offer (section blacked out)...Because the Lubicon refused to move from their opening position on compensation (\$60 million), exploratory discussions have not yet commenced."

In fact, as detailed in the October 24, 2003 letter to Mr. Nault, the Lubicon position on compensation is not the Lubicon opening position on compensation at all but the result of Canadian government effectively bringing negotiation of financial compensation to a halt by asking for a Lubicon bottom line. Once the Lubicons tabled the requested bottom line, Canadian government tried to transform the Lubicon bottom line into a new Lubicon opening position, neatly avoiding discussion of the substantial basis for the original Lubicon position on financial compensation, and then proposing to negotiate the Lubicon bottom line as a straight negotiation of numbers without regard for the original basis for compensation. It was the requested Lubicon bottom line that the Lubicons refused to treat as an opening position for negotiation, not the Lubicon opening position. We are prepared to go back and publicly negotiate our opening position on compensation on it's merits -- which neither level of Canadian government was prepared to do since it was based on huge sums of money they'd either saved, received to stood to receive at Lubicon expense -- but we are not prepared to be jerked around by people who ask for a bottom line, mischaracterize that requested bottom line as our opening position, propose to treat our bottom line as though it were our opening position and then accuse us of being unreasonable when we refuse to negotiate the requested bottom line as though it's our opening position.

With regard to the vague statement that "The department fleshed out the value of the entire package arguing that (the Lubicons) have been extremely conservative in assessing future returns on their investments, thereby undervaluing our offer", Ms. Glynn is obviously seeking to reinforce the impression of a reasonable federal position which the unreasonable Lubicons inexplicably refused to consider. In fact Ms. Glynn is referring to anecdotal assertions put forward by provincial negotiator John McCarthy that the Lubicons could earn a higher rate of return on a proposed capital fund than the Lubicons are calculating and that the Lubicons therefore didn't need as large a capital investment fund. The Lubicons assessed Mr. McCarthy's assertions and were advised by qualified financial advisors that a higher rate of return was possible at greater risk but that Real Return Bonds issued by the Government of Canada are the only investment vehicle available in Canadian denominated dollars capable of meeting Lubicon objectives of ensuring a targeted annual investment income, ensuring safety of principal, having a long investment duration and preserving the purchasing power of the capital pool and annual interest payments. Neither Mr. McCarthy nor Professor Morse were able to substantively respond to Lubicon financial advice, and neither had any further suggestions on how the Lubicons could be assured of annual investment income in lieu of the vast resource wealth which the Lubicons are being asked to cede -- other than through a conservatively managed capital investment fund with inflation protection and a targeted rate of real return.

On June 4, 2004 Ms. Glynn wrote your Deputy Minister a Briefing Note which says, in part:

"...obtained a copy of the 1996 Department of Justice (DOJ) document entitled 'Guidelines for Self-Government Negotiators' (section blacked out) In actual fact, none of the federal team members were in possession of the document."

Well in actual fact, Mr. Minister, as detailed in the attached March 22, 2004 letter to then Minister Mitchell, on September 25, 2003 federal negotiators tabled “preambular” language drawn verbatim from the 1996 Justice Department Guidelines. In an obviously choreographed performance Professor Morse then went on to express concern about the tabling of these clauses by federal negotiators claiming that federal negotiator (and fellow lawyer) Troy Chalifoux had exceeded his authority tabling these clauses because the clauses had allegedly been drafted the night before in a motel in Peace River without consulting federal self-government authorities in Ottawa. In subsequent discussion of the clauses, Professor Morse falsely assured us that there was no real difference between the legal force and effect of clauses in the preamble and clauses in the body of an agreement.

Anybody who reads the 1996 Justice Department Guidelines knows immediately where the “preambular” clauses tabled by federal negotiators on September 25th came from, as well as where the idea to put the clauses in the preamble came from. Ms. Glynn’s statement that “none of the federal team members were in possession of the (Justice Department) document” is either an artful use of language to deliberately create a false impression or it is an outright lie. The Justice Department Guidelines read:

“In determining where to best place a given clause, negotiators should bear in mind the different legal effects of including wording in the preamble to an agreement as opposed to the body of the agreement itself. Preambles are given less weight than the substantive provisions of the agreement (where the ‘meat’ of the agreement is reflected) and are generally only referred to by the courts to assist in interpreting ambiguous substantive provisions in the body of the agreement”.

On September 14, 2004 Ms. Glynn sent you a Briefing Note which says:

“During an intense level of negotiations in late 2003, with the goal of reaching an agreement in principle by Christmas, the LLIN (Lubicon Lake Indian Nation) refused to compromise on money and self-government. It (the Lubicon Lake Indian Nation) insists that Canada and Alberta must seek new mandates, never once considering a review of its own, which has been in place since the 1980s”

In fact what Ms. Glynn is talking about is federal negotiators taking the position that they were unprepared to negotiate financial compensation unless the Lubicons agree to negotiate the requested bottom line as though it were the Lubicon opening position, and that they were unprepared to discuss self-government as part of a Lubicon settlement agreement and were only prepared to discuss agreement to talk about self-government post-settlement.

Professor Morse denied that this federal position was in effect another take-it-or-leave-it offer from the government of Canada. He said he was prepared to discuss the federal position but that he’d reached the extent of (his) mandate” and had “no mandate to go beyond what (he’d) already tabled”. (This position that the federal offer is not a take-it-or-leave-it offer but federal negotiators have no mandate to discuss anything other than what they’ve tabled has since been reiterated by Ms. Glynn.)

As for Ms. Glynn's childish allegation that the Lubicons "insist that Canada and Alberta...seek new mandates, never once considering a review of its own", the Lubicons have in fact been making significant compromises on items on the table from the very beginning. All we have been unwilling to compromise, and will never be prepared to compromise, is our objective of a settlement which gives our people half a chance of once again achieving self-sufficiency in our own land while others extract billions of dollars from our lands in natural resources.

The federal government's position, on the other hand -- clearly expressed in Professor Morse's contract and reflected in federal government positions at the negotiating table -- has remained limited by what's available to aboriginal people anyway under normal government programs and services. That was the basis of the "take-it-or-leave-it offer tabled by the Mulroney government in January of 1989 and it was the basis of the so-called "global offer" tabled by Professor Morse in April of 1999. (Lubicon advisor Fred Lennarson was once asked by a federal official what was wrong with a settlement of valuable Lubicon land rights based on what was available to aboriginal people anyway through normal government programs and services. Fred Lennarson asked the official to name one single aboriginal society in Canada that is self-sufficient based solely on normal government programs and services. The official said "You know I can't do that". Fred Lennarson told the official "That's what's wrong with a settlement of Lubicon land rights based solely on what's available through normal government programs and services".)

As detailed in the October 24, 2003 letter to Mr. Nault, normal government programs and services are also the basis of the federal government's position on self-government. To quote a revealing Briefing Note Ms. Glynn sent to you on December 8, 2004:

"The Lubicons are requesting recognition of their inherent right of self-government -- something which has been requested by many First Nations, but has never been granted to any, and would require a Cabinet-approved change to Canada's approach to self-government".

Recognition of our right to manage our own affairs on our own land will be part of any settlement of valuable Lubicon land rights -- whatever is available generally to aboriginal people in Canada under normal government programs and services, to quote Professor Morse, "for aboriginal groups who have aspirations for self-government". Financial compensation for the damages our people have suffered and the billions dollars in resources which have been illicitly extracted from our unceded traditional Territory will also be part of a settlement of Lubicon land rights. These are not new positions on our part and they are not unreasonable positions. They have been our position all along and have been supported by a wide range of independent observers including E. Davie Fulton and the Lubicon Settlement Commission of Review.

We ask again that the Martin government meet it's constitutional responsibility to the Lubicon people and not use current talks with the AFN as a dodge to try and avoid meeting that responsibility.

We ask again that the Martin government renounce the 1996 Justice Department Guidelines to federal self-government negotiators on how to negotiate self-government in bad faith.

We ask again that the Martin government appoint a negotiator with a mandate to negotiate outstanding Lubicon issues in good faith and to give that negotiator instructions to reach a settlement of Lubicon land rights by the end of the calendar year (as distinct from just using the pretense of negotiations to buy time while resource exploitation continues and vital Lubicon interests are systematically and deliberately eroded).

We ask again that the Lubicon people be loaned the money necessary to allow us to do the work necessary for us to participate effectively in negotiations.

And we ask that Lubicon land negotiations be open and public so that Canadians can follow the negotiations and judge the issues and positions of the parties for themselves.

Sincerely,

Bernard Ominayak
Chief, Lubicon Lake Indian Nation

CC: AFN National Chief Phil Fontaine
Canadian Prime Minister Paul Martin

Lubicon Lake Indian Nation

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November 14, 2001

The Honourable Robert Nault
Minister of Indian and Northern Affairs
Government of Canada
Ottawa, Ontario K1A 0H4
Fax: 613-953-4941

Dear Mr. Minister:

The Lubicon people again need your help for Lubicon land negotiations to go forward. Our problem is threefold.

First the amount of time federal negotiators are prepared to spend in negotiations is very limited and not really sufficient to successfully negotiate something as complicated as Lubicon land rights.

The federal negotiating team, for example, chartered to Peace River from Edmonton on October 9th, drove from Peace River to our community of Little Buffalo Lake arriving about 11:00 in the morning, met with us for a maximum of four hours and then departed by 4:30 in the afternoon in order to be able to charter back to Edmonton from Peace River that same day.

One of the things we agreed on October 9th was that there would be a meeting of our technical people to work on the wording of settlement provisions previously agreed at the negotiating table. The first dates that Federal technical people were available to meet were October 25th and 26th.

Technical people for both sides met in Edmonton on October 25th for a maximum of 4 hours to work on the wording of provisions supposedly agreed at the negotiating table on (or by) October 9th. The technical people did not meet on October 26th because federal technical representatives, on instructions of the Chief Federal Negotiator, proposed to renegotiate items previously agreed at the negotiating table which the technical people had neither the mandate nor the authority to renegotiate.

The next negotiating session took place on October 29th. Federal negotiators again chartered from Edmonton to Peace River that morning, drove from Peace River to Little Buffalo, met with us for a maximum of three hours, returned to Peace River and then chartered back to Edmonton that same day. At that negotiating session a report was given on the October 25th meeting of the Technical Committee indicating basically that the items referred to the Technical Committee for drafting were being referred back to the negotiating table for renegotiation. With the exception of achieving agreement on an earlier discussed trust agreement, and a unresolved discussion on how to handle increased cost of housing construction due to changed codes and standards, there was little discussion and little progress on other issues.

We thus spent a total of maybe 10 or 12 hours in negotiations during the month of October and ended the month basically returning to issues supposedly agreed in the beginning of the month.

Federal negotiators have explained their unavailability to negotiate for more than a day or two a month in a number of ways. The problem starts with the Chief Federal Negotiator, who teaches full time in an Ottawa law school, and for the last three years has only had a day or two free a month for negotiations with us.

Last school term the Chief Federal Negotiator could only meet on Tuesdays because he taught on Mondays and Thursdays. If he attended negotiations in our area on Wednesday, he explained, he couldn't make it back to Edmonton in time to catch the late afternoon flight, and he didn't want to have to take an overnight flight. Other problems limiting the availability of federal negotiators to meet, we've been told at various points, are other files, busy schedules, federal representatives not liking to take time away from their week-end by flying out from Ottawa on Sunday or returning on Saturday (making Monday and Friday travel days rather than negotiating days), a limited number of daily flights between Edmonton and Peace River (precluding late afternoon connecting flights back to Ottawa), a general disinclination on the part of federal representatives to take overnight flights and federal representatives simply preferring to dine and overnight in Edmonton because, they say, hotels and restaurants in Peace River aren't as good.

The Chief Federal Negotiator told us that he would be able to meet with us a couple of days a month, instead of only one day a month, if we agreed to hold negotiating sessions in Edmonton instead of our community of Little Buffalo Lake. He told us that would be possible for him because flight schedules would be better and he could catch a flight back to Ottawa late Wednesday afternoon instead of having to return to Edmonton from Peace River Tuesday night in order to be able to fly back to Ottawa on Wednesday, on a flight other than the overnight flight.

The Lubicon people have always been prepared to hold technical support work group sessions in Edmonton or even Ottawa, and have done so, but we prefer to hold negotiating sessions in Little Buffalo so that our people can attend and follow the negotiations -- something which we know from experience is critical to successful negotiations. Needless to say, holding negotiating sessions two days a month instead of only one day won't solve the problem of inadequate time committed to negotiations anyway. If we are to meet the kind of timetable for successful conclusion of negotiations that both you and I would like to see, federal representatives are simply going to have to be available to negotiate for more than a day or two a month.

Secondly, as I indicated above, negotiations are going around in circles instead of proceeding systematically to the conclusion we both seek because federal negotiators regularly try to re-open and renegotiate issues that have already been negotiated and agreed at the table.

During a negotiating session on April 25th, for example, there were two proposals on the table for selecting a third and independent member of a dispute resolution tribunal. The Lubicon proposal was that the third person would be selected by a neutral appointing body such as the Canadian Council of Churches. The Chief Federal Negotiator -- taking the position that it would not be possible to agree on a neutral appointing body -- proposed to select a mutually acceptable list of five pre-agreed alternate individuals upon which it would be possible to draw in sequence depending upon availability; i.e., if the first person on the list was unavailable we would go to the name of the second person on the list and so on.

After considerable discussion during which Lubicon representatives questioned, based on experience, whether it would be easier to select 5 mutually agreed alternate individuals than one neutral appointing body, it was agreed that a list of five pre-agreed alternate individuals might not include a person with credentials appropriate to deal with a particular issue in dispute, and it was therefore decided to try and agree on a self-replacing panel of five individuals charged with providing the third independent tribunal member either out of their own ranks or from someplace else -- in effect constituting our own neutral appointing body. If it proved impossible to agree on a panel of five mutually acceptable individuals, it was further decided to try and agree on an existing neutral appointing body such as the Canadian Council of Churches.

On October 9th the Technical Committee was asked, among other things, to finalize the language of a dispute resolution draft incorporating previously agreed elements, including how the third independent member of a dispute resolution tribunal is to be provided. Lubicon representatives also expected to start talking about mutually acceptable candidates for the 5 person panel.

On October 25th, however, federal representatives on the Technical Committee advised Lubicon representatives that the Chief Federal Negotiator wanted to include his original proposal of a pre-agreed list of five mutually acceptable alternate individuals "as an option in the margins". Needless to say adding "an option in the margins" which had been discussed and rejected at the negotiating table over six months earlier means that we no longer have agreement on how to proceed with selection of a third independent Tribunal member. (Federal representatives also advised Lubicon representatives on the Technical Committee that the Chief Federal Negotiator wanted to make substantive changes in a number of other areas.)

Together with the very limited amount of time federal representatives are prepared to commit to negotiations, this problem of regularly trying to renegotiate the same issues goes a long way toward explaining why we've not accomplished more than we have at the negotiating table. Basically we make just enough progress at the negotiating table to barely keep us at the table. If we made less progress, frankly there'd be little reason to continue.

All of which brings me to the third and most serious problem I want to call to your attention; namely, the on-going efforts of the Alberta government and your Alberta Regional Office officials to undermine and subvert the land rights at issue at the negotiating table.

The reason we only talked for a maximum of four hours on October 29th, instead of the customary five or six hours, is because Lubicon representatives had to attend an emergency meeting that morning requested by a forestry company named Daishowa. Daishowa wanted to discuss clear-cut logging of lands under negotiation and threats by the Alberta government to take Daishowa's timber rights away if Daishowa didn't break an agreement with the Lubicons not to cut or buy timber from lands under negotiation.

While government efforts to undermine and subvert Lubicon land rights have been on-going for many years and have many aspects, this current effort is one of the most serious we've faced. If it's allowed to proceed, others can be expected to follow. The Lubicon people will have to respond or there will be nothing left to talk about at the negotiating table, especially given the glacial pace of negotiations. Moreover it's hard to imagine how it will be possible to proceed with negotiations if the Lubicon people are forced to defend ourselves and our interests on the ground.

We first became aware of this particular government sponsored and financed effort to undermine and subvert Lubicon land rights in the fall of 1999 when a new logging company called KTC Logging Ltd. proposed to clear-cut in the northwestern part of the traditional Lubicon Territory. KTC Logging Ltd. had received money from the Alberta Regional Office to set up the logging company that was proposing to clear-cut lands at issue in negotiations.

As you may know KTC is short for Kee Tas Kee Now Tribal Council. The Kee Tas Kee Now Tribal Council is made up of three bands located in the area surrounding ours -- the newly created (1989) Woodland Cree Band, the newly recognized Loon River Band (1991) and the Whitefish Lake Band.

The three bands making up the KTC have a well-documented and continuing history of being used by both levels of Canadian government to try and subvert Lubicon land rights. In fact one of the lawyers hired by the Mulroney government to create the Woodland Cree Band and to orchestrate recognition of the Loon River Band has said openly that the federal government's entire purpose in creating the Woodland Band and recognizing the Loon River Band was to destroy the Lubicon society. (For your information I enclose a copy of an article on creation of the Woodland Cree Band which appeared in the December, 1991 edition of Saturday Night magazine. You'll note that several of the officials named in the article are still employed by the Regional Office.)

The Chief Federal Negotiator, to his credit, recognized that government financed clear-cut logging on Indian lands under negotiation jeopardized negotiations and he moved to try and defuse the problem. He was reportedly instrumental in arranging for a delegation of senior Regional Office officials -- the same people in fact who had created this situation in the first place by financing establishment of KTC Logging Ltd. -- to meet with the KTC and obtain agreement that the Tribal Council would confine their logging activities to an area outside of our traditional territory "at least for now". He also reportedly blocked a second proposal to provide Departmental funds to the KTC to purchase a sawmill with provincially granted timber "rights" in our area named the Brewster sawmill. And he arranged to have proposals to fund projects that might adversely impact negotiations called to his attention prior to consideration for Departmental funding.

Early in 2000 we learned that the proposal for the KTC to buy the Brewster Sawmill was not really deferred but rather evolving, apparently with Regional Office encouragement and advice. We were told that the government was pressing for the KTC to involve an experienced sawmill operator in the KTC sawmill proposal and that KTC had approached a company called West Fraser Timber about forming a partnership and buying the Brewster mill.

West Fraser had recently purchased another company called Alberta Plywood. Brewster and Alberta Plywood both had agreements with the Lubicon people not to cut wood in Lubicon Territory pending settlement of Lubicon land rights.

Asked if West Fraser will continue to honour the agreements of Brewster and Alberta Plywood not to cut wood in Lubicon Territory pending settlement of Lubicon land rights, Russ Clinton of West Fraser made clear that the role of Kee Tas Kee Now is to run interference for everybody else. Mr. Clinton told us "Our role is strictly operational -- it's Kee Tas Kee Now's responsibility to resolve things with other aboriginal groups".

In July we gained further insight into the role Kee Tas Kee Now is being set up to play in this effort to undermine and subvert Lubicon land rights. Despite the fact that the Woodland Cree Band was created by the government out of individuals from a half-a-dozen aboriginal societies in 1989 and therefore has no traditional territory in the conventional sense, and despite the fact that all three of the Kee Tas Kee Now bands have in recent years signed settlement agreements ceding any claim to land rights outside of their respective reserve areas, the three Kee Tas Kee Now bands have been circulating maps purporting to show what they call their "joint traditional land base". The "joint traditional land base" claimed by the three KTC bands is considerably bigger than their designated reserve areas and has in fact grown in size with each rendering of these maps until it now overlaps practically the entire Lubicon Traditional Territory.

One aspect of these "traditional land use" maps is production of new traditional trapline maps. These traditional trapline maps are intended to support the "traditional land base" maps by showing supposed Woodland, Loon and Whitefish traplines again covering practically the entire traditional Lubicon Territory.

We learned about the so-called "traditional trapline maps" maps from Whitefish Elders who told us that they were being told to claim traditional territory which they know is traditional Lubicon Territory. They said they were told that it's no longer possible to survive by hunting and trapping. They said they were told that the Lubicons are blocking Indian economic development by opposing clear-cut logging. They said they were told that they have to lie for their people to have a future. They said they were told that their people will miss out on forestry jobs like they missed out on jobs in the oil industry if they don't lie. And they were told to "get on board" -- that lying like this is the way the modern white mans' world works.

We learned that the Regional Office had given the KTC \$100,000 in August of last year to "undertake efforts to form tripartite working arrangements (with forestry companies and the Alberta government)". We learned that the Regional Office gave the KTC another \$20,000 shortly thereafter "to develop business plans to negotiate the purchase of the Brewster Sawmill".

We learned that the KTC "has begun a partnership process to participate in natural resource development in the north central area of Alberta with Alberta and private industry". (Traditional Lubicon Territory is right in the middle of north central Alberta.)

We learned that the "benefits of this (Departmentally sponsored and funded) project moving forward include joint ownership of a sawmill". We learned that the Department expected to give the KTC another \$150,000 in 2001. And we learned, "In the opinion of the Alberta Region, the level of risk which the Crown will have to face is low, and the risk is worth the investment".

In September of last year RDG Barrie Robb told us that a proposal to provide money to purchase the "Brewster woodlot into the teardrop" was being considered by the Regional Office. (We learned from other sources that the decision to finance KTC purchase of the Brewster sawmill had at that point already been effectively made.)

Mr. Robb told us that he didn't think KTC purchase of the Brewster sawmill should be a problem for Lubicon land negotiations because he understood "the new company (Seehta Forest Products) won't be cutting in the teardrop for three years". ("The teardrop" refers to the traditional Lubicon Territory, which is roughly in the shape of a teardrop.) Asked if it would be possible to make Departmental financing conditional on Tribal Council agreement not to clear-cut in Lubicon Territory pending settlement of Lubicon land rights, Mr. Robb responded "I think (Lubicon) negotiations will be done in one and a half to two years" and "that would leave enough room to conclude negotiations".

Asked if it didn't make more sense to simply take the position that the Tribal Council would have to stay out of the Lubicon Territory until settlement is achieved, Mr. Robb replied "They (the KTC) might want to argue that they don't want their business held up until Lubicon land rights are settled". He said "We can't stop a group of First Nations trying to better their lives and we should support them".

Told that the Department should not be using one group of First Nations people to subvert the land rights of another group of First Nations people, Mr. Robb proposed to "buy dinner" for KTC Grand Chief Paddy Noskiye and me "to discuss the details of the KTC proposal". Mr. Robb said, altogether unconvincingly but clearly indicating that he knows exactly the potential implications of the Department financing the KTC to clear-cut in Lubicon Territory prior to settlement of Lubicon land rights, "We don't want to see a war between the Lubicons and the KTC".

Told that the Chief Federal Negotiator had avoided this same problem the year before by having the proposal to buy the Brewster sawmill deferred pending settlement of Lubicon land rights, Mr. Robb said "This is something I'll have to talk to Brad about" -- which Mr. Robb apparently then did because shortly thereafter Mr. Morse told me that "Barrie Robb is still interested in sitting down (with Chief Noskiye and me to discuss the Brewster proposal). (Mr. Robb cancelled one dinner meeting he proposed with Chief Noskiye and never got back to me as promised about scheduling another one.)

Seehta purchased the Brewster sawmill a couple of months later, reportedly with bank loans leveraged with money from the Regional Office.

We understand that the Regional Office subsequently financed the purchase of logging equipment for Seehta Forest Products. We understand further that the Chief Federal Negotiator was advised in advance that the money was going to be provided. And we understand that the money was provided with the proviso that the equipment would not be used to log in Lubicon Territory.

On October 26th it was reported that Seehta Forest Products had begun clear-cut logging in Lubicon Territory on lands at issue in the negotiations. Equipment involved included two feller-bunchers, one de-limber, one Cat and one skidder.

We also received a phone call from Wayne Thorp, General Manager of Woodlands operations for the Daishowa pulp mill in Peace River. Daishowa has an agreement with the Lubicons not to cut or buy wood from the Lubicon Territory pending settlement of Lubicon land rights. We are currently working with Daishowa on mutually acceptable alternatives to clear-cut logging which will allow for the harvesting of forest resources in our area post settlement. Mr. Thorp told us that he's being pressured by the Alberta government to buy the "incidental aspen" being cut down by Seehta Forest Products

On October 29th Mr. Thorp told us that he'd received a phone call from a man named Al Benson with the Alberta Forest Service. Mr. Thorp said Mr. Benson told him "Either take the wood or the rights will be reallocated".

Mr. Thorp said Daishowa wants to respect the agreement with the Lubicons not to cut or buy wood from the Lubicon Territory pending settlement of Lubicon land rights but "There's nothing we can do now that the wood is coming down". He said "We have to take it or get somebody else to buy it -- Tolko or somebody else". (Tolko also has an agreement with the Lubicons which is clearly in jeopardy as a result of Seehta's actions.)

Mr. Thorp told us that "Buchanan Lumber is scheduled to start logging in the area in mid-November". He said "You'll have the same problem with them." (Buchanan tried to log in the Lubicon Territory some 12 years ago but pulled out and hasn't returned after a logging camp Buchanan set up in the area was torched. Following Seehta's lead, and undoubtedly with assurances from the Alberta government that there's no longer a problem logging in the Lubicon area, Buchanan has apparently now unwisely decided to try again.)

Asked how much time he has to respond to the provincial edict to either buy the aspen or face losing the aspen rights, Mr. Thorp said he should advise Seehta of Daishowa's position that very day -- that the aspen is being cut and stacked and something has to be done with it.

We told Mr. Thorp that that the Lubicon people have no choice but to hold Daishowa to the agreement to stay out of Lubicon Territory pending settlement of Lubicon land rights.

The Lubicon people respectfully ask that you, as Federal Indian Affairs Minister with constitutional responsibility for ensuring that Indian lands and rights are respected, head off the looming confrontation on the ground and get Lubicon land negotiations on track by taking the following steps:

1. instruct your Regional Office officials to use the provisions of their financing arrangements with the KTC to get Seehta to immediately stop logging in the Lubicon Territory and to confine their logging activities to areas outside of the traditional Lubicon Territory;

2. instruct your Regional Office officials to stop working surreptitiously with their colleagues in the Alberta government to undermine and subvert Lubicon land rights;
3. ensure that your negotiators come to the table with a mandate which will enable them to settle Lubicon land rights and prepared to sit at the table and negotiate;
4. advise the government of Alberta that their transparent efforts to orchestrate clear-cut logging in our area as a way of asserting provincial jurisdiction and undermining Lubicon land rights are jeopardizing negotiations and creating economic instability with potentially adverse consequences for everybody with interests in the area -- including the Alberta government;
5. seek provincial government cooperation with federal government efforts to settle Lubicon land rights, including holding bilateral negotiations with both Alberta and the Lubicons until such time as bilateral issues are resolved and efforts by Alberta to subvert Lubicon land rights have stopped.

Respectfully,

Bernard Ominayak
Chief
Lubicon Lake Indian Nation

Lubicon Lake Indian Nation

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October 24, 2003

The Honourable Robert Nault
Minister of Indian and Northern Affairs
Government of Canada
Ottawa, Ontario K1A 0H4
Fax: 613-953-4941

Dear Mr. Minister:

I am writing to express concern about meeting the commitment you and I made on June 13 of this year to reach agreement on settlement of Lubicon land rights by this coming Christmas. I am writing because negotiations have not been proceeding satisfactorily and because it seemed pretty clear in the past that Professor Morse did not accurately report to you the nature of the difficulties we were facing at the negotiating table. I am providing detail on the discussions so you can appreciate the nature of the problems we are facing rather than have to deal simply with different competing interpretations of what's going on.

One major problem we've been facing is Professor Morse's effective refusal to deal substantively with Lubicon self-government proposals despite having repeatedly agreed to do so. Moreover, in his efforts to avoid dealing substantively with Lubicon self-government proposals, Professor Morse has created pre-conditions to discussing self-government which could not be met anytime in the foreseeable future -- if ever. Obviously we cannot reach agreement by Christmas if Professor Morse refuses to discuss Lubicon proposals regarding a key settlement issue.

In 1984 Federal Inquiry Officer E. Davie Fulton asked the Lubicon people to describe the nature of Lubicon self-government in writing. We did so. The resulting document describing the government of the Lubicon people has been before the federal government ever since.

As a lawyer, judge and ex-federal Justice Minister Mr. Fulton expressed concerns about Lubicon proposals with regard to the application of the Canadian criminal code and with regard to the application of Lubicon laws outside of Lubicon reserve lands. We were productively discussing these complicated issues with Mr. Fulton when his mandate was prematurely terminated by the Mulroney government in 1985.

These same Lubicon self-government proposals were on the table for discussion during negotiations with federal representatives in December of 1988. Federal representatives indicated that Lubicon self-government proposals were generally acceptable but that federal self-government experts had some questions which they wanted to discuss with us. We never discussed those questions, however, because in January of 1989 the Mulroney government ended negotiations with a "take-it-or-leave-it offer" which, among other deficiencies, made no provision for recognition of the Lubicon right to be self-governing.

In 1998, prior to commencement of the current round of Lubicon settlement negotiations, these same Lubicon self-government proposals were presented to Professor Morse as an integral part of Lubicon settlement proposals. While they did not come up for substantive discussion in the current round of negotiations until July 25, 2003 -- about six weeks after our June 13 meeting -- they are not new. They have been in the hands of the federal government for nearly 20 years and before Professor Morse for over 5 years.

On July 25th Professor Morse told us "Constitutionally we (Canada) think we have to have the province involved (to negotiate Lubicon self-government proposals)". He said "We can't proceed (to negotiate Lubicon self-government proposals) bilaterally".

That may be Professor Morse's position but it is not ours. Noting exclusive federal government jurisdiction for Indians and Indian lands, and noting also bilateral self-government negotiations with other First Nations, Lubicon representatives told Professor Morse that the Lubicon people consider negotiation of self-government to be a bilateral matter for discussion between the federal government and the Lubicon people -- recognizing of course that there are some specific issues pertaining to the exercise of Lubicon self-government powers which may have to be discussed with the province.

Instead of negotiating recognition of Lubicon self-government powers and how those powers are to be exercised, as per the Lubicon proposal, Professor Morse proposed instead that we discuss "agreement to negotiate a framework agreement consisting of three stages".

The first stage of self-government negotiations, Professor Morse said, would be "a framework agreement" which, he said, would be "easy" to do, "non-binding" and describe "what we're going to talk about". (This framework agreement is what Professor Morse proposed that we negotiate as part of a Lubicon settlement agreement. Basically he proposed that we agree to talk about negotiating delegated self-government powers post-settlement -- as distinct from the Lubicon proposal to negotiate exercise of recognized Lubicon self-government powers post-settlement.)

The second stage of self-government negotiations, Professor Morse said, "would be an AIP (agreement-in-principle) which, he said, would take years, be non-binding and "try to set out the powers to be achieved".

The third stage of self-government negotiations, Professor Morse said, would be "a final self-government agreement including fiscal arrangements and an implementation plan".

Lubicon representatives responded to Professor Morse's proposal by repeating that the Lubicons want to bilaterally negotiate recognition of Lubicon self-government powers as part of the Lubicon settlement agreement, realizing that negotiation of how those powers are to be exercised will take time and have to be negotiated post-settlement, and realizing also that the province may have to be involved in discussion of how some of those self-government powers are to be exercised.

Professor Morse agreed that federal representatives would review Lubicon self-government proposals and get back to the Lubicons with a proposed date to discuss those proposals. He subsequently agreed to discuss Lubicon self-government powers bilaterally on August 21st following two days of scheduled trilateral negotiations on other matters. (If one takes Professor Morse's comments at face value, federal officials had not reviewed Lubicon self-government proposals as of July 25th despite being in possession of them for at least five years, and despite the fact that we had specifically agreed months earlier that self-government would be one of the next major issues to be dealt with at the negotiating table.)

On August 19th, during trilateral negotiations on other matters, Professor Morse said that he wanted to make some remarks on Lubicon self-government proposals with provincial representatives present. He said that federal representatives had reviewed Lubicon self-government proposals and "are committed to a trilateral process".

"While from Canada's perspective we are prepared to talk (about Lubicon self-government proposals) either bilaterally or trilaterally," Professor Morse said, "my instructions are clear -- in order to do something substantive we will have to involve Alberta".

Professor Morse said Lubicon self-government proposals are "not along the lines of trying to set things out in a framework agreement". He acknowledged that Lubicon proposals include provision for post-settlement negotiation of how Lubicon self-government powers are to be exercised but, he said, "this (Lubicon) approach is fundamentally different than what we're suggesting".

Professor Morse said again that the federal government is prepared to discuss Lubicon self-government proposals but warned that "experience is that detailed discussions are far reaching, have to be approached with care and will result in something far more detailed than the Lubicons are proposing". "Therefore", he said, "there are some concerns over this and what we can do by Christmas". (Refusing to discuss Lubicon self-government proposals on the table since at least July 25th is by now of course coming close to transforming Professor Morse's "concerns over...what we can do by Christmas" into a self-fulfilling prophecy that it's not possible to negotiate Lubicon self-government proposals by Christmas.)

Repeating that while federal representatives are prepared to talk bilaterally about Lubicon self-government proposals, Professor Morse said "There are some practical considerations" that have to be taken into account. He said "We (the federal government) will need to involve new people". He said "There will have to be a change in (federal) legal counsel". He said "Comprehensive self-government is handled out of Headquarters, not the Regional Office".

Provincial negotiator John McCarthy responded to Professor Morse's remarks by saying that the province, like the Lubicons, "considers self-government to be a bilateral matter". Mr. McCarthy said "the province has been involved in discussions with First Nations on some things like policing and child welfare" but that he has "no instructions on self-government".

For the province to become involved in self-government negotiations, Mr. McCarthy said, would require a provincial political decision to do so, development of provincial self-government policies and positions, creation of a support bureaucracy and other things which could not be done quickly even if the province decided that it wanted to become involved in self-government negotiations (This provincial government situation thus effectively precludes trilateral negotiations in the foreseeable future even if the province and the Lubicons agreed to negotiate Lubicon self-government on a trilateral basis.)

Lubicon representatives therefore suggested that federal and Lubicon representatives proceed to discuss Lubicon self-government proposals bilaterally on the 21st, as earlier agreed, noting that the province can be involved later in areas where there may be a need to develop mutually acceptable working relationships between the Lubicons and the province in specific areas such as child welfare and perhaps policing.

Professor Morse again agreed to proceed with bilateral self-government negotiations with the possible involvement of Alberta later in areas where the Lubicons are prepared to deal with Alberta and Alberta is prepared to become involved.

On August 21st Professor Morse made another lengthy presentation in which he said "The federal government has recognized the inherent right of self-government since 1995 and is willing to enter into negotiations with the (Lubicon) First Nation and the province to work out how to live together". He listed a number of places where self-government negotiations have been concluded or are proceeding. "What we have not had in Alberta", he conceded, "is comprehensive self-government negotiations involving Alberta".

Professor Morse said "We have had (bilateral) talks with the Treaty 8 First Nations". He initially claimed that "Alberta has been invited to join in" those negotiations but later acknowledged that this was not correct -- that bilateral "talks have been going on for several years putting together a (a supposedly "easy") framework agreement with Treaty 8 First Nations and", he said, "the plan is now to go to Alberta and see if Alberta will join in".

Professor Morse then went on to talk again at length about his thoughts on self-government without specifically addressing Lubicon self-government proposals. He advised us that education involves a number of things including teacher certification, curriculum development, portability, primary education, secondary education and post secondary education. He said there would have to be a chapter on health, and how to handle a possible public health crisis like SARS, and how to handle certification of doctors. He said there would have to a chapter on welfare and how social assistance is handled.

Professor Morse said "The first part of self-government negotiations is jurisdiction". He said "The second part is a financial transfer agreement and money to make the jurisdiction real". He said "Self-government jurisdiction gives power but not money". He said "The financial transfer agreement provides funds".

Lubicon representatives told Professor Morse than the Lubicon people are well aware of the complexities of negotiating the exercise of Lubicon self-government powers with the government of Canada. They advised Professor Morse that what the Lubicon people are seeking at the moment, and in the context of a commitment by the Chief and the Minister to negotiate a settlement agreement by Christmas, is simply recognition of the self-government powers which the Lubicon people will retain post-settlement, and provision for a post-settlement process to negotiate exercise those powers.

Professor Morse said "most of the powers listed in Lubicon proposals are fine". He said "A few are problems".

Professor Morse said "We agree that the Lubicons should have jurisdiction on education". "But", he said, "that gives rise to all kinds of things". He asked "Do you really want to certify your own teachers?"

"In the thrust of it", Professor Morse said, "we agree". "The question", he said, "is how to make it work".

Professor Morse said "We think the Lubicons should have control over education for your kids in your community". However, he said, "Agreements are subject to interpretation by the courts". "If we say the Lubicons have jurisdiction", he asked, "what does that mean?"

Lubicon representatives told Professor Morse that endless academic ruminations about the complexities of self-government will never result in agreement on self-government powers. They reiterated that the Lubicon people want to discuss specified Lubicon self-government powers for inclusion in the settlement agreement and provision for post-settlement negotiation of the exercise of those powers.

Lubicon representatives indicated that the Lubicon people appreciate that these post-settlement negotiations will be complicated and may well involve a number of sub-agreements in areas such as health, education and welfare as well as a basic self-government agreement. They told Professor Morse that the idea of such negotiations shouldn't be unsettling to Canadians since such negotiations are in fact going on all the time between different non-aboriginal governments in Canada within the context of generally agreed areas of jurisdiction.

Professor Morse said he would need different people involved to have the kind of discussions the Lubicons were proposing. He suggested another bilateral session this time in Ottawa because he said he would need to involve Ottawa-based self-government experts and because, he said, an Ottawa-based Justice Department lawyer on the federal negotiating team named Perry Robinson had personal problems preventing travel. (Professor Morse did not say why he had not involved the people he needed to negotiate the self-government issue in the August 21st session scheduled specifically to discuss long-standing Lubicon self-government proposals.)

Lubicon representatives agreed to recast Lubicon self-government proposals in language appropriate for inclusion in the settlement agreement -- as distinct from the description of Lubicon self-government prepared for Mr. Fulton in 1984 and presented to Professor Morse in 1998. It was further agreed that these recast Lubicon proposals would be discussed bilaterally with federal officials in Ottawa on September 17th and 18th.

In an effort to try and facilitate self-government negotiations, Lubicon self-government proposals were recast in the language of existing legislation and self-government agreements between Canada and other First Nations. These

recast Lubicon self-government proposals were forwarded to federal officials on September 10th -- the week before the bilateral meeting in Ottawa scheduled to discuss them.

On September 17th Professor Morse told us "For our side we're quite pleased with the new (Lubicon) draft". He said "We didn't expect a whole new draft -- just a list of the powers the Lubicons want included".

Professor Morse said "We got it (the Lubicon draft) last week". He said "We discussed it internally this week".

Professor Morse said "We have shared it with people in the self-government branch". He said "We have also shared it with the Assistant Negotiator for Treaty 8 on Treaty 8 negotiations".

Professor Morse said "They just got it". He said "We have no feedback from them".

Professor Morse said "We shared the earlier (Lubicon self-government draft) with self-government people in July". He said "We have preliminary feedback on the earlier draft". He repeated "We have no feedback on the current draft".

Professor Morse said "We have reconfirmed that from the federal perspective this is a Headquarters matter". He said "The Regional Office will play less of a role".

Professor Morse said "It also switches from the claims branch to the self-government branch at both the Department (of Indian Affairs) and Justice". He said "We need to have new people to be assigned to have their involvement". He said "Those individuals have not yet been assigned".

Professor Morse said "Canada is committed to negotiate self-government with First Nations". He said "The process established to negotiate self-government has four steps".

Professor Morse said "The first step is discussions with aboriginal groups who have aspirations for self-government". He said "We discuss the parameters of self-government negotiations-to-happen ending with a framework agreement".

Professor Morse said "There are then substantive negotiations leading to an agreement-in-principle -- hopefully a fairly detailed agreement".

Professor Morse said "Then we negotiate a final self-government agreement". "Then", he said, "we negotiate implementation legislation".

Professor Morse said "As you move down this road there is a demonstration of a greater level of support". He said "You don't take a framework agreement to Cabinet". He said "It goes through an interdepartmental review".

Professor Morse said "The AIP goes to Cabinet". He said "The Final Settlement Agreement goes to Cabinet". He said "You have to go to Parliament for any required legislation".

Professor Morse said "The Parties get involved in negotiating the financial role as part of the AIP". He said "It deals with the transitional phase -- fiscal arrangements".

Professor Morse said "We're prepared to have the Final Settlement Agreement receive legislative recognition and constitutional protection". He said "The financial side we don't see as legislatively protected or constitutionally protected". He said "That's government to government".

"On the implementation side", Professor Morse said, "terms have to be negotiated". He said "A bill is not going forward unless the bill is endorsed by the First Nation".

"From the federal side", Professor Morse said, "ratification will follow the same process as settlement".

"That in a nutshell", Professor Morse said, "is the federal process". He said "We can review it in this (technical committee) session or in a formal (main table negotiating) session". "If you want to discuss it with self-government representatives", he told Lubicon representatives, "we can bring somebody from self-government to present their dog and pony show".

Professor Morse said "Self-government agreements affect all three levels of government". "Therefore", he repeated, "all three governments (Lubicon, federal and provincial) have to be full participants in the whole thing and sign on".

Professor Morse said "It's not clear what the provincial role consists of since they've only done child welfare". He said "It's all brand new for them".

Professor Morse said "They (the province) have to start at square one". He said "They have to develop policy". He said "They have to appoint negotiators". He said "They have to give them a mandate".

"If they (the provincial government) embrace the federal approach", Professor Morse said, "we would expect that they would take an agreement to Cabinet". He said "They (provincial Cabinet) will have to review it". He said "They will need an administrative or bureaucratic process to prepare the agreement for Cabinet consideration".

"Now", Professor Morse said, "another aspect is the Treaty 8 Framework Agreement". He said "I understand that the Lubicon position is that they are not part of Treaty 8 -- not part of the Treaty 8 (self-government) negotiations".

Professor Morse said "Cabinet has given a mandate for the federal government to negotiate and for me to negotiate". "But", he said, "Cabinet is not keen on negotiations with one First Nation". He said "They want to deal with groups (of First Nations)".

Professor Morse said "This is partly due to the large number (of First Nations) to deal with -- 640 First Nations". He said "It is partly for powers to be exercised you need a large enough population base".

Professor Morse said "The federal preference is for First Nations to come together into regional structures to more effectively carry things out". "For example", he said "schools are more easily carried out on a larger basis".

Professor Morse said "While the federal government's preference is to deal with aggregates of First Nations, the federal government is prepared to deal with the Lubicons, although", he said, "given that there is a Treaty 8 Framework Agreement, there is going to have to be a related agreement on Canada's part that there is not a complete disconnect between the Lubicons and other First Nations in Treaty 8".

Lubicon representatives pointed out to Professor Morse that the Lubicon people are not an "aboriginal group" aspiring to be self-governing. Lubicon representatives told Professor Morse that the Lubicon people are already self-governing and are negotiating a settlement of Lubicon land rights which includes recognition of the Lubicon right to be self-governing and sets out a process for post-settlement negotiation of how Lubicon self-government powers are to be exercised.

Lubicon representatives told Professor Morse that he did not need to impress them with the complexity of self-government issues. They told Professor Morse that they are well aware of the complexities. In the Lubicon proposal, they told Professor Morse, these complexities will have to be sorted out over time post-settlement.

Lubicon representatives told Professor Morse that the process which he has just again reviewed has been presented before and rejected as inappropriate for negotiating recognition of the Lubicon right to be self-governing in the context of negotiation of Lubicon land rights. Lubicon representatives told Professor Morse that they did not come all the way across the country to hear yet another presentation on the federal government's approach for dealing with "aboriginal groups who aspire to be self-governing". Neither did they come to Ottawa, they told him, to hear a "dog and pony show" from the federal government's self-government "experts" on that approach.

Lubicon representatives told Professor Morse that they came to Ottawa to discuss Lubicon self-government proposals because he said that he would need to involve Ottawa-based self-government experts to discuss Lubicon self-government proposals and because Ottawa-based Justice Department lawyer Perry Robinson couldn't travel due to personal problems.

Lubicon representatives pointed out that none of the Ottawa-based self-government experts were in attendance at the September 17th Ottawa meeting. If Professor Morse has no intention of negotiating Lubicon self-government as a part of negotiation of Lubicon land rights, they asked, why were they asked to travel across the country to negotiate Lubicon self-government with federal self-government experts.

Lubicon representatives told Professor Morse that his conduct smacks of bad faith and that his continuing refusal to discuss Lubicon self-government proposals jeopardizes the June 13th commitment made by the Chief and the Minister to reach a settlement of Lubicon land rights by Christmas.

Lubicon representatives noted that Professor Morse suggested that his self-government experts were not in a position to respond to Lubicon self-government proposals because, he said, they'd only just received Lubicon self-government proposals. Why is that the case, Lubicon representatives asked, when Lubicon self-government proposals have been in the hands of federal officials for nearly 20 years, in his hands for over 5 years, and when the latest abbreviated 10-page draft of Lubicon self-government proposals was forwarded to federal officials as agreed in the middle of the previous week specifically for discussion in the scheduled meeting on the 17th.

Lubicon representatives told Professor Morse that there is absolutely no good reason why there cannot be productive bilateral negotiation of Lubicon self-government proposals followed by possible discussion with the province about specific things where Lubicon exercise of self-government powers may need to be coordinated with exercise of governmental power by the province. They pointed out that bilateral negotiations are currently going on with a number of other First Nations.

Similarly, Lubicon representatives said, there is no good reason why other Treaty 8 First Nations need to be involved in Lubicon management of Lubicon affairs on Lubicon lands -- including operation of an on-reserve Lubicon school for Lubicon students.

Lubicon representatives then advised Professor Morse that they had come to Ottawa to discuss Lubicon self-government proposals. If he was not prepared to discuss Lubicon self-government proposals, they told them, their instructions were to return to Alberta.

Talks on September 17th thus ended pending word from Professor Morse on whether or not he was prepared to discuss Lubicon self-government proposals. Later that afternoon Lubicon representatives were contacted and assured that federal representatives would be prepared to discuss Lubicon proposals the following day.

The following day Professor Morse said that Perry Robinson would "present "preliminary views (on Lubicon self-government proposals) from the Department of Justice".

Perry Robinson cautioned that "The people at Justice have not had much of a chance to look at Lubicon self-government proposals". However, he said, he and another Justice Department lawyer on the federal negotiating team named

Joanne Bury met the previous afternoon with a senior Justice Department lawyer in the self-government section at Justice named Allen Cracower.

Perry Robinson said that Mr. Cracower had just received a copy of Lubicon self-government proposals the previous Thursday. Perry Robinson said that Mr. Cracower made his preliminary comments yesterday afternoon after discussions with Lubicon representatives broke down.

Perry Robinson told Lubicon representatives that there "are a couple of things we're not going to be doing today". One thing that he was not going to be doing today, he said, is comment on "the meat of Lubicon proposals".

Perry Robinson offered that one comment made by Mr. Cracower is that Lubicon proposals "are the kinds of categories (of governmental powers) contemplated by the federal government's self-government policy".

Perry Robinson said "For some issues the province may have to be involved -- for example, post secondary education".

Perry Robinson said "We will need comments back from the Department (of Indian Affairs) since it's their (self-government) policy" He said "We don't have those comments back from them".

Perry Robinson said "Also some of the items will require feedback from the province".

"As far as the administration of Justice", Perry Robinson said, "Justice will have to comment".

On what he would be doing, Perry Robinson said, he would be making some comments "on the structure of the (Lubicon self-government) document". He said he would also "identify some red flags" which he defined as "things Justice won't consider".

Lubicon representatives asked Perry Robinson when the government of Canada will be prepared to actually sit down and negotiate Lubicon self-government proposals. They pointed out that Lubicon self-government had been on the table for negotiation since at least July 25th and to date there had not been any substantive discussion of Lubicon self-government proposals.

Perry Robinson said that he was prepared to provide "a serious substantive reaction on what Justice will and will not be prepared to consider".

Lubicon representatives told Perry Robinson that they were not there just to hear what Justice is and is not prepared to consider. They said they were there to negotiate Lubicon self-government proposals as part of a negotiated settlement of Lubicon land rights -- the end result of which, if successful, would be to legitimize Canadian government claims to traditional Lubicon Territory.

Carrying on Perry Robinson said Lubicon self-government proposals "would benefit from a preamble which sets out what (the Lubicons) are attempting to do -- what parts would have constitutional status, which parts wouldn't; how the agreement is to be implemented -- by legislation or other". He said "The preamble should also set out the background, the nature of the agreement and its status". Perry Robinson "This is just a suggestion". He said "Details could be worked out later".

Perry Robinson said "There will also need to be a list of defined terms". He said "These (a preamble and list of defined terms) are two major structural issues".

Perry Robinson then went on to offer comments on specific Lubicon self-government proposals including "we don't know what this means in this context", "this is not open for negotiation" and "this has to be consistent with the Minister making a recommendation to Cabinet and Cabinet making its own decisions". (The first problem with Perry Robinson's comments, of course, is that by definition they were not open for negotiation.)

Without providing a point-by-point report on the "red flags" presented by Perry Robinson, one exchange serves to illustrate their vacuity.

As indicated earlier, proposed Lubicon self-government powers were recast in the language of existing legislation and self-government agreements with other First Nations. They included footnotes showing where the language for specific clauses came from.

Section 2.1.19 in the recast Lubicon proposals reads that the Lubicons would have the power to enact legislation and regulations providing for "control of (on-reserve) public games, sports, races, athletic contests and other amusements and social events". The footnote shows that this language comes from the federal Indian Act.

Incredibly Perry Robinson advised us that Mr. Cracower "sees issues and potential problems in section 2.1.19" of Lubicon self-government proposals.

Lubicon representatives pointed out that section 2.1.19 is drawn directly from the federal Indian Act and told Mr. Robinson that senior Justice Department self-government lawyer Cracower is raising "a red flag" about the language of the federal Indian Act.

Mr. Robinson pulled out a copy of the Indian Act and confirmed that the language in section 2.1.19 of Lubicon self-government proposals is drawn directly from the federal Indian Act. Without further comment Mr. Robinson then moved on to his next equally unhelpful "red flag".

Following Perry Robinson's point-by-point recitation of "red flags" on proposed Lubicon self-government powers, Lubicon representatives summarized the challenge before the negotiators as follows:

- 1.) how can Lubicon self-government powers be recognized and described in the settlement agreement and a process established for post settlement negotiation of how those powers are to be exercised;
- 2.) what happens to the settlement agreement if post-settlement agreement cannot be achieved on exercise of Lubicon self-government powers.

Professor Morse said "I think you've articulated the challenges". He said "I'm not sure what the solutions are".

Lubicon representatives told Professor Morse that they'd expect him to be prepared to speak to Lubicon self-government proposals at the main table negotiating session scheduled for Little Buffalo the following week.

Professor Morse said "I think the question is will we have some (federal self-government) proposals for next week". He said "I don't think so".

Professor Morse said "Perry has provided some initial reactions from Justice". He said "We need full reactions". He said "We also need full reactions from the Department (of Indian Affairs)". He said "I don't think we can do that in the next couple of days".

Lubicon representatives asked Professor Morse if federal representatives will be ready to negotiate Lubicon self-government proposals in time to meet the Christmas deadline agreed by the Minister and the Chief.

Professor Morse said "You're talking about a process that involves a number of people". He said "You're not asking (federal officials) to confirm an existing position". "What the Lubicons are putting together is quite different approach". He said "I don't know how much time it will take to respond".

Professor Morse said "The Minister made this a priority". He said "I think it will take weeks rather than months".

"Frankly", Professor Morse said, "in terms of approach, it's not just the Department (of Indian Affairs)". He said "It will lead to other departments".

Lubicon representatives told Professor Morse that organizing things on the federal side of the table is his problem as the head federal negotiator. They pointed out that he'd had a copy of Lubicon settlement proposals for over five years, including Lubicon self-government proposals, and that he has known for months that we would soon be negotiating self-government in the context of Lubicon settlement negotiations.

Lubicon representatives reminded Professor Morse that they had come to Ottawa at his suggestion expressly to negotiate Lubicon self-government powers with his Ottawa-based self-government experts.

Lubicon representatives told Professor Morse that they did not understand why federal representatives cannot agree to recognition of Lubicon self-government powers already agreed with other First Nations elsewhere. (In a subsequent negotiating session on October 1st Professor Morse finally provided a forthright answer to the question why the federal government won't agree to recognition of self-government powers already agreed with other First Nations elsewhere. Commenting that the language the Lubicons had quoted from agreements with other First Nations was largely drawn from framework agreements and agreements-in-principle -- and

inadvertently underscoring the reason the Lubicons need Lubicon self-government powers recognized in a binding settlement agreement -- Professor Morse said "Putting it in a final settlement agreement, that's binding, that's different than putting it in a non-binding framework agreement".)

Lubicon representatives pointed out to Professor Morse that the "preliminary comments" from Justice even question the acceptability of the language used in provisions of the federal Indian Act.

Lubicon representatives told Professor Morse that his approach to negotiation of Lubicon self-government will clearly not produce the agreement on Lubicon land rights committed by the Chief and the Minister by Christmas.

Professor Morse said "We have had an approach on the table for some time". He said "It was not clear to me until recently that it was not acceptable to the Lubicons". (Professor Morse was presumably referring to the approach he first articulated during the meeting in July 25th, which was in fact discussed and rejected at that time, after which he had expressly agreed to discuss long-standing Lubicon self-government proposals.)

Professor Morse said "The government was prepared to deal with Lubicon proposals through the normal process". He claimed "I didn't understand until last month that was not acceptable". "What you're saying now", Professor Morse said, "is that the federal position is unacceptable -- that self-government has to be part of the settlement agreement".

Professor Morse claimed "This is new". He said "We are going to have to develop a position based on this (supposedly new) Lubicon position".

Lubicon representatives told Professor Morse that there is nothing new about the Lubicon position -- that it has always been the Lubicon position that recognition of the right of the Lubicon people to be self-governing has to be part of any settlement of Lubicon land rights. They pointed out that it was the Lubicon position in talks with Mr. Fulton in 1985, that it was the Lubicon position in talks with the federal government in 1988, and that it was the Lubicon position in the written materials presented to him in 1998 prior to commencement of the current round of Lubicon settlement negotiations.

On September 9th Lubicon representatives asked Professor Morse if federal representatives were prepared to discuss Lubicon self-government proposals. Professor Morse responded by asking if the Lubicons had given provincial representatives a copy of Lubicon self-government proposals.

Professor Morse repeated "The federal view is that the province needs to be a full active participant in self-government negotiations". He argued that this is the case because, he said, "It's not sufficiently clear in law or in court decisions about how far federal and provincial jurisdiction goes". Therefore, he said "We think it will work best on the ground if all participants are involved from day one".

Lubicon representatives told Professor Morse that there's nothing in law or policy which prevents federal representatives from discussing Lubicon self-government bilaterally with the Lubicons -- including the exercise of self-government powers which may at some point have to be discussed with the province. Lubicon representatives also pointed out that provincial negotiator McCarthy has made clear that the province is not prepared to become involved in self-government negotiations, even if the Lubicons were to agree on trilateral negotiations, and that Professor Morse's position on provincial involvement would therefore unavoidably have the effect of putting off discussion of Lubicon self-government negotiations for the foreseeable future.

Professor Morse said that he "understand(s) that the province is not prepared to become involved in Lubicon self-government negotiations but", he said, "the federal view is that the province has to be involved". He repeated "Those are my instructions".

Lubicon representatives summarized the situation as follows:

The Lubicons take the position that Lubicon self-government is a bilateral matter to be settled between the Lubicons and the federal government although they are prepared to talk to the province about coordinating the exercise of specific Lubicon self-government powers with the province.

Similarly the province sees self-government as a bilateral issue between the Lubicons and the federal government but is prepared to talk to the Lubicons about coordinating the exercise of specific provincial government powers with the Lubicons.

Professor Morse, on the other hand, takes the position that the federal government is only prepared to discuss Lubicon self-government with the province as a full participant in Lubicon self-government negotiations.

Under such circumstances, Lubicon representatives said, it is not possible to negotiate Lubicon self-government unless the Lubicons and the Province both change their positions and the province develops necessary policies and bureaucratic support capacity.

Provincial negotiator McCarthy indicated that he agrees with the Lubicon summation of the situation.

Professor Morse asked "What are we trying to have done by when?" "What the Lubicons seem to be saying", he said, "is a final settlement agreement by December".

Professor Morse said "I thought we were after an agreement on essential elements". He said "That doesn't mean a final settlement agreement that's gone through ratification".

Lubicon representatives said that they are aware that it will not be possible to achieve a final settlement agreement in all of its aspects including ratification and land transfer by December. However, Lubicon representatives said, with a number of major elements already agreed, it should be technically possible to have agreement on all major elements of a final settlement agreement by December - including Lubicon self-government powers - assuming that federal representatives come to the table prepared to negotiate the main remaining items including recognition of Lubicon self-government powers.

On the other hand, Lubicon representatives observed, it will clearly not be possible to have an agreement by Christmas if Professor Morse continues to refuse to even discuss Lubicon self-government proposals and to insist on trilateral negotiations.

Professor Morse agreed that it will not be possible to negotiate even a Memorandum of Intent (MOI) by December if agreement on self-government powers has to be included as an essential element of the agreement, and if the province refuses to become a full participant in self-government negotiations. However, he said, "If John McCarthy got agreement from provincial Cabinet to participate in discussions to clarify Lubicon (self-government) objectives, I think we could start (self-government) talks without a provincial commitment to fully participate in self-government negotiations".

John McCarthy said "If you want to get a deal done on land and capital construction I think I can get commitments, but I don't think we can get it fully done by Christmas". If you want me to go back to Cabinet (for a mandate to participate in self-government negotiations), I can do that but it would take some time". He said the province "would have to develop a policy and take a position on it (Lubicon self-government)". He said "that probably couldn't go to Cabinet until next year".

John McCarthy said that he'd been involved in a number of settlements in the last 17 years but self-government negotiations was not part of any of them. He said "I can't answer how long it would take (for the province to consider becoming involved in self-government negotiations)". He said "It's never been done".

Frustrated Lubicon representatives told Professor Morse that they thought he had the power to negotiate a settlement of Lubicon land rights.

Professor Morse said "Yes but within government policy on negotiation of self-government".

During a break in the discussions federal negotiating team member Troy Chalifoux approached me outside of the meeting room and asked about the possibility of taking a different approach to negotiating self-government in the context of a settlement agreement. Instead of specifying recognized self-government powers the exercise of which would be negotiated post-settlement, Troy Chalifoux asked, what about the possibility of what he called "preambular clauses" recognizing the inherent right and spelling out a process for negotiating implementation of the inherent right post-settlement.

I told Troy Chalifoux that the Lubicons would be prepared to explore his idea to see if working together we could come up with an acceptable alternative approach to Lubicon self-government proposals.

The following day Troy Chalifoux tabled three paragraphs which he said had been drafted by Justice Department lawyers Perry Robinson and Joanne Bury. He said "the intent of the paragraphs is to recognize essential principles without jeopardizing the progress we're making in other areas".

The three paragraphs tabled by Troy Chalifoux read as follows:

Whereas the Lubicon Nation assert they have an existing inherent right of self-government;

Whereas the Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under Section 35 of the Constitution Act, 1982;

Whereas the Lubicon Nation, Canada and Alberta agree to negotiate the relationships amongst the three governments and their respective jurisdictions in the future.

Lubicon representatives agreed to work with the three paragraphs indicating, among other things, that there would have to be a paragraph recognizing that there is currently a lack of clarity about the jurisdiction of the three governments requiring remedy or the three paragraphs would have no purpose, that there would have to be some kind of "therefore" paragraph for the proposed "preambular" paragraphs to lead anywhere, that a time-frame would have to be specified for negotiating implementation of the inherent right, that there would have to be provision for funds to cover the cost of implementation negotiations, that there would have to be a paragraph specifying that the implementation negotiations were without prejudice to the positions of the Parties on jurisdictional questions, and that there would have to be a paragraph on what would happen if the negotiations aren't successful.

Troy Chalifoux's suggestion has been under active consideration ever since and the Lubicon people are hopeful that it may offer a workable alternative to the Lubicon self-government proposal. The real question in our minds is not whether we can hammer out something workable but whether Professor Morse is prepared to do anything other than talk about negotiating the right of the Lubicon people to be self-governing.

Those concerns were reinforced during a meeting on October 16th when we again had a hard time getting a straightforward answer from Professor Morse. In response to a question about the Chalifoux proposal, Professor Morse said "You have to understand where it came from". He said "It was done overnight after Troy talked to Bernard".

Professor Morse said "We have had a number of discussions". He said "A variety of concerns have been expressed on how it could be fine-tuned or expanded".

Professor Morse said "Our system is very comfortable with the idea of addressing this item in a preamble of the final settlement agreement". He said "We have had a number of responses on language".

Professor Morse said "We have not been told you can't do that". He said "We've been told that we need to work with the language - that we need to have neutral language".

Professor Morse said "The idea is that there is a need to negotiate". He said "We're prepared to work on it".

"On our side", Professor Morse said, "the idea makes sense". He said "We're prepared to move forward on language".

Professor Morse said "We understand from John McCarthy that the province is prepared to recommend the language".

John McCarthy corrected Professor Morse saying "I didn't say I'm prepared to recommend the proposal". He said "It's totally new". He said "I'll have to run it through our system". He said "I'm completely neutral".

Lubicon representatives said the Lubicons are working on language which attempts to capture the Lubicon and provincial positions. They said Professor Morse's position that the province has to be a full participant in trilateral self-government negotiations remains a major stumbling block which Lubicon representatives don't understand pointing out again that Treaty 8 self-government negotiations are bilateral.

Professor Morse said "I didn't mean to say we can't talk bilaterally". He said "Our position is that to do what the Lubicons want to do we will need the province at the table".

Troy Chalifoux offered "Since the language is ours we'll work on the preamble". He said "We're probably pretty close on timing and funding". He said "We'll have to figure out what happens if we don't agree - we'll need to work on language for that".

The Lubicon people look forward to receiving and reviewing the new federal proposal on how to handle the issue of Lubicon self-government in the context of an agreement which we still hope to sign by Christmas. Needless to say time is of the essence especially given the complete lack of substantive progress on the self-government issue so far.

The other issue where we are making no progress is financial compensation. Here Professor Morse bases his position largely on a knowing misrepresentation of the situation.

Basically Professor Morse attributes lack of progress on the financial compensation issue to what he characterizes as a lack of willingness on the part of the Lubicon people to negotiate numbers. He steadfastly refuses to take into account how we got to where we are knowing full well that how we got to where we are is important.

The Lubicon position on financial compensation was originally based on a number of legal categories having to do with things like damages and loss of use. The numbers calculated by the lawyers were huge - upwards of a billion dollars.

In 1984 Mr. Fulton proposed to group all of the legal claims for financial compensation against the federal government into one category - compensation for lost programs, benefits and services, or, in other words, compensation for things which the Lubicon people should have received from the government of Canada but didn't receive. Mr. Fulton's rationale was that the legal categories proposed by the lawyers were complicated and hard to quantify.

Our initial reaction to Mr. Fulton's proposal was to reject it because we didn't think we were owed anything for benefits from the government of Canada when we weren't a party to treaty. We did think, however, that we were owed a great deal for the destruction of our traditional economy and way of life and the illicit expropriation of valuable natural resources from our unceded traditional territory.

Mr. Fulton argued that we were wrong about not being owed anything for loss of programs benefits and services. He said that the government of Canada appropriates money every year for the Indian program and Indian people are entitled to receive programs, benefits and services whether they are party to treaty or not. He pointed out that Indian people in the Maritimes, British Columbia and the NWT all received programs, benefits and services even though they were not party to treaty.

We therefore agreed to work with Mr. Fulton to try and calculate the value of lost programs, benefits and services. We went to the archives of Canada and looked up the amount of money appropriated by the government of Canada for the Indian program going back to the signing of Treaty 8 in 1899. We looked up the number of Indians noted in the records to be served by the money going back to 1899. We factored in Statistics Canada inflation rates and Bank of Canada interest rates and we subtracted the value of the programs, benefits and services we had received from Canada largely since the early 1980's. By those calculations we'd been shorted about \$165 million dollars.

Mr. Fulton accepted our approach to calculating the value of lost programs, benefits and services as a reasonable one but said \$165 million was a lot of money. He proposed to run the numbers starting at the time of first contact in 1939 instead of 1899. We did not agree to start running the numbers at the time of first contact in 1939 but we were talking back and forth with Mr. Fulton -- in effect negotiating the compensation issue -- when his mandate was prematurely terminated by the Muloney government in 1985.

On October 14, 1988 provincial representatives asked us what kind of financial compensation the Lubicons were seeking from the Alberta government for the value of natural resources expropriated from our unceded traditional territory. We said we didn't know - that we would need to look at the value of the resources taken and negotiate an appropriate amount.

Provincial representatives asked us to give them a number or a formula so that they could assess their "exposure". Based on publicly available information that the province received about 20% of the value of the resource in royalties, and on court records which indicated that about \$500 million a year in resources was being extracted from our unceded traditional territory going back to 1979-80, the Lubicons tabled a formula with the province of 10% of the 20% the province had received in royalties. The following week then provincial Premier Don Getty made a public statement in which he said that the Lubicons had tabled a formula which would amount to over \$100 million.

That was the situation with regard to financial compensation going into the Grimshaw Accord and settlement negotiations at the end of 1988. With \$265 million on the table -- \$165 million from the federal government for the value of lost programs, benefits and services, and over \$100 million from the province in compensation for natural resources extracted from unceded Lubicon Territory -- federal and provincial representatives effectively brought negotiations over numbers to an end by asking us to table "a bottom line number" -- to spell out the amount the Lubicons would accept in financial compensation from both levels of Canadian government.

The Lubicon people agreed to table "a bottom line" of \$100 million total in 1988 dollars from both levels of Canadian government. Discussions since that time until now have centered on whether or how to provide the money -- not negotiation of the "bottom line" figure requested by both levels of Canadian government.

By the time of 1992 round of negotiations the value of \$100 million in 1988 dollars had increased to \$120 million and the proposal discussed was \$60 million from each level of Canadian government. The federal government released a press statement which says, in part, "the Band's demand for \$60 million in compensation each from Canada and Alberta is not resolvable via negotiations but may be through arbitration." The statement went on to allege that there was agreement to arbitrate the compensation issue under the Commercial

Arbitration Act, which technically wasn't true -- there had been discussion about arbitration but not agreement to arbitrate the issue of compensation under the Commercial Arbitration Act.

On April 27, 1993, during a community meeting in Little Buffalo Lake, then provincial Aboriginal Affairs Minister Mike Cardinal indicated that the province was prepared to provide the provincial half of the \$120 million dollars "at the rate of \$6 million a year for a period of ten years, provided that this amount, similarly provided, is matched by the federal government". (This proposal was accepted by the Lubicon people as an acceptable way to resolve the compensation issue and was included -- along with Lubicon self-government proposals -- in the package of Lubicon settlement proposals provided to Professor Morse in 1998.

We understand that asking for a "bottom line" is not agreement to provide that bottom line and that this issue is still before us to resolve, either through figuring out some other creative way to enable the Lubicon people to meet our objective of a guaranteed on-going source of independent revenue for our people, or perhaps by agreeing to refer the issue of compensation to some kind of independent binding arbitration.

What we don't accept is total lack of movement on this issue under the phony, untrue ruse that we're refusing to negotiate. Somebody ought to tell Professor Morse that it's unbecoming to demand a bottom line and then try and transform that bottom line into a new starting point for negotiations.

I look forward to hearing back from you and remain committed to trying to reach agreement of Lubicon land rights by Christmas.

Sincerely,

ORIGINAL SIGNED BY

Bernard Ominayak
Chief
Lubicon Lake Indian Nation

Lubicon Lake Indian Nation

P.O. Box 6731
Peace River, Alberta T8S 1S5

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Fax: (780) 629-3939

March 22, 2004

The Hon. Andy Mitchell
Minister of Indian and Northern Affairs
Government of Canada
Ottawa, ON K1A 0H4

Via Fax: 1-613-953-4941

Dear Mr. Mitchell;

On March 7, 2004, Chief Federal Negotiator Professor Brad Morse faxed the attached letter dated March 5 to my office.

Professor Morse said that he was writing “to express [his] concern over the time that has elapsed since we last met in late November.” He said he and another federal negotiating team member have raised this concern with members of our negotiating team “and they have assured us that they have sought instructions from [me] in this regard.” Professor Morse asks that I let him know how the Lubicon Nation wishes to proceed.

Professor Morse concludes his March 7 letter by saying, “We remain fully committed to the successful conclusion of our negotiations.”

While we share Professor Morse’s concern with the pace of these negotiations, Professor Morse knows exactly why negotiations have not been progressing at a quicker pace.

The Lubicon people remain fully committed to successfully concluding Lubicon land rights negotiations but it has become clear that our ability to successfully negotiate a settlement is limited by the Professor Morse’s mandate. Professor Morse significantly fails to address or even mention this problem in his letter even though we have discussed the issue of mandate with Professor Morse on numerous occasions.

When we last met with the federal negotiating team Professor Morse told us that with regard to financial compensation he had no further money available to offer for financial compensation or anything else within his current mandate. While Professor Morse was reluctant to call his current offer a “take-it-or-leave-it” offer, he did make clear that he would not be putting any additional money on the table under his current mandate. If

that's the case, it seems that either the Lubicon Nation must accept his current offer or he must be given the authority to negotiate the amount of financial compensation until a satisfactory agreement has been reached.

Professor Morse tries to take the position that the Lubicon people refuse to negotiate our position on compensation and that the federal government "can't negotiate with themselves". He steadfastly refuses to take into account how we got to where we are knowing full well that how we got to where we are is important.

I explained how we got to where we are in my October 24, 2003 letter to your predecessor Robert Nault (a copy of which is attached). For your convenience I will summarize the history here as well.

Going into settlement negotiations at the end of 1988 the financial compensation number on the table for negotiation was \$265 million -- \$165 million from the federal government for the value of lost programs, benefits and services (using an approach originally suggested by federal representatives), and over \$100 million from the province (calculated on the basis of 10% of the 20% the province receives in royalties for natural resources extracted from unceded Lubicon Territory). Federal and provincial representatives effectively brought negotiations over numbers to an end at that time by asking us to table "a bottom line number" -- to spell out the amount the Lubicons would accept in financial compensation from both levels of Canadian government.

The Lubicon people agreed to table "a bottom line" of \$100 million total in 1988 dollars from both levels of Canadian government.

By the time of the 1992 round of negotiations the value of \$100 million in 1988 dollars had increased to \$120 million — \$60 million from each level of Canadian government. The federal government released a press statement which says, in part, "the Band's demand for \$60 million in compensation each from Canada and Alberta is not resolvable via negotiations but may be through arbitration." The statement went on to allege that there was agreement to arbitrate the compensation issue under the *Commercial Arbitration Act*, which technically wasn't true -- there had been discussion about arbitration but not agreement to arbitrate the issue of compensation under the *Commercial Arbitration Act*.

On April 27, 1993, during a community meeting in Little Buffalo Lake, then provincial Aboriginal Affairs Minister Mike Cardinal indicated that the province was prepared to provide "\$6 million a year for a period of ten years, provided that this amount, similarly provided, is matched by the federal government". (This proposal was accepted by the Lubicon people as an acceptable way to resolve the compensation issue and was included -- along with Lubicon self-government proposals -- in the package of Lubicon settlement proposals provided to Professor Morse in 1998.)

We understand that asking for a "bottom line" is not agreement to provide that bottom line and that this issue is still before us to resolve, either through figuring out some other

creative way to enable the Lubicon people to meet our objective of a guaranteed on-going source of independent revenue for our people, or perhaps by agreeing to refer the issue of compensation to some kind of independent binding arbitration.

But it is a complete mischaracterization of this issue to say that we're refusing to negotiate. One party cannot legitimately ask the other party for a bottom line and then try to transform that bottom line figure into a new maximum figure for negotiation.

I told Professor Morse on a number of occasions that any financial compensation offer will, in the end, be considered as part of an overall settlement package. Professor Morse tries to use this statement to suggest that the issue of compensation can be set aside while negotiations proceed on every other matter. This is an incorrect understanding of the Lubicon position. It is the Lubicon position that all areas of settlement are related and it may be possible to achieve Lubicon objectives in one area through agreement in another area. But the Lubicon people are not prepared to forego altogether the legitimate objective of a guaranteed on-going source of independent revenue for our people or, for that matter, any of our other legitimate objectives.

If the limits of Professor Morse's current mandate have effectively ended negotiations on financial compensation (or, for that matter, any other settlement item with additional financial implications) then we will need to address the question of mandate before we can reasonably expect any overall settlement package to meet Lubicon objectives.

Similarly on the issue of self-government we have reached a stage in negotiations where the issue of mandate must be resolved for us to continue. Moreover we face an even more significant issue of the failure of federal negotiators to negotiate in good faith.

In my October 24, 2003 letter to your predecessor Robert Nault, I described the lengthy but unproductive discussions we have had at the table regarding self-government.

I described how, during a break in discussions last September 24, federal negotiating team member Troy Chalifoux approached me outside of the meeting room and asked about the possibility of taking a different approach to negotiating self-government in the context of a settlement agreement. Instead of specifying recognized self-government powers the exercise of which would be negotiated post-settlement, Troy Chalifoux asked, what about the possibility of what he called "preambular clauses" recognizing the inherent right and spelling out a process for negotiating implementation of the inherent right post-settlement. He said this was just an idea "off the top of his head" which he was putting forward for reaction in hope that we could find another way to move forward.

I told Troy Chalifoux that the Lubicons would be prepared to explore his idea to see if working together we could come up with an acceptable alternative approach to Lubicon self-government proposals.

The following day Troy Chalifoux tabled three paragraphs which he said had been drafted by Justice Department lawyers Perry Robinson and Joanne Bury the night before

in Peace River. He said “the intent of the paragraphs is to recognize essential principles without jeopardizing the progress we’re making in other areas”.

The three paragraphs tabled by Troy Chalifoux read as follows:

Whereas the Lubicon Nation assert they have an existing inherent right of self-government;

Whereas the Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under Section 35 of the Constitution Act, 1982;

Whereas the Lubicon Nation, Canada and Alberta agree to negotiate the relationships amongst the three governments and their respective jurisdictions in the future.

Professor Morse expressed concern about these clauses saying that Troy Chalifoux had exceeded his authority putting them forward and they had been drafted the night before in Peace River without consulting federal self-government authorities in Ottawa.

Our negotiators asked Professor Morse why these clauses would be included in the preamble rather than in the body of the agreement. They asked whether there was any difference between clauses included in the preamble and those included in the body of the agreement. Professor Morse assured the Lubicon people that there was no effective difference between putting clauses in the body of the agreement or the preamble of the agreement.

In late December we received a copy of a 1996 Department of Justice document titled “Guidelines for Self-Government Negotiators”. These “Guidelines” provide specific instructions to federal negotiators on how to negotiate in bad faith and to ensure that negotiated self-government powers are not legally-binding on the government of Canada, effectively undermining the constitutionally-protected inherent right of self-government.

These Guidelines say that even though the federal government has a policy recognizing the inherent right of self-government for Aboriginal peoples, “the policy goes considerably beyond what the government would be prepared to accept as a strict matter of law, if it were forced to litigate the matter before the courts.”

In words most Canadians will understand more clearly, the federal government’s much-touted inherent right policy is all well and good as long as it is not allowed to become legally binding on the government.

Therefore, the Guidelines continue, “the precise language used must be carefully chosen so as not to undermine the government’s legal options in the event of litigation.”

The Guidelines go on to delineate acceptable clauses to be included in agreements with Aboriginal peoples. They warn that negotiators “are advised not to make substitutions or alterations to the wording provided, which has been very carefully crafted to address both Aboriginal aspirations and federal legal and policy concerns.”

The Guidelines advise federal negotiators on where to place these “very carefully crafted” clauses so as to ensure that they have no real effect. They say:

In determining where best to place a given clause, negotiators should bear in mind the different legal effects of including wording in the preamble to an agreement as opposed to the body of the agreement itself. Preambular language serves to set the stage for the substance of the agreement which follows, and may help to establish the context in which an agreement has been reached. Preambles are given less legal weight than the substantive provisions of the agreement (where the “meat” of the agreement is reflected) and are generally only referred to by the courts to assist in interpreting ambiguous substantive provisions in the body of the agreement. [emphasis added]

You’ll recall that Professor Morse assured us at the table that there is no real difference between including clauses in the preamble rather than the body of the agreement. He knew better, both as a lawyer and because he and Troy Chalifoux had attended a Department of Justice seminar on these Guidelines earlier in the summer.

You’ll recall also that Professor Morse told us that members of his team had drafted their proposed “preambular clauses” overnight in Peace River and that they had not yet been approved by headquarters. However the “very carefully drafted” “preambular clauses” the Guidelines propose include the following clauses which closely mirror the clauses presented to us:

WHEREAS First Nation “X” asserts that it has an inherent right to self-government and believes that this agreement represents an expression of its inherent right;

Whereas the Government of Canada recognizes the inherent right of self-government is an existing aboriginal right within Section 35 of the Constitution Act, 1982;

Upon receiving these “Guidelines” it became clear to us that the proposals presented by the federal negotiating team were not ones thought up “off the top of their heads” as I was told; they were not drafted overnight in Peace River; they did not carry the same weight as clauses included in the body of the agreement and, most importantly, they were not intended to protect inherent Lubicon self-government powers until a full self-government agreement can be negotiated. Nor are they proposals offered in good faith or presented to us with any degree of honesty or respect. Rather the “Guidelines” make clear that the clauses presented to us are intended only to undermine our constitutionally recognized inherent right to self-government and render it meaningless.

On January 30, 2004, Lubicon representatives Kevin Thomas and Reinie Jobin met with Jeffery Copenace and David Brodie in the Prime Minister's Office to discuss the state of negotiations. Mr. Thomas described to Mr. Copenace the little drama that was played out for the Lubicon people by federal negotiators and drew his attention to the points in these "Guidelines" in which self-government negotiators are instructed to present the same "preambular language" that the federal negotiating team put forward.

Mr. Thomas expressed the hope that if the document represented the previous government's position and not the new Martin government's position, the Lubicon people would look forward to negotiating self-government provisions for the Lubicon settlement agreement in good faith once federal negotiators were given a new mandate to do so. If, however, the document represents the current government's position, then the Lubicon people are prepared to publicly debate its contents and the way it was used at the negotiating table. He noted that if this was debated publicly none of the other First Nations negotiating self-government agreements with Canada would be any more impressed by its contents than the Lubicon people are.

Mr. Copenace agreed to look into the matter and discuss the question of mandate with your office. Since that time he has not responded substantially to the issue of mandate and is no longer returning Mr. Thomas's phone calls.

Our negotiators have raised the issue of mandate with Professor Morse on the phone on three occasions since we last met and have also discussed the issue on the phone with Troy Chalifoux.

On February 12 Professor Morse told Mr. Thomas that he has "flagged the issue of mandate" but had not received any directions at that time. On February 26, he told Mr. Thomas that he was waiting to hear back from your Chief of Staff Paul Bresee, who was reportedly raising the issue of mandate with yourself. It is therefore notable that his subsequent letter of March 5 failed to even mention the issue of mandate, let alone address it substantially.

For our part, Fred Lennarson raised the issue of mandate directly with your Chief of Staff Paul Bresee. Paul Bresee asked Mr. Lennarson for copies of the "Guidelines" and other background documents and promised to review the materials by the end of the week of February 23rd. To this date he has not provided Mr. Lennarson with a reaction to the materials and is not responding to Mr. Lennarson's phone calls.

In this context, it is difficult for us to respond to Professor Morse's letter asking us to resume negotiations without any indication that he has received any new instructions.

As I said earlier, we too are concerned about the pace of these negotiations.

I wrote to you on December 16th inviting you to meet with us and saying that

a Final Settlement Agreement is possible in short order if the will is there and if those who oppose a fair settlement of Lubicon land rights are not allowed to obstruct the process. [underlining added] Hopefully with your involvement and the active support of the new Prime Minister a swift settlement of Lubicon land rights will be possible.

I note that while I have not yet received a response to my December 16th letter, a letter was sent to the Lubicon Legal Defence Fund on March 3 over your signature selectively quoting from the above statement to the effect that I feel a settlement is possible “in short order” and thereby giving the misleading impression that there are no problems with negotiations. I don’t see how you could have been given that impression from the contents of my December 16th letter or from any of the earlier letters to which it refers, but I trust with this letter you are now fully aware of the issues before us. If the issues before us are still not clear then you and I should arrange to discuss them.

If we are truly to achieve a settlement “in short order” we will need to approach negotiations with an appropriate federal mandate and good faith.

Rather than returning to regular negotiating sessions to discuss primarily technical matters and pretending we don’t have a problem with mandate – as Professor Morse suggests – the best means of moving this forward would be for you to give your representatives a mandate to sit down and negotiate self-government and financial compensation in good faith and with the full backing of your office and that of the Prime Minister. You and I should be able to communicate directly to confirm agreements and discuss any problems that arise with negotiations.

If we can successfully negotiate acceptable agreements on self-government and compensation we can then turn our attention to the remaining issues on the table, which I hope and believe could be resolved relatively quickly.

I will look forward to a timely response.

Sincerely,

ORIGINAL SIGNED BY

Bernard Ominayak
Chief, Lubicon Lake Indian Nation

MEMORANDUM OF INTENT

It is agreed on November 26, 2005 between Chief Bernard Ominayak of the Lubicon Lake Indian Nation and Sharman Glynn, Senior Negotiator for Canada that the parties will pursue an agreement that would include the following:

- Canada will request that Alberta transfer for the use and benefit of the Lubicon Lake Indian Nation, land as agreed to at the negotiation table in 2002 by Canada, Alberta and the Lubicon Lake Indian Nation.
- Canada will provide, pursuant to the Capital Agreement negotiated by the Lubicon Lake Indian Nation and Canada in 2002, funds in the amount of \$84.6 million in 1999\$ for the construction of a new community at Lubicon Lake for 477 members of the Lubicon Lake Indian Nation.
- In return for the land Canada would require, at a minimum, an acknowledgement from the Lubicon Lake Indian Nation that land has been received from Canada pursuant to Canada's Treaty 8 obligation.
- All other elements of the Lubicon Lake Land Claim Settlement Agreement would remain outstanding and eligible for future negotiation.
- It is understood by the parties that finalization of land boundaries and resolution of third party interests related to the land selections must be completed before any land transfers can take place.

→ _____
Chief Bernard Ominayak
on behalf of the Lubicon Lake Indian Nation

_____ ←
Sharman Glynn
on behalf of Canada