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File No. Dossier 45-CDA-I3-I-3-LUBICON LAKE BAND
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VOLS ACCESSION NO. 29793

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TITLE—TITRE:

SOCIAL AFFAIRS—HUMAN RIGHTS—POLICY AND
PLANS—CANADA—COMPLAINTS TO UNITED NATIONS
ABOUT VIOLATIONS IN CANADA—LUBICON LAKE
BAND

AFFAIRES SOCIALES—DROITS DE L'HOMME—
PRINCIPES ET PROJETS—PLAINTES AUX NATIONS
UNIES AU SUJET DES VIOLATIONS AU CANADA—
LUBICON LAKE BAND

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FILE NO. - DOSSIER N°

45-CDA-13-1-3-LUBICON LAKE BAND

VOLUME

3



TO/À O/Gaudreau, Swords, SIS/Lord

FROM/DE • IMU

REFERENCE •
RÉFÉRENCE

SUBJECT • Comité des droits de l'homme:
SUJET Communication no. 167/1984 (Lubicon
Lake Band)

Security/Sécurité
UNCLASSIFIED
Accession/Référence
File/Dossier
45-CDA-13-1-3-
Lubicon LK Band
Date
Le 31 juillet 1985
Number/Numéro
IMU-1518

ENCLOSURES
ANNEXES

DISTRIBUTION

... Vous trouverez sous-pli, les commentaires écrits, soumis au Comité des droits de l'homme par M. Bernard Ominayak, en réponse aux observations du Gouvernement du Canada sur la recevabilité de la communication no. 167/1984. Ce document est accompagné de la note du Secrétariat des Nations Unies (Centre des droits de l'homme) no. G/SO 215/51 CANA (38) 167/1984.

Comme vous le savez, le Comité des droits de l'homme a terminé ses travaux d'été à Genève. Toutefois, nous ne sommes malheureusement pas en mesure de savoir à ce stade-ci, si le Comité a examiné la communication sus-mentionnée et en est arrivé à une décision. Nous communiquons néanmoins avec notre mission à Genève pour qu'elle demeure en alerte et nous transmette immédiatement tout développement dans cette affaire.

Dès que nous aurons reçu des nouvelles de Genève, nous serons mieux en mesure d'évaluer la nécessité de prendre de nouveau action dans ce cas.

Robert M. Middleton
Directeur
Direction des Affaires
des Nations Unies

IMU/Jacqueline Caron/2-8040/mp

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OTTAWA, (Ontario)

K1A 0G2

Le 31 juillet 1985

IMU-1516

Maître Martin Low
Avocat général
Droits de la personne
Ministère de la Justice
Immeuble Justice
rue Kent et Wellington
Ottawa, Ontario

ACC	REF	DATE
FILE		
45-CDR-13-1-3-Lubicon		
Lake Band		

OBJET: Comité des droits de l'homme:
Communication no. 167/1984 (Lubicon Lake Band)

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Veuillez agréer, Monsieur, mes salutations distinguées.

ORIGINAL SIGNED BY
B. M. MIDDLETON

Robert M. Middleton
Directeur
Direction des affaires
des Nations Unies

IMU/Jacqueline Caron/2-8040/mp

D. LR: JLO

FILE/CIRC/DIV/DIARY/WFILE

OTTAWA, (Ontario)

K1A 0G2

Le 31 juillet 1985

IMU-1515

Monsieur Richard Nolan
Directeur
Droits de la personne
Secrétariat d'Etat
15, Eddy Street
Hull, Québec
K1A 0M5

ACC	RE	DATE
FILE	DOSSIER	
45-CD-13-1-3- Lubicon		
LK Bond		

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Robert M. Middleton
Directeur
Direction des affaires
des Nations Unies

IMU/Jacqueline Caron/2-8040/mp

DI : JLO

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K1A 0G2

Le 31 juillet 1985

IMU-1515

Monsieur Richard Nolan
Directeur
Droits de la personne
Secrétariat d'État
15, Eddy Street
Hull, Québec
K1A 0M5

45-COA-13-1-3 - Lubicon Lake Band

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Le 31 juillet 1985

IMU-1516

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Avocat général
Droits de la personne
Ministère de la Justice
Immeuble Justice
rue Kent et Wellington
Ottawa, Ontario

45-COP-13-1-3-Lubicon
Lake Band

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ORIGINAL SIGNED BY
B. M. MIDDLETON

Robert M. Middleton
Directeur
Direction des affaires
des Nations Unies



Department of Justice
Canada

Ministère de la Justice
Canada

Ottawa, Canada
K1A 0H8

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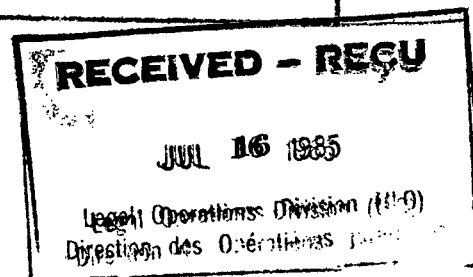
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- Lubicon Lake

July 15, 1985

Ms. Colleen Swords
Legal Services
Department of External Affairs
Room 253, Tower C
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
K1A 0G2

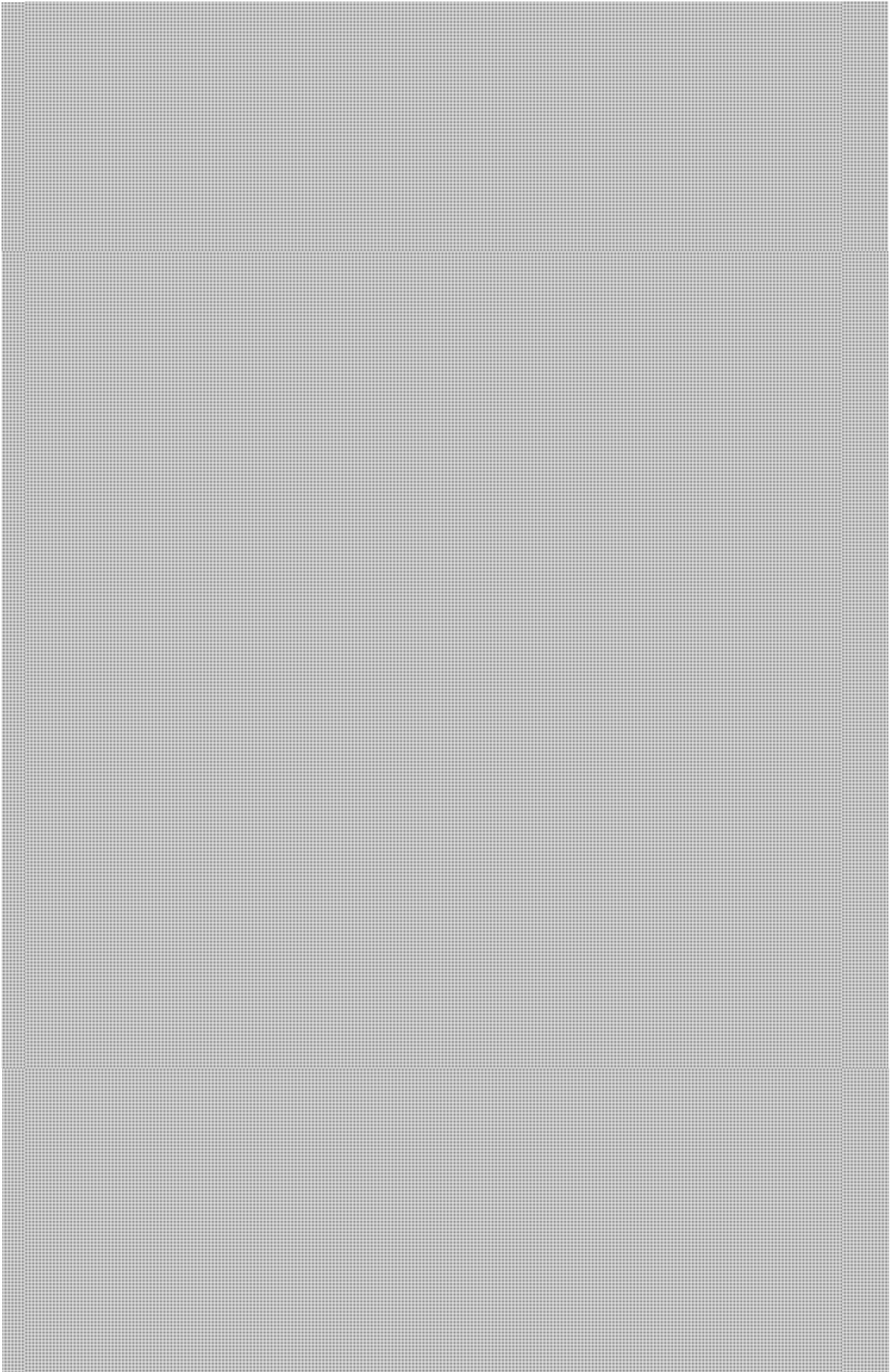


Dear Ms. Swords:

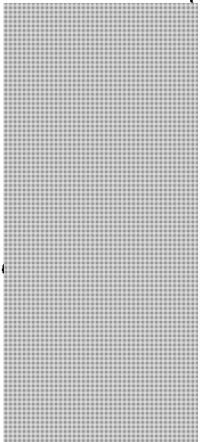
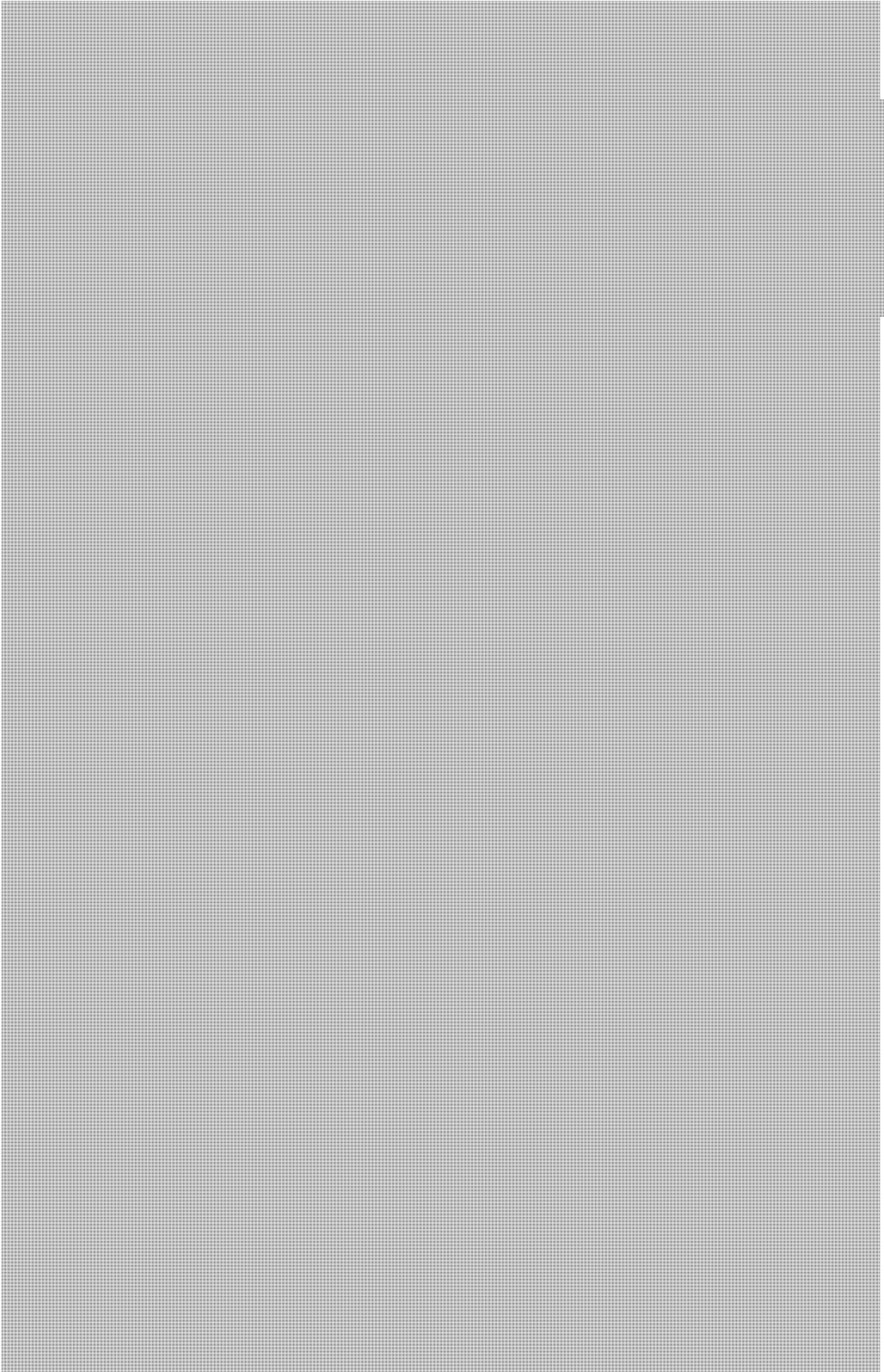
Re: Canada's Response To The Communication Submitted By The
Lubicon Lake Band To The United Nations Human Rights
Committee - Argument On Self-Determination And The Right To
Property



-2-

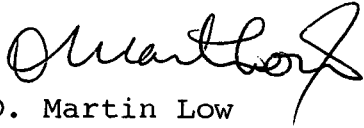


-3-



-4-

Yours sincerely,



D. Martin Low
General Counsel
Human Rights Law Section

IW/aml

c.c. Fred Caron
Martin Freeman

s.23

000215

OFFICE DES NATIONS UNIES À GENÈVE

CENTRE POUR LES DROITS DE L'HOMME



UNITED NATIONS OFFICE AT GENEVA

CENTRE FOR HUMAN RIGHTS



Télégrammes : UNATIONS, GENÈVE

Télex : 28 96 96

Téléphone : 34 60 11 31 02 11

RÉF. N°: G/SO 215/51 CANA (38)

(à rappeler dans la réponse) 167/1984

Palais des Nations

CH - 1211 GENÈVE 10

ACC	402 344	DOSSIER
FILE	45-CDA-13-1-3- Lubicon	Lake Band

..... The Secretariat of the United Nations (Centre for Human Rights) presents its compliments to the Permanent Mission of Canada to the United Nations Office at Geneva and has the honour to transmit herewith, for information, a copy of the comments submitted by Bernard Ominayak on the State party's observations of 31 May 1985 concerning the admissibility of communication No. 167/1984, the Lubicon Lake Band v. Canada, which is before the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights.

12 July 1985

A handwritten signature in ink.

VAN NESS, FELDMAN, SUTCLIFFE & CURTIS

A PROFESSIONAL CORPORATION

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WASHINGTON, D. C. 20007

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ROSS D. AIN
ALAN L. MINTZ
ROBERT R. NORDHAUS
CHARLES B. CURTIS
GARY L. FONTANA
ADAM WENNER

GARY D. BACHMAN
PETER D. DICKSON
JEFFREY S. CHRISTIE
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LISA A. SHAPIRO
CYNTHIA INGERSOLL
JESSICA S. LEFEVRE
LYNN MINNA
D. ERIC HULTMAN
HOWARD ELIOT SHAPIRO
OF COUNSEL

July 8, 1985

Mr. Jakob Th. Moller
Chief, Communications Unit
Center for Human Rights
United Nations Office
CH-1211 GENEVE 10
SWITZERLAND


RE: Communication No. 167/1984

Dear Mr. Moller:

I have the honour to transmit to the United Nations Human Rights Committee, in my capacity as legal assistant of Bernard Ominayak, the enclosed comments on the May 31, 1985 response of the Federal Government of Canada to Communication No. 167/1984.

We are most grateful for your consideration and assistance in this matter.

Respectfully yours,


Jessica S. Lefevre

Enclosure

VAN NESS, FELDMAN, SUTCLIFFE & CURTIS

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OF COUNSEL

The Lubicon Lake Band of Alberta Canada herewith submits to the United Nations Committee on Human Rights ("Committee") its comments on the May 31, 1985 response of the Federal Government of Canada to Communication No. 167/1984.

I. Summary

The Government of Canada offers three principal allegations in its response. It alleges, first, that the Lubicon Lake Band has not exhausted its domestic remedies. However, the Band has, in fact, exhausted these remedies to the extent that they offer any meaningful redress of its claims concerning the destruction of its means of livelihood.

Secondly, the Government of Canada alleges that the concept of self-determination is not applicable to the Lubicon Lake Band. The Lubicon Lake Band is an indigenous People who have maintained their traditional economy and way of life, and have occupied their traditional territory since time immemorial. At a minimum, the concept of self-determination should be held to be applicable to these people as it concerns the right of a People to their means of subsistence.

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Finally, the Government of Canada makes allegations concerning the identity and status of the communicant and victim, and makes further assertions as to alleged misrepresentations in the Band's earlier Communications to the Committee. The "communicant" is identified in the Band's original Communication. The "victims" are the members of the Lubicon Lake Band, who are represented by their unanimously elected leader, Chief Bernard Ominayak. In each of its Communications with the Committee, the Band has made every effort to provide an accurate account of the facts concerning the situation at issue.

II. Admissibility of the Lubicon Lake Band's Communications

A. Whether domestic remedies have been exhausted.

In its response of May 31, 1985, the Government of Canada (also cited as "Canada"), alleges that the Lubicon Lake Band has failed to exhaust all available domestic remedies, as required by Article 5(2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights ("Optional Protocol").

The Communication of the Lubicon Lake Band (also cited as "the Band") dated February 14, 1985 and the Supplement of March 27, 1985 sets forth the lengthy efforts of the Lubicon Lake Band to have their aboriginal rights or, alternatively, their treaty rights, recognized and implemented, and, particularly their hunting, fishing and trapping way of life and subsistence economy protected.

VAN NESS, FELDMAN, SUTCLIFFE & CURTIS

-3-

The Band and its members depend for their survival, subsistence and way of life on the wildlife resources of their traditional hunting/trapping territory. The massive and intensive energy resource development in the Band's traditional territory, carried on despite the institution and conduct of court proceedings respecting aboriginal rights (or alternatively treaty rights), threatened the survival, livelihood and way of life of the Lubicon Lake People.

While the legal debate continued, energy exploration and development progressed on an ever accelerated basis. The scale and pace of this development forced the Lubicon Lake Band to pursue interim injunction proceedings in an attempt to protect its very means of subsistence -- i.e., its traditional economy. Without the preservation of the status quo, a final judgment on the merits, even if favorable to the Band, would be rendered ineffectual.

Ultimately, however, as a result of the energy development and Canada's failure to intervene on behalf of or to provide any effective assistance whatsoever to the Band, the Lubicon Lake Band has now been effectively deprived of its means of subsistence. It has witnessed the decimation of its economy and is currently witnessing the decentigration of its culture. Any final judgment recognizing aboriginal rights, or alternatively treaty rights, can never restore the way of life, livelihood and means of subsistence of the Band.

VAN NESS, FELDMAN, SUTCLIFFE & CURTIS

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In its response, the Government of Canada has completely ignored this fundamental issue of the immediately threatened and imminent extinction of the Band's means of subsistence and way of life. Canada has, therefore, failed to address the issue of the remedy required to protect the Band's subsistence, livelihood and hunting and trapping way of life. Surely, Canada realizes that in many areas of the law, such as domestic disputes or labour disputes, temporary or provisional measures are required to ensure that eventual relief will be effective. The seeking of relief by an interim injunction in the case of the Band was the only recourse left to it to ensure its survival. It is distressing enough that the Band failed in this quest. It is intolerable that Canada not only ignores the fundamental issue of the Band's fight for its survival but reproaches the Band for attempting to preserve its way of life and subsistence through interim injunction proceedings.

Essentially, Canada attempts to ascribe the unreasonable prolongation of the remedies respecting aboriginal rights, or alternatively treaty rights, to poor strategy and lawyership on the part of the Lubicon Lake Band. Canada, therefore, fails to confront the fundamental issue of the Band's survival and chooses to ignore the mortal threat posed by the sudden and massive energy development in the Band's traditional area.

Furthermore, Canada conveniently ignores the complexity of the issues related to aboriginal and treaty rights in its

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section on "remedies" (Response, Section A(1)) while highlighting this very complexity when dealing with "additional remedies" (See Response, Section A(2), at page 10). Thus, Canada fails to distinguish the fundamental difference between a remedy involving the final determination of whether the Band has aboriginal or treaty rights and the remedy required to protect its hunting and trapping way of life, its livelihood and its very subsistence.

Simply and starkly put, the Band asserts that even if it is successful in having its aboriginal rights or even treaty rights recognized by the courts, such a judgment cannot restore the hunting and trapping way of life and subsistence economy of the Band, which have now been illegally, unjustly and unethically appropriated from the Lubicon Lake Indians by the Government of Alberta and various oil corporations with the knowledge and at least tacit consent of Canada. The consequence is that all domestic remedies have indeed been exhausted with respect to the protection of the Band's economy as well as its unique, valuable and deeply cherished way of life.

In summary, the fundamental issue of the imminent destruction of the Band's means of subsistence is simply not addressed by Canada except to the extent that it attempts to put up a smokescreen of alleged poor lawyership of counsel for the Band coupled with a deceptive attempt to lead the Committee

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to believe that aboriginal rights cases in Canada can be quickly litigated.

1. The Caveat Litigation

Canada implies that there has been a judicial determination of the caveat case. This is simply not so. After retroactive legislation was adopted by the Alberta Legislature forbidding the registration of the caveat, the Court considered it a moot issue (see page 3 of Band's Communication of February 14, 1984).

2. Dual Actions in the Federal Court of Canada and in the Alberta Court of Queen's Bench

Canada's response leaves the impression that the duality of proceedings was a serious mistake on the Band's part, causing considerable delay. This is erroneous and misleading. In the first place, the nature of the federal system in Canada is such that an action based on aboriginal or treaty rights, instituted against the Government of Canada, must be brought in the Federal Court of Canada and not the provincial courts.^{1/} Thus, from the outset the Federal Court

^{1/} Even the judgment of the Federal Court Trial Division of November 19, 1980 dismissing the legal proceedings as against the Government of Alberta and the oil corporations makes it clear that Her Majesty in Right of Canada must be sued in the Federal Court of Canada. The judgment, in holding that relief must be sought as against other defendants from the Court of Queen's Bench in Alberta, recognizes that this entails two (2) actions but "it is one of the disadvantages which one must put up with where there is a dual system of government and courts with separate areas of jurisdiction" (per Addy, J., 1981, 117 D.L.R. (3d) 247 at p. 253).

of Canada was the proper Court with respect to the Government of Canada (in many ways the principal Defendant). In fact, the Federal Government was recently described by the Supreme Court of Canada as having a fiduciary obligation in respect to the Indian interest in land in the case of Guerin v. Her Majesty the Queen in Right of Canada, 1985, 13 D.L.R. (4d) 321.

Canada also makes the categorical statement (at p. 4) that it was clear from the Supreme Court of Canada decision in Quebec North Shore Paper Company v. C.P. Ltd., 1976, that only the Provincial Court had jurisdiction in the Band's action against the Province of Alberta and private corporations. This is a serious distortion of an issue that the Supreme Court of Canada itself considers unsettled. In the pending Supreme Court of Canada case, Chief William Joe v. Her Majesty the Queen in Right of Canada, one of the very issues set down as a constitutional question by order of the former Chief Justice of the Supreme Court of Canada, Bora Laskin, on November 24, 1983 is whether the Federal Court of Canada has jurisdiction to grant declaratory relief with regard to aboriginal land rights for Indians plaintiffs as against Her Majesty the Queen in Right of a province.^{2/}

^{2/} The case cited by Canada, Quebec North Shore Paper Company v. C.P. Ltd., in essence held only that there must be existing and applicable federal law, whether under statute or regulation or common law, upon which the jurisdiction of the Federal Court can be exercised. Plaintiffs in the Lubicon Lake Band

Canada reproaches the Band for not proceeding earlier with the main action in the Federal Court of Canada and thus for not advancing two (2) actions on the merits at the same time, rather than pursuing an interim injunction in an attempt to protect its way of life and means of subsistence.

In April of 1980 when the action was first instituted in the Federal Court of Canada, the Lubicon Lake Band and the Indians of Lubicon Lake were seeking a declaration as to their aboriginal rights -- i.e., a determination on the merits. However, they did not, at that time, anticipate the sudden and massive oil exploration and development which started about the end of 1979, but which accelerated dramatically in 1980 and 1981 and even more dramatically in 1982. By the spring of 1982, it had become apparent that if an interim remedy or relief was not obtained by way of an interlocutory injunction, the destruction of the Band's economy and way of life was almost a certainty. It was in this context that the interim injunction proceedings were first launched, with the ensuing delays discussed in the Band's earlier communications.

[footnote continued from previous page]

proceedings as in the Plaintiffs in the Supreme Court of Canada proceedings in Chief William Joe et al. v. Her Majesty the Queen in Right of Canada assert that aboriginal rights and treaty rights are questions of federal law which are sufficient to underpin the jurisdiction of the Court. It was also interesting to note that even the judgment in the Lubicon Lake Band proceedings of the Federal Court, Trial Division, of November 19, 1980 does not mention the Quebec North Shore Paper Company case.

Canada also appears to argue that aboriginal rights cases can be determined expeditiously. This is simply not so and is contradicted by the history of recent land claims cases.^{3/} Even with the best of intentions of the parties and the courts, the inherent complexity of the present proceedings render it more than probable that the litigation respecting the determination of aboriginal or treaty rights of the Lubicon Lake Indians will take several years. Furthermore, the poverty of the Lubicon Lake people makes the problem of delay even more acute.

It is ironic and even ridiculous that Canada, in effect, accuses the Band of delaying the court proceedings when it has sought precisely the opposite, although of necessity, in order to protect its way of life, it has had to concentrate on the interim injunction proceedings. We need not repeat how interim injunction proceedings, under every fundamental principle of

^{3/} For example, in the Calder case, the action was commenced in the late 1960's. The judgment of the Trial Division was October 17, 1969 and the judgment of the Supreme Court of Canada was January 31, 1973. In the Paulette case, there were also jurisdictional problems and it took some four (4) years before the Supreme Court of Canada decided the case on an issue totally unrelated to Indian rights. The James Bay court proceedings, in which an interlocutory injunction was issued to Indians and Inuit on the basis of aboriginal rights and later suspended by the Quebec Court of Appeal, was settled after three (3) years by the James Bay and Northern Quebec Agreement without any determination, even by a lower court, on the merits. In a recent Supreme Court of Ontario decision in the case of The Attorney General for the Province of Ontario v. the Bear Island Foundation and Potts et al., the hearing on the main issue of aboriginal rights lasted almost two (2) years.

Canadian law, are supposed to be matters dealt with by the courts with the greatest of expediency. Unfortunately, this simply did not occur in these proceedings.

3. Criteria for an interim injunction

At page 5 of its Response, Canada discusses the test for the granting of an interim injunction, set forth in the case of Erickson v. Wiggins Adjustments Limited. The Honorable Mr. Justice Forsyth, employing this test to render a judgment against the Band, found, in essence that the Band's claim did constitute a serious issue, but that, in his view the Band's loss of its livelihood and culture was compensable through money damages. This decision should be contrasted with the decision of the British Columbia Court of Appeal of March 27, 1985 in the case of McMillan Bloedel Limited v. Mullin et al. and Martin v. Her Majesty the Queen in Right of the Province of British Columbia and McMillan Bloedel Limited et al. In that case, in circumstances very similar to the proceedings in the Lubicon Lake case, an interim injunction was granted by the court based on the Plaintiff's aboriginal rights. The injunction restrained the cutting of trees and logging operations and the operation of machinery which could frighten or disturb animals, birds, or fish on Meares Island, British Columbia.

Mr. Justice Seaton of the British Columbia Court of Appeal stated at page 20 of his Reasons for Judgment:

VAN NESS, FELDMAN, SUTCLIFFE & CURTIS

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"If logging proceeds and it turns out that the Indians have the right to the area with the trees standing, it will no longer be possible to give them that right. The area will have been logged. The Courts will not be able to do justice in the circumstances. That is the sort of result that the Courts have attempted to prevent by granting injunctions."

It is submitted that this reasoning applies precisely to the situation in which the Indians of the Lubicon Lake Band now find themselves. The Courts can no longer do justice in the present circumstances. The animals have gone and the Band's way of life and means of subsistence have effectively been destroyed.^{4/}

4. Proceedings on the merits

The Government of Canada attempts to argue that since the Canadian courts have not rendered a final judgment on the merits of the Lubicon Lake Bands aboriginal or treaty rights, the Committee should not consider the Band's Communications. To this end, Canada asserts that "(t)he Commission has consistently held that remedies that do not in reality offer any chance of redress need not be exhausted."

^{4/} At a minimum, the British Columbia Court of Appeal decision demonstrates that the seeking of interim injunctive relief, by the Band, was not only an appropriate remedy, but the only possible remedy to preserve the subject-matter of the dispute. As for Mr. Justice Forsyth's comment, mentioned on page 6 of Canada's Response, it merely demonstrates that he had no appreciation for the fact that the very survival as well as the way of life of a People were at stake. Mr. Justice Forsyth's observation is even less surprising in the context of his subsequent judgment.

As argued repeatedly by the Band, in this Communication and in its previous Communications, given the devastation to their economic resources resulting from the rapid and extensive energy development in their territory, the only realistic remedy available to the Band, within Canada's legal system, was their application for an interim injunction. Had the Band succeeded in this application, pursuit of a trial on the merits might have offered a realistic means of redressing their claims, although the Band's poverty would have presented a serious impediment to this pursuit. At this point, however, the Band not only lacks financial means, but its wild life resources have been virtually annihilated and as a result, its economy has been destroyed. All domestic remedies available to the Band to protect their means of subsistence and their way of life have now been exhausted. The domestic remedies which remain - i.e., pursuit of a trial on the merits - will not redress the loss of the Band's livelihood.^{5/}

^{5/} Canada cites cases from the European Commission and Court of Human Rights in support of its proposition that, where doubts as to the prospects of success exist, an applicant is not absolved of the duty of exhausting its domestic remedies. Here, however, no doubt exists as to the Lubicon Lake Band's prospects of success. The Supreme Court of Canada has twice refused to entertain the issue of interim injunctive relief sought by the Band. Given this loss, even a favorable decision on the merits will be useless, since by the time it is obtained, the Lubicon Lake Band will be extinct.

5. The scope of aboriginal and treaty rights

It is of course true that the Supreme Court of Canada has not definitively pronounced upon the scope of aboriginal and treaty rights as set out in the Constitution Act, 1982. However, the Lubicon Lake Band placed this issue before the Supreme Court of Canada as the specific basis for its request for interim injunctive relief and yet the Supreme Court of Canada refused to hear the case. This is a denial of an interim remedy which in the case of the Band's means of subsistence and way of life has had the effect of finally determining the issue. As a result, domestic redress is effectively unavailable to the Lubicon Lake Band and its members. Furthermore, with respect to the vital issue of the protection of the Band's livelihood and way of life, redress was so unduly delayed, due to circumstances set forth in the Band's previous Communications, that it should, in any event, be held to constitute an effective denial of domestic redress.

B. Additional Remedies

It is truly unfortunate that Canada has seen fit to distort so vividly a complex and controversial series of events.

In its paragraph on the bottom of page 9 and the top of page 10 of its Response, Canada, implies that there was a firm proposal to the province and that the Band was in agreement with such proposal. Neither is true.

The Band agreed to explore the possibility of negotiations and agreed to disagree on certain of those points even in respect to negotiations. After one meeting with the Province of Alberta in January of 1982, not only the Band but federal officials acknowledged that Alberta was not prepared to enter into discussions which could remotely be qualified as serious. Rather than fulfill its role as trustee, Canada chose to do nothing. Therefore, the Band had no option but to sue in an attempt to preserve its means of subsistence and way of life and to have its rights recognized.

The Federal Government attempts to further cloud the issue by stating that other Native communities have claims which overlap the area claimed by the Band. It neglects to mention that the Lubicon Lake Indian Band was part of the group which filed, with the Department of Indian Affairs and Northern Development, the land claim mentioned. Furthermore, the Big Stone Cree Band has consistently supported the Lubicon Lake Band and its claim even though their common boundary in the land claim area may have to be fixed.

It is also startling to observe how, in referring to the appointment of a special envoy of the Minister, Canada attempts to gloss over some 45 years of virtual inactivity, despite its role as trustee, including its decision to stand on the sidelines during the last three (3) years. Moreover, it is far from certain whether the special envoy's efforts will be successful.

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It should also be noted that, while Canada attempts to argue that the Lubicon Lake Band's claim may not be considered in isolation from the competing claims of the other Native communities (See Response, p. 11), this is precisely what the special envoy will be doing. His position is that they are easily severable.

With respect to the question of on-going discussions with Native peoples, these discussions involve very broad issues which do not address the specific problems of the Lubicon Lake Indian Band.

In conclusion on this point, neither the pending actions nor the appointment of a special envoy by the Minister of Indian Affairs and Northern Development bear upon the question of the destruction of the means of subsistence and the way of life of the Lubicon Lake Band and its members. Nor does the fact that the two (2) court actions are still pending, seeking a determination on the merits, affect the fact that there has been an unreasonable prolongation of the remedy of interim injunction, which has contributed substantially to the delay in the other actions.

C. Right Of Self-Determination

1. Question of Genocide

The Government of Canada raises a preliminary point with regard to the question of genocide, which will be addressed here. In its Supplementary Communication of

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March 27, 1985, page 8, the Lubicon Lake Band stated that "at the very least, cultural, if not physical genocide is successfully being practiced upon the Crees of Lubicon Lake with the concurrence and complicity of the Federal Government of Canada."^{6/}

The United Nations Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" including, "(d)eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part".

The Government of Canada undoubtedly does not consider its actions with respect to the Lubicon Lake Band as acts of genocide or even ethnocide (cultural destruction). ^{7/} However,

^{6/} See also, discussion below.

^{7/} With respect to the effects of cultural genocide, one commentator has stated that:

A culture's destruction is not a trifling matter. A healthy culture is all-encompassing of human lives . . . If people suddenly lose their "primary symbol," the basis of culture, their lives lose meaning. They become disoriented, with no hope. . . The loss and human suffering for those whose culture has been healthy and is suddenly attacked and disintegrated are incalculable.

One should not speak lightly of "cultural genocide" as if it were a fanciful invention.

[footnote continued next page]

the facts set out in the Band's original submission provide a sound basis for arguing that the Provincial Government and the energy corporations, which are its lessees, have attempted to impose conditions of life upon the Band calculated to bring about its destruction. They have acted with a clear intent to destroy both the Band's means of physical subsistence and the cultural base which binds it as a group, and to thereby provide themselves unfettered access to the Band's territory and the oil and gas it contains. With full knowledge that these actions were bringing about the rapid and thorough destruction of the Band's economic and cultural base, Canada has refused to intervene on behalf of these people, as is required by its trust responsibility and as it promised to do 45 years ago when it informed the people of Lubicon Lake that a reserve would be set aside for their benefit. It is arguable that this gross negligence on the part of the Federal Government of Canada

[footnote continued from previous page]

The consequence in real life is far too grim to speak of cultural genocide as if it were a rhetorical device to beat the drums for "human rights." The cultural mode of group extermination is genocide, a crime. Nor should "cultural genocide" be used in the game: "Which is more horrible, to kill and torture; or, remove the reason and will to live?" Both are horrible.

Davis, Robert and Mark Zannis, The Genocide Machine in Canada: The Pacification of the North (Black Rose Books: Montreal, 1973), p. 20.

should constitute a basis for holding it responsible, under international jurisdiction, for the genocidal (or at a minimum, ethnocidal) actions of one of its provinces.

2. Incompatibility Ratione Personae

The Government of Canada asserts that the Lubicon Lake Band is not a "people" withing the meaning of Article 1 of the Covenant on Civil and Political Rights. There appears to be no clear definition of the term "people" within the documents of the United Nations. However, a review of its usage indicates that a "people" is an entity which may exist within the jurisdiction of a "state". See e.g., United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples.

The Lubicon Lake Band is an indigenous, self-identified, relatively autonomous, socio-cultural and economic group. Moreover, the Federal Government of Canada has recognized, through treaty negotiations and the creation of a fiduciary relationship, that indigenous peoples are unique, and in certain respects, separate from other groups within Canada. Therefore, the Lubicon Lake Band respectfully submits that, by virtue of its status as a centuries-old, self-sufficient (until recently) indigenous people, which has occupied its territory since time immemorial, it is deserving of the respect for and the rights of a "people" represented by the principles contained in Article 1 of the International Covenant on Civil

and Political Rights. In particular, it is deserving of the right of self-determination so that it may "freely pursue [its] economic, social and cultural development." Of even greater importance at this point in time, it deserves not to "be deprived of its own means of subsistence."

Canada's argument that the Lubicon Lake Band is only one of 582 Indian Bands in Canada and a sub-group of the Canadian Cree Indians, as well as its argument that the Lubicon Lake territory is claimed by several native communities, is irrelevant to the claim submitted here. First, a group's size should not be allowed to serve as a basis for depriving it of its means of existence. Secondly, the multiple claims in the Lubicon territory have arisen as a result of the fact that the Native communities have been forced from their traditional territories into much smaller areas of land. Furthermore, the Native peoples involved here are willing to cooperate in a settlement. Finally, the Canadian Government should not be allowed to use its inability to resolve these claims as an excuse for its failure to protect the Lubicon People from decimation. For the same reasons, its argument that a ruling by the Committee in favor of the Band could be detrimental to other claimants within the territory should be given no merit. The Band does not request that the Committee issue a determination as to its territorial rights. Rather, it asks only that the Committee assist it in attempting to convince the

Government of Canada that the Band's existence is seriously threatened and that Canada is responsible for the current state of affairs and for their correction.

3. Collective Rights Under the Optional Protocol^{8/}

The Government of Canada argues that communications under the Optional Protocol may only be submitted by individuals and may relate only to violations of individual rights. Two responses to this argument are available. First, groups are clearly composed of individuals. In the present context, an attempt to maintain a distinction between the two is meaningless. If individuals are deprived of their means of subsistence, the group will perish as a physical

^{8/} The Government of Canada raises a question concerning the relationship of the International Indian Treaty Council to Chief Ominayak and the Lubicon Lake Band. The International Indian Treaty Council is identified in the Band's initial communication. The International Indian Treaty Council authored the original communication at the request of and on behalf of the Lubicon Lake Band, on the basis of communications with and documented information provided by Chief Ominayak and other members of the Lubicon Lake Band. The original communication was reviewed by Chief Ominayak and signed by him before its submission to the Committee. The Supplementary Communication was similarly verified by Chief Ominayak before its submission to the Committee. If the Committee has any doubt as to the authenticity of these communications, Chief Ominayak will attest to their truth by affidavit.

The Government of Canada also raises a question with regard to the identity of Chief Ominayak and his qualifications as representative of the Lubicon Lake Band. Chief Iminaijak is the unanimously elected leader of the Lubicon Lake Band. If the Committee feels that any doubt exists with regard Chief Ominayak's representation of the Band or of the injuries suffered by its members, or with regard to the question of whether its members are acting in common, members of the Band will submit affidavits on these points.

entity; if individuals are deprived of their ability to pursue economic, social and cultural development, the group will perish as a cultural entity.

Canada attempts to inject this distinction into the structure of the Covenant by arguing that self-determination, under Article 1 of the Covenant merely sets forth a "contextual background for the exercise of individual human rights." In support of this argument, it cites the Committee's General Comments on Article 1 (CCPR/C/21/Add. 3, 5 October 1984), which hold that self-determination is:

an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.

This Comment, as well as the other points of Canada's argument here, appear to provide more support for the proposition that the Committee should enforce the "collective" rights enumerated in Article 1 of the Covenant than they do for the proposition that the Committee should determine that these rights are outside of its jurisdiction. In particular, if, as Canada argues, the Committee is mandated to protect individual rights, and if the realization of the right of self-determination is "an essential condition for the effective guarantee and observance of" these rights, then the Committee would be very seriously hampered in its duties if it were unable to consider questions relating to the right of self-determination.

Secondly, the preamble to the Optional Protocol begins by stating that it is intended "to further . . . achieve the purposes of the Covenant on Civil and Political Rights . . . and the implementation of its provisions" If Article 1 of the Covenant is read as guaranteeing only group rights and the Optional Protocol is read as protecting only individual rights, as distinct from collective rights, then it must be concluded that the Optional Protocol provides no enforcement for the rights enumerated in Article 1 of the Covenant. However, the Optional Protocol provides, in Article 2, that its procedures are available to "individuals who claim that any of their rights enumerated in the Covenant have been violated" Surely, if it is determined that the group-individual distinction has any merit in this regard, it must be decided that the principles of Article 1 of the Covenant are vested in individuals as members of groups.

D. Misrepresentations

The Government of Canada suggests that the Committee should dismiss the Band's Communications on the basis of alleged misrepresentations made by the Band. In its Communications to the Committee, the Lubicon Lake Band has attempted to state the facts of this case as accurately as possible. It is the Band's position that these facts demonstrate a miscarriage of justice so gross and inexcusable that even the slightest exaggeration on the part of the Band would be superfluous.

The judge presiding on the Lubicon Lake Band's application for an interim injunction specifically mentions in his judgment of November 17, 1983, that one of the alternative foundations of the relief claimed is aboriginal rights. He also refers to S. 35 of the Charter (sic), the Canada Act, 1982. Yet, the presiding judge, in contrast to the presiding judge in the James Bay case and the majority of the British Columbia Court of Appeal in the Meares Island case (McMillan Blevdel Limited v. Mullin, et al.) did not take the aboriginal rights invoked into account in determining whether an interlocutory injunction should issue. Thus, the Band reiterates that aboriginal and treaty rights, although constitutionally enshrined, have no practical significance (at least in Alberta) in the context of protecting such rights from damage or destruction.

With respect to the second alleged misrepresentation, we stress that the Supreme Court of Canada gave no reasons for denying leave to appeal. It is speculation on Canada's part to assert that the Supreme Court of Canada would have considered the application by the lower courts of the law as it relates to interim injunctions.

Furthermore, Canada is incorrect in its assertion that the issues of constitutionality and equality were not before the Supreme Court of Canada. These issues were placed directly before the courts in the Band's written submissions and they were strongly argued oral argument. In the first application,

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applicants specifically submitted that it is of considerable importance that the Supreme Court of Canada determine whether any special or different considerations apply when interim injunctive relief is sought on the basis of constitutional rights or Indian title by Aboriginal Peoples (par. 19, p. 102 of the first application). Moreover, among the grounds on which the first application was based were the scope: of Indian title, of existing aboriginal and treaty rights within the meaning of section 35 of the Constitution Act, 1982, and of rights of Indians under the Alberta Natural Resources Transfer Agreement (Constitution Act, 1930) - first application, p. 30.

With respect to the issue of equality, this question was specifically raised in both the first application (par. 2, p. 5) and in the second application (especially at pp. 23 and ff.). Applicants alledged, in particular, that they were not treated equally under the law, that rights without remedies are not rights at all, and that difficulty in exercising a right is a source of inequality before the law (second application, pp. 23 and 24).

3. the Government of Canada describes the Band's stated concern over the impartiality of the Canadian Courts as "totally unfounded", without ever addressing the clear-cut basis of the Band's concern. The Band's stated concern, which the Band continues to assert, is that "...it is difficult to believe that the court

could be truly impartial given the extremely large sums of money to be gained by the Province and the energy corporations...and taking into account the close business and personal relationships that exist among the corporations, Provincials officials and members of the court". The Government of Canada does not and cannot deny the extremely large sums of money to be gained by the various involved parties, nor do they nor can they deny the close business and personal relationships that exist among the corporations, Provincial officials and members of the court. Rather they chose to simply assert, in spite of these well known facts, that representatives of Government and the judiciary "...have a long history of performing their tasks with integrity and honesty."

Needless to say, the Band's well documented experience with representatives of the Canadian Government does not support the assertion made by the Government of Canada that representatives of the Canadian Government have a long history of performing their tasks with integrity and honesty.

Specifically regarding the basis of the Band's stated concern over the impartiality of the Canadian courts, the facts include:

a. On June 30, 1983, the Alberta Provincial Government filed a sworn affidavit with the Provincial Court of Queen's Bench stating that "the total direct and indirect income or monetary impact to Alberta from an injunction would amount to 450 to 500 million annually...more than 95% of the total income is derived from the gas and oil industry."

b. The judge in the Provincial Court of Queen's Bench who initially heard the Band's application for an injunction was formerly the chief lawyer for the NOVA Corporation, a massive Alberta-based energy conglomerate, partially owned by the Alberta Provincial Government, which controls, among other things, the Husky Oil Company, a major petrochemical facility and gas pipeline construction company in Alberta.

c. The Chief Justice of the Alberta Court of Appeal, who selected himself to chair a panel of three judges established to hear the Band's appeal of the injunction application, is known to have been a close personal friend of Alberta Provincial Premier Peter Lougheed, to have been the Lougheed family lawyer before he became a judge, and to have given Premier Lougheed the Premier's first job as a lawyer in the Calgary law firm of Fennerty, McGillvray and Robertson.

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d. J.M. Robertson, senior partner in the Calgary law firm of Fenerty, McGillvray and Robertson, is both the chief oil company lawyer on the case and also the ex-partner of the Chief Justice who selected himself to hear the Band's appeal.

e. When the Chief Justice died unexpectedly, the man who replaced him as Chairman of the three judge panel selected to hear the Band's appeal, was formerly the President of the governing political party in Alberta, and was also the man who convinced Premier Lougheed to run for Leader of that party.

4. the Government of Canada denies as "completely unfounded" the allegation that "...cultural if not physical genocide is successfully being practiced upon the Cree of Lubicon Lake with the concurrence and complicity of the Federal Government of Canada." This denial totally ignores considerable evidence in support of this allegation which the Government of Canada has not, does not and cannot deny, including:

a. a sworn affidavit filed with the Provincial Court of Queen's Bench on November 24, 1982, in which the Chairman of the Anthropology Department at the University of Calgary concludes:

"There is a very great risk that if development activity, particularly gas and oil exploration, drilling and development, increases...in the traditional hunting/trapping territory

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of the Crees of Lubicon Lake, the result of the continuation of such activities will be the destruction of the society, culture, traditions and way of life of the Crees of Lubicon Lake and the destruction of their economic base."

b. a several month long, independent investigation by the World Council of Churches concluding with a letter to Prime Minister Trudeau in October 1983 which reads, in part:

"In the last couple of years the Alberta Provincial Government and dozens of oil companies have taken actions (in the Lubicon Lake area) which could have genocidal consequences...(the Government of Canada) has the constitutional right, power and responsibility to ensure the general welfare and well being of Canadian Indians...to ensure that traditional and aboriginal rights are upheld and respected... (and)...to ensure the just and equitable settlement of legitimate Indian rights and claims...the fate of the Lubicon Lake people is clearly and unavoidably (in the hands of the Government of Canada)...and... disasterous consequences can be avoided only by...immediate (Federal Government) action."

c. a letter from the Federal Minister of Indian Affairs Minister to his Provincial Government counterpart, dated February 17, 1984, which reads, in part:

"I must point out, that within the last few months, the Band's situation has become progressively worse. As a result of industrial development in the Lubicon region, the autumn harvest

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was negligible. The threat to the Band's traditional lifestyle is even more pronounced. If this Band is to survive as a group and to preserve its identity, a reserve is desperately needed."

d. an independent investigation by senior Canadian Church leaders concluding with a public statement issued on March 29, 1984, which reads, in part:

"We wish to report that we found the well documented allegations presented to us are substantially correct. In the short time we were there, the violation of human rights became apparent to us. The traditional economy, which we believe was intact a few years ago, is in a state of ruin. The trust and confidence in the social structure of the Band and in the elders is being severely tried. Everyone is very confused about the sudden lack of control over their lives. Unity amongst the people is being threatened from without. We found that the traditional lifestyle of the Lubicon Lake Cree is in serious jeopardy in light of rapid encroachment of oil and gas development, all without the people's consent. Traditional hunting and trapping trails are criss-crossed by private oil company roads protected by gates and no trespassing signs. We found ourselves subjected to the harassment that Band members say happens to them continually...we wish to stress that the legal responsibility for the Lubicon Lake Band lies squarely with the Federal Government by virtue of the BNA Act and the (Canadian) constitution. We urge it to immediately begin serious negotiations with the Band to ensure that their traditional and aboriginal rights are respected and to provide the necessary funding so that lack of financial resources does not remain a barrier to the Band pursuing its legitimate rights through the legal system." (Emphasis added.)

e. a feature story prepared and published in the April 7, 1984, edition of the Toronto Globe and Mail newspaper concluding with an editorial which reads, in part:

"Indian trapping incomes have been cut by more than half, the food for which they hunted has vanished -- this year they harvested three moose where three years ago they got 120. Their aboriginal way of life has been virtually destroyed. Meaner treatment of helpless people could scarcely be imagined...If a scrap of decency exists in Ottawa and Edmonton, a just settlement will be sought immediately."

"There is little doubt the Lubicons face terrible social problems. Their culture is under stress. But this is caused more by an unresolved land claim and not, as the (World Council of Churches) claims, by a Province with 'genocidal' tendencies... negotiating land claims is a responsibility of the Federal Government."

f. an article which appeared in the June 5, 1984, edition of the New York Times, quoting a well known and highly regarded anthropologist who visited the area and studied the situation, which reads, in part:

"James Smith, curator of North American ethnology for the Museum of the American Indian in New York, does not apply the term genocide to the (Lubicon Lake) situation. He says the Indians are victims of 'ethnocide', which he defines as an attempt 'to tear the very fabric of the meaning of life apart'."

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g. a letter to the Federal Minister of Multi-Culturalism from the Human Rights Unit of the Anglican Church of Canada, dated October 10, 1984, which reads, in part:

"This letter is to draw your attention to the situation of the Lubicon Lake Band which causes deep resentment and anger to this unit. It is a story of political neglect and bureaucratic deceit extending back for more than 40 years. While the Provincial Government of Alberta may be the major culprit, the past actions of the Federal Government and its officials can justifiably be termed irresponsible, unfair, uncaring and at times even fraudulent, as personnel of the Department of Indian Affairs have in retrospect admitted...In light of the dreadful and unjust treatment that the Band has received, it is not too strong a statement to say that the consequences are genocidal...A reserve is essential for the Band's survival. The oil companies are only doing what the Government of Alberta permits and it (the Government of Alberta) is motivated by the desire for gas and oil royalties. We are sure that you will agree that, under the Canadian constitution, it is the responsibility of the Federal Government to look after the Indians."

h. a statement made on February 22, 1985, by Federal NDP Indian Affairs Critic Jim Manly, following a visit to the area, which reads, in part:

"Although both Federal and Provincial Governments have been told about the growing danger to the Lubicon people, industrial development continues with no attempt to provide the Lubicon people with an adequate land base. That being the case, I can only

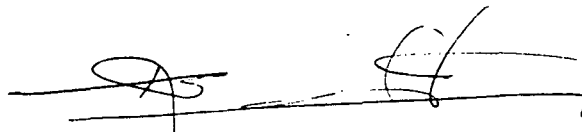
VAN NESS, FELDMAN, SUTCLIFFE & CURTIS

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conclude that the destruction of their
economy and the devastation of their
way of life is deliberate. Unless
this process is reversed, the end
result will be the death of the
Lubicon Indians as a people."
(Emphasis added.)

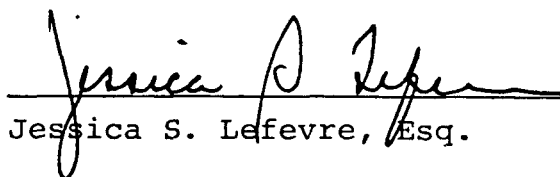
The author of this communication is prepared to provide further information or clarification which may be desired.

Submitted by:



Bernard Ominayak
Chief of the Lubicon Lake Band
Little Buffalo Lake
Alberta, Canada

Prepared with the assistance of:



Jessica S. Lefevre, Esq.

EXTERNAL AFFAIRS



AFFAIRES EXTÉRIEURES

TO
A The Under-Secretary of State for
External Affairs, OTTAWA (IMU)

FROM
De The Permanent Mission of Canada
GENEVA

REFERENCE
Référence

SUBJECT
Sujet Human Rights Committee: Communication
No.167/1984 (Lubicon Band)

SECURITY
Sécurité Unclassified

DATE July 16, 1985

NUMBER
Numéro 4977

FILE	DOSSIER
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MISSION	45-13-2-Lubicon band

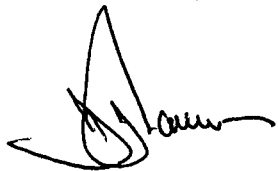
ENCLOSURES
Annexes

DISTRIBUTION

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Justice Ott/
Low

... Please find attached a copy of Note
No. G/SO 215/51 CANA (38) 167/1984 received from the
Human Rights Center on July 15, 1985, together with a
copy of the comments submitted to the committee by
Mr. Bernard Ominayak.


The Permanent Mission

301: 29 1985

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LE 26/6.

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External Affairs
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Affaires extérieures
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MESSAGE

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DRAFTER/RÉDACTEUR	DIVISION/DIRECTION	TELEPHONE	APPROVED/APPROUVÉ
JACQUELINE CARON/mp	IMU	2-8040	R.M. MIDDLETON
SIG			SIG

FOOTNOTES

1. Möse, E. and Opsahl, T., "The Optional Protocol to the International Covenant on Civil and Political Rights" (1981), 21 Santa Clara Law Review 271 at 303.
2. Trindade, A.A. Cançado, "Exhaustion of Local Remedies Under the United Nations Covenant on Civil and Political Rights and its Optional Protocol" (1979), 28 International and Comparative Law Quarterly 734 at 755; Tardu, M.E., Human Rights: The International Petition System, Dobbs Ferry, New York: Oceana Publications, Inc., 1980, Vol. 2, Part I, at 49.
3. Emerson, R., "Self Determination" (1971), 65 American Journal of International Law 459 at 472.
4. Möse, E. and Opsahl, T., supra note 1, at 299-302; Schwelb, E., "The International Measures of Implementation of the International Covenant on Civil and Political Rights and the Optional Protocol" (1977), 12 Texas International Law Journal 141 at 182.



External Affairs
Canada

Affaires extérieures
Canada

MESSAGE

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Accession/Référence
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	---COMITE DES DROITS DE L HOMME: CAS LUBICON LAKE BAND (167/1984).			
	PRIERE DE REpondre AU SECRETARIAT EN VOUS REFERANT A NOTRE			
	BELINO EN REF.			

DRAFTER/RÉDACTEUR	DIVISION/DIRECTION	TELEPHONE	APPROVED/APPROUVÉ
JACUQUELINE CARON/mb	IMU	2-8040	HW RICHARDSON
SIG			SIG



TO/A JLO/Kirsch (via JG)
FROM/DE JLO/Swords

REFERENCE •
RÉFÉRENCE

SUBJECT • Lubicon Lake Band
SUJET

Security/Sécurité
RESTRICTED
Accession/Référence
402287
File/Dossier
Lubicon Lake Band 45-CDA-13-1-3
Date
June 14, 1985
Number/Numéro
JLO-866

ENCLOSURES
ANNEXES

DISTRIBUTION

I received a call late on May 29, 1985 from Martin Low
(Dept. of Justice)

The section was one we had proposed
that argued essentially that the Band was claiming
property rights, title to certain lands, under the guise
of a claim to self-determination and the International
Covenant on Civil and Political Rights (ICCPR) does not
contain any right to property. Therefore, their
submission was inadmissible rationae materiae.

2. I had previously heard that the Dept. of Indian and
Northern Affairs was having difficulty with this
proposition due to the type of claim the band is making
domestically and because John Tait at the Dept. of Justice

3. In response I indicated (1) we had made the argument
in the Denny case albeit in somewhat different terms and
(2) the concept of property rights could encompass more
than legal title in the form of a deed to land, i.e. the
very type of rights Indian bands claim as aboriginal
title. I queried whether it might not be possible to
reword the section if the problem was simply that it
appeared we were arguing that the property rights claimed
by the band was "deed" title.

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- 2 -

RESTRICTED

4. This apparently was not satisfactory due to the unique nature of the concept of aboriginal title and since the Dept. of Justice [REDACTED]
[REDACTED]

5. After consultation with J. Gaudreau (unfortunately JCX, JCD and yourself were in a meeting), I agreed to [REDACTED] on condition that Dept. of Justice provided us with a written explanation of their position. I made it clear that we might wish to return to our argument at the next stage of the complaint -- the merits -- i.e. the complaint is ruled admissible. I also indicated that we were agreeing, primarily because of the urgency of getting the Canadian response to the Human Rights Commission. In this regard, you should note that Canada's response was due in January. We promised it in time for consideration at the Human Rights Committee's July meeting and the Centre for Human Rights recently sent Canada a note pointing out that if they did not receive Canadian response by the end of May it would be too late for the July meeting. Canada is frequently late in providing its responses and we (JLO) have reason to believe the Committee's patience is taxed to the point where there is a genuine risk of a ruling on admissibility in the absence of our submission.

6. I have subsequently reminded Mr. Low of their commitment to provide us with a written explanation of their position.

7. The intricacies of the relation between aboriginal title and a right to property and their relation to self-determination in the ICCPR is an issue we cannot neglect. We may not be forced to address it in the Lubicon Lake case because the complaint may well be ruled inadmissible (our case is strong on the failure to exhaust domestic remedies). Nevertheless to avoid any last minute differences of opinion on difficult legal questions, we should have a thoroughly considered opinion and one which addresses the position formulated by Dept. of Justice.

8. If we do not receive a written legal opinion from the Dept. of Justice by mid-June, I believe it important that a formal written request be sent underlining that such was the condition of our agreement to [REDACTED]
[REDACTED]

OFFICE DES NATIONS UNIES A GENÈVE

CENTRE POUR LES DROITS DE L'HOMME



UNITED NATIONS OFFICE AT GENEVA

CENTRE FOR HUMAN RIGHTS

Télégrammes: UNATIONS, GENÈVE

Télex: 28 98 96

Téléphone: 34 80 11 31 02 11

RÉF. N°:

(à reporter dans la réponse)

G/SO 215/51 CANA (3)

167/1984

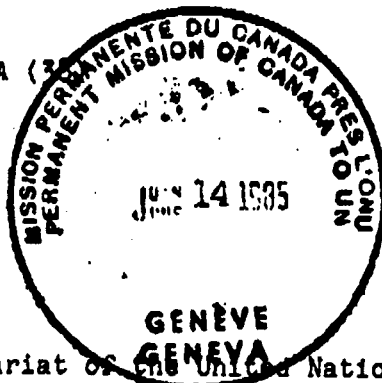
Palais des Nations

CH - 1211 GENÈVE 10



45-13-2 (Lupinm).

2/2



The Secretariat of the United Nations (Centre for Human Rights) presents its compliments to the Permanent Mission of Canada to the United Nations Office at Geneva and has the honour to acknowledge receipt of the Permanent Mission's note No. 28, dated 31 May 1985, addressed to the Secretary-General, enclosing the observations of the Government of Canada relating to the admissibility of communication No. 167/1984, submitted to the Human Rights Committee by Bernard Ominayak, Chief of the Lubicon Lake Band, under the Optional Protocol to the International Covenant on Civil and Political Rights.

The State party's observations will be brought to the attention of the Human Rights Committee.

The Secretariat has noted that pages 8, 9 and 13 of the observations contain footnote indications. The text, as received, does not, however, contain any footnotes.

12 June 1985

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FILE	DOSSIER
45-CDP-13-1-3-Lubicon Lake Band	

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PERMANENT MISSION GENEVA

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External Affairs
Canada

Affaires extérieures
Canada

J.C.

MESSAGE

MGTC/JOURNAL/CIRC/DOSSIER

Accusation/Référence

File/Dossier

45-13-2 (LUBICON LAKE BAND)

PAGE 1 OF 2

**ACTION
SUITE A DONNER**

Align first character of Security Classification under this arrow
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SECURITY
SECURITÉ

UNCLASSIFIED

FACSIMILE

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FM/DE

FM GENEV YTGR-4099 17JUNE85

TO/A

TO EXTOTT/IMU

INFO

INFO JUSTICE OTT/LOW DE OTT

DISTR

REF

DISTR JLO

SUBJ/SUJ

rip 170 1279
19 juin 85

---CENTRE FOR HUMAN RIGHTS - COMMUNICATION NO. 167/1984

LUBICON LAKE BAND

ATTACHED IS A NOTE RECD FROM THE CENTRE FOR HUMAN RIGHTS
DATED 12 JUNE, NO G/SO 215/51 CANA (38), RE LUBICON LAKE BAND.

GVA003/15

1/2

fz

19 JUN 1985 09 12

DRAFTER/RÉDACTEUR

DIVISION/DIRECTION

TELEPHONE

APPROVED/APPROUVÉ

SIG

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000260

ACTION
SUITE A DONNER

J.C.
You "forgot" this in my office
file
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UNCLASSIFIED

FM GENEV YTGR3819 05JUN85

TO EXTOTT IMU

DISTR JLO

ACC	FILE	LOSS
45-20A-13-1-3-Lubicon Lake Band		

---HUMAN RIGHTS CTTEE:COMMUNICATION 167-1984(LUBICON)

TEXT OF GOVT REPLY WAS TRANSMITTED TO HUMAN RIGHTS CENTER UNDER
DIPLO NOTE DATED 31MAY AND DELIVERED BY HAND ON JUNE3.

2.TEXT REFERS TO FOTTNOTES NOT/NOT RECD.WE ASSURED CENTER
THESE WILL BR PROVIDED ASAP(TRUST THEY ARE SENT BY BAG).IN
MEANTIME,CENTER IS TRANSLATING AND REPRODUCING TEXT OF REPLY.

UUU/125 051455Z YTGR3819



JLO/J. GAUDREAU/2-1360/OL

TO/À : FILE (via P. Kirsch, JCD)
FROM/DE : JLO/J. Gaudreau

REFERENCE • Telegram IMU-9355 of 31 May
RÉFÉRENCE
SUBJECT • HUMAN RIGHTS COMMITTEE: OPTIONAL PROTOCOL:
SUJET • COMMUNICATION No. 67/1984: LUBICON LAKE BAND

Security/Sécurité
UNCLASSIFIED
Accession/Référence
395460.
File/Dossier
45-CDA-13-1-3-LUBICON Lake Band.
Date
June 4, 1985
Number/Numéro
JLO-822

ENCLOSURES
ANNEXES

DISTRIBUTION

SIS
IMU
JUSTICE/
Erit Weiser
JLO/CS

On Monday morning June 3, I received a telephone call from Harvey Goldberg (phone 4-7213) of the office of Jim Lakey, Director, Policy Planning and Development, Corporate Policy Sector, Department of Indian and Northern Affairs (phone 7-0459).

2. Goldberg informed me that following discussions they had on Friday May 31 with, inter alia, John Tait ADM (Public Law), Department of Justice (phone 6-4947), it was agreed (confirmed) that INA, will submit the text of Canada's observations on the admissibility of the Lubicon Lake Band complaint to minister Crombie for his information only, not for formal approval.

3. As a consequence, it was possible to instruct the Permanent Mission in Geneva to deliver the said observations immediately under cover of a diplomatic note.

4. I informed Henry Richardson (IMU) who undertook to notify Geneva accordingly by telephone.

Jacques Gaudreau
Legal Operations Division

P.S. (1) Henry Richardson informed me subsequently that he had been in contact with Deputy Permanent Representative F. Tanguay who had told him the note would be forwarded to the Secretariat on June 3.

(2) At JCD's request, I passed all of this information to Martin Low in Justice (phone 2-1027) who seemed satisfied with these developments. He said it had been Tait's impression on Friday however that INA wanted to clear (?) the text with the local MP before the Canadian Mission in Geneva could be given the authorization to deliver the note. I said that it would be odd to seek concurrence from a MP while the INA minister himself was not asked to concur. I emphasized that in any event, Goldberg had made no mention of this to me when we had spoken earlier in the morning.



JLO/J. GAUDREAU/2-1360/OL

TO/A FILE (through P. *Kirsch*)
FROM/DE • JLO/J. Gaudreau

REFERENCE • telegram IMU-9355 31 May 1985
RÉFÉRENCE
SUBJECT • HUMAN RIGHTS COMMITTEE: OPTIONAL PROTOCOL:
SUJET • COMMUNICATION NO. 167/1984: LUBICON LAKE BAND

Security/Sécurité
UNCLASSIFIED
Accession/Référence
395462
File/Dossier
45-CDA-13-1-3-LUBICON
Date
June 3rd, 1985
Number/Numéro
JLO-813

ENCLOSURES
ANNEXES

DISTRIBUTION

WITH ATT.

IMU
SIS
JLOC

Attached is the text of the observations of the Government of Canada that Colleen Swords (JLO) was instructed to take to the Canadian Mission in Geneva on June 3 (see telegram under reference).


Jacques Gaudreau
Legal Operations Division

31 May 1985

RESPONSE OF THE GOVERNMENT OF CANADA
RESPECTING THE COMMUNICATIONS DATED
FEBRUARY 14, 1984 AND MARCH 27, 1985 FROM CHIEF BERNARD
OMINAYAK AND THE LUBICON LAKE BAND TO THE HUMAN RIGHTS COMMITTEE

I. General

The Secretary-General of the United Nations, in his note No. G/SO 215/51 CANA (38), 167/1984 dated November 21, 1984 requested Canada's comments on a communication submitted on February 14, 1984 to the Human Rights Committee by Chief Ominayak and the Lubicon Lake Band. By note dated April 4, 1985 the Secretariat of the United Nations (Centre for Human Rights) transmitted to the Permanent Mission of Canada to the United Nations at Geneva a supplement dated March 27, 1985 to the original communication submitted by Chief Ominayak and the Lubicon Lake Band. In the communications, Chief Ominayak alleges that Canada is in breach of Article 1 of the International Covenant on Civil and Political Rights because of Canada's alleged denial of the rights of the Lubicon Lake Band of self-determination and to freely dispose of its natural wealth and resources for its own ends.

II. Inadmissibility Of Chief Ominayak's Communications

The communications submitted to the Human Rights Committee raise issues relating to the exhaustion of domestic remedies, the scope of the right of self-determination and the identity and status of the communicant and victim.

-2-

A. Failure To Exhaust Domestic Remedies

The author of the communication has failed to exhaust all available domestic remedies as required by Article 5, paragraph (2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights.

1. Remedies Commenced By The Lubicon Lake Band Have Not Been Exhausted

Article 5(2)(b) of the Optional Protocol provides that the Committee shall not consider a communication from an individual unless all available domestic remedies have been exhausted, although the Committee may consider a communication if "the application of the remedies is unreasonably prolonged." It is the position of the Government of Canada that the Lubicon Lake Band has not pursued to completion domestic remedies commenced by it and that responsibility for any delays in the application of such remedies does not lie with the Government of Canada.

Lubicon Lake Band suing in its own legal right, and Chief Ominayak suing in his personal capacity, and with other Band Councillors in a representative capacity, have initiated three different legal procedures as indicated in the communication dated February 14, 1984 (pages 4-6). For convenience hereafter, the Band will be described as the litigant

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with carriage of the proceedings. Only the litigation concerning the caveat filed by the Band has been finally determined. Two other legal actions, one in the Federal Court of Canada and one in the Alberta Court of Queen's Bench, are pending.

The remedies sought by the Lubicon Lake Band include, in the provincial court action, a permanent injunction enjoining the defendant corporations from conducting further oil exploration activities, and in both actions, damages and a declaration that the Band has subsisting Indian title over specific lands and natural resources based on treaty and aboriginal rights. With respect to the Federal Court action, either party has a right of appeal to the Federal Court of Appeal and from there to the Supreme Court of Canada, provided leave is obtained. A decision of the Alberta Court of Queen's Bench may be appealed by either party to the Provincial Court of Appeal and from there to the Supreme Court of Canada, assuming once again that leave is granted. No court has yet had the opportunity to decide on the substantive issues involved in the Band's claims or therefore, to make any corresponding orders.

With regard to the Federal Court action referred to in the author's communication dated February 14, 1984 at pages 4-5, the Band and its experienced legal

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advisors in April 1980, sought to sue the Province of Alberta and private corporations in proceedings in the Federal Court of Canada. In the circumstances of this case, neither the Province nor private entities could have been sued as defendants in the Federal Court of Canada; pursuant to the Federal Court Act, that Court has jurisdiction only in actions against the Crown in right of Canada, including Crown corporations such as Petro-Canada. This jurisdictional issue was conclusively determined by the Supreme Court of Canada in 1976 in the case of Quebec North Shore Paper Co. v. C.P. Ltd. [1977], 2 S.C.R. 1054. As a result of this case, it was clearly the provincial court that had jurisdiction in the Band's action against the Province of Alberta and private corporations.

Rather than reconstitute the proceedings in the proper forum, the Band contested interlocutory proceedings brought by these defendants concerning the issue of jurisdiction. These interlocutory proceedings resulted in a determination against the Band in November 1980. An appeal by the Band from the decision of the Federal Court was dismissed by the Federal Court of Appeal in May 1981.

The Federal Government filed its defence in the main action within the prescribed time limits on July 29, 1980. It argues that the Band's right to land and

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natural resources derives solely from a treaty concluded in 1899 and that there is no entitlement on the basis of aboriginal rights. The action, however, has been left in abeyance by the Band. As plaintiff, the Band has carriage of the proceedings and the right at any time to take steps to bring the action to a state of readiness for trial.

Following the interlocutory proceedings relating to the jurisdiction of the Federal Court, a new action was instituted on February 21, 1982, against the Province and certain corporate defendants in the Court of Queen's Bench of Alberta. As indicated in the communications, the Band sought an interim injunction. In November 1983, after extensive proceedings, the Band's interim application was dismissed by the Court of Queen's Bench based on the case of Erickson v. Wiggins Adjustments Ltd., [1980] 6 W.R.R. 188 which set out the criteria that must be present for a court to grant an interim injunction. Pursuant to this case, an applicant for an interim injunction must establish:

- (1) that there exists a serious issue to be tried,
- (2) that irreparable harm will be suffered prior to trial if no injunction is granted, and
- (3) that the balance of convenience between the parties favours relief to the applicant.

-6-

The Alberta Court denied the Band's application on the grounds that the Band had failed to prove irreparable harm and that it could be adequately compensated in damages if it was ultimately successful at trial.

At one of the preliminary proceedings prior to the hearing on the application for an interim injunction, the presiding judge, while making clear that he was not attempting to interfere with the rights of the plaintiffs to proceed in whatever fashion they saw fit, suggested that the extensive time and preparation required for the interim injunction hearing "might better be spent in preparation for the trial itself with the trial going forward at the earliest possible date." (Judgment of the Honourable Mr. Justice Forsyth dated March 2, 1983).

Rather than proceed with a trial on the merits, the Band appealed against the dismissal of the interim application. Its appeal was dismissed by the Alberta Court of Appeal on January 11, 1985. The Band's application for leave to appeal the dismissal of the interim injunction to the Supreme Court of Canada was refused on March 14, 1985. Almost two months later, on May 13, 1985, the Supreme Court of Canada denied another request by the Band that the court bend its own rules to rehear the application. The Court upheld

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its well-established rule prohibiting the rehearing of applications for leave to appeal.

It still remains open to the Band, which has carriage of these proceedings, to take measures to prepare the case for trial on the merits, as indeed has been the case since the interlocutory proceedings were first initiated.

After such extensive delays caused by interim proceedings and the contesting of clearly-settled procedural matters of law, the author's claim that the application of domestic remedies is being unreasonably prolonged has no merit. It has been open to the Band as plaintiff to press on with the substantive steps in either of its legal actions so as to bring the matters to trial. It is the position of the Government of Canada that the author cannot rely on the plaintiff's own inaction to claim that the application of remedies have been unreasonably prolonged.

The Committee has considered that the question of admissibility should be interpreted and applied in accordance with the generally accepted principles concerning the matter in the field of human rights. This implies that the practices of similar bodies, particularly those of the European Commission of Human

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Rights under Article 26 of the European Convention, will be of considerable significance.¹

The Commission has consistently held that remedies that do not in reality offer any chance of redress need not be exhausted. On the other hand, the mere existence of doubts as to prospects of success does not absolve an applicant from exhausting a given remedy since it is for the domestic courts to determine the matter in the first instance: Retimag v. Federal Republic of Germany 712/60, 4 Yearbook 384; X and Y v. Belgium 1661/62, 6 Yearbook 360; 9843/82 5 E.H.R.R. 465. Therefore, in X. v. U.K. 6406/73, 3 E.H.R.R. 302, where a question concerning statutory interpretation had not been the subject of any decision by the higher courts, it was incumbent upon the applicant to appeal the matter to the Court of Criminal Appeal, and then if necessary, to the highest court in the land.

By the Band's own submission, (communication dated March 27, 1985 at page 7), the Supreme Court of Canada has not yet interpreted the scope of aboriginal and treaty rights as they are set out in the Constitution Act, 1982. This issue of substance was not before the Supreme Court of Canada when it considered the Band's application for leave to appeal from denial of an interim injunction (discussed infra). In effect, the

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Band is requesting the Committee to conclude that no effective remedies are available because the Band was unsuccessful on the separate question of whether or not it was entitled to an interim injunction pending trial of its action on the merits. It is the position of the Government of Canada that, until there has been a final judicial determination on the Band's rights under the Constitution, there are no grounds for concluding that domestic redress is unavailable or, in the present circumstances, that remedies have been so unduly delayed as to constitute an effective denial of domestic redress.

2. Additional Remedies

The term "domestic remedies", in accordance with the prevailing doctrine of international law, should be understood as applying broadly to all established municipal procedures of redress. Article 2(3)(b) of the Covenant recognizes that in addition to judicial remedies, a State Party to the Covenant can also provide administrative and other remedies.²

Following the filing of its defence in the Federal Court action, the Federal Government proposed late in 1981 that the claim be settled by providing the Band with reserve land pursuant to a treaty concluded in 1899. The conditions proposed by the Province (which

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holds legal title to the lands) were not acceptable to the Band and it accordingly rejected the proposed resolution to the dispute.

The Lubicon Lake Band's claim to certain lands in Northern Alberta is part of an extremely complex situation, that involves competing claims from several other native communities in the area. In June 1980, approximately two months after the Band commenced its action in the Trial Division of the Federal Court, six other native communities filed with the Department of Indian Affairs a separate land claim asserting aboriginal title to lands which overlap with the property sought by the Lubicon Lake Band's claim. Subsequently, in June 1983, the Big Stone Cree Band filed a claim with the Department of Indian Affairs - this time claiming treaty entitlement - to an area which also overlaps with land claimed by the Lubicon Lake Band. The Big Stone Cree Band allegedly represents five of the native communities that filed the June 1980 claim based on aboriginal title.

To deal with this very complex situation, in March 1985 the Minister of Indian and Northern Affairs appointed a former Judge of the British Columbia Supreme Court as a special envoy of the Minister to meet with representatives from the Band, other native communities and the Province, review the

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entire situation and formulate recommendations. A consideration of the Lubicon Lake Band's claim in isolation from the competing claims of the other native communities will jeopardize the domestic remedy of negotiated settlement selected by the latter.

Canada is also taking steps to enhance the local autonomy and self-governing status of native peoples through on-going discussions. Early in April, the Prime Minister of Canada and the Provincial Premiers met with native leaders to discuss entrenching native self-government in the Constitution. These discussions will be continued at a federal-provincial ministerial conference on native rights scheduled for June 5-6, 1985.

With two pending actions by the Band still before the Courts, and the appointment referred to above of a special envoy to assist in solving this extremely complicated dispute, it is the position of the Government of Canada that it has a right to have domestic remedies of a legal and conciliatory character followed to completion prior to the Committee examining the matter. Furthermore, it is Canada's view that it clearly has not been responsible for an unreasonable prolongation of remedies in the circumstances of this case.

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B. Right Of Self-Determination

As a preliminary point, the Government of Canada totally rejects the communicant's contention that genocide is being practiced on the Lubicon Lake Band. The Government of Canada interprets the communications as alleging solely a violation of the right of self-determination as contained in Article 1 of the Covenant. However, if the Committee deems it necessary to consider the issue of genocide, the Government of Canada reserves the right to make submissions on this issue at a later date.

The Government of Canada submits that the communications, as they pertain to the right of self-determination, are inadmissible for two reasons. Firstly, the right of self-determination applies to a "people" and it is the position of the Government of Canada that the Lubicon Lake Band is not a people within the meaning of Article 1 of the Covenant. The communications are therefore incompatible with the provisions of the Covenant and as such, should be found inadmissible under Article 3 of the Protocol. Secondly, communications under the Optional Protocol can only be made by individuals and must relate to the breach of a right conferred on individuals. The present communication relates to a collective right and the author therefore lacks standing to bring a communication pursuant to Articles 1 and 2 of the Optional Protocol.

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1. Incompatibility Ratione Personae

The Government of Canada submits that the Lubicon Lake Band does not constitute a people for the purposes of Article 1 of the Covenant and it therefore, is not entitled to assert under the Protocol the right of self-determination.

In the present state of international law, a thinly scattered minority group living within the midst of a more numerous population grouping and occupying territory co-extensive with that grouping cannot claim to be a people within the meaning of Article 1 of the Covenant.

This principle has been acknowledged by authors commenting on the right of self-determination. Thus, Emerson indicates that:

Where there is such intermingling, no form of self-determination, short of mass migration, can be invoked to satisfy such demands as the minority community may make for recognition of its separate identity.³

The Lubicon Lake Band comprises only one of 582 Indian Bands in Canada and a small portion of a larger group of Cree Indians residing in Northern Alberta. It is therefore the position of the Government of Canada that the Lubicon Lake Indians are not a "people" within the meaning of Article 1 of the Covenant.

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As indicated above, the contested area of land is also the subject of claims by several other native communities in the area, in addition to the Lubicon Lake Band. The dispute is further complicated by reason of individuals who may be claimed as members of more than one Band. This factor is significant because calculation of the size of a land claim is dependent upon the number of members comprising a Band.

These complications highlight the difficulty of defining a people in the present circumstances. Furthermore, a ruling in favour of the Band at this point in time could have the effect of attributing rights to the Lubicon Lake Band over the disputed lands, to the detriment of the other claimants.

2. The Effect Of Collective Rights Under The Optional Protocol

As a preliminary matter, the Government of Canada requests clarification of the status of the International Indian Treaty Council in relation to the present communications. The communication dated February 14, 1984 states at page 1 that "[i]t is authored by the International Indian Treaty Council at the request of Chief Bernard Ominayak and the Cree Band of the Lubicon Lake in Alberta, Canada." If, in fact, the International Indian Treaty Council is the author of the communications, the Government of Canada submits that Articles 1 and 2 of the Optional Protocol, which speak

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of "individuals", do not encompass non-governmental organizations and that therefore, the communications are inadmissible. The Government of Canada requests clarification on the status of the author. However, for the purpose of the present response, the Government of Canada will assume that the author is Chief Ominayak.

(a) Article 1 of the Optional Protocol provides that:

A State party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. (emphasis added)

Further, Article 2 of the Optional Protocol states that "individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies" may complain to the Committee (emphasis added).

Article 1 of the Covenant recognizes that: "all peoples have the right of self-determination" (emphasis added). It is the Government of Canada's view that the right of self-determination, being a collective right, is not in and of itself available to an individual. The Optional Protocol which relates to breaches of rights given to individuals, cannot therefore be invoked.

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The Government of Canada submits that self-determination as contained in Article 1 of the Covenant is not an individual right, but rather provides the necessary contextual background for the exercise of individual human rights. This view is supported by the following phrase from the Committee's General Comments on Article 1 (CCPR/C/21/Add. 3, 5 October 1984) which provides that the realization of self-determination is:

an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. (emphasis added)

The General Comment goes on to recognize that the rights embodied in Article 1 are set apart from, and before, all the other rights in the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. The rights in Article 1, which are contained in Part I of the Covenant are, in the submission of Canada, different in nature and kind from the rights in Part III. The former are collective, the latter individual. Thus, the structure of the Covenant, when viewed as a whole, further supports the argument that the right of self-determination is a collective one available to peoples. As such, it cannot be invoked by an individual under the Optional Protocol.

The Government of Canada contends that the Committee's jurisdiction, as defined by the Protocol, cannot be invoked

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by an individual when the alleged violation concerns a collective right. Therefore, the present communications pertaining to self-determination for the Lubicon Lake Band should be dismissed.

(b) It is the position of the Government of Canada that even if an individual can claim, on behalf of a people, a breach of a collective right under the Optional Protocol, the present communications are incomplete. Where a communication concerns an alleged violation of a collective right, the communication must establish the identity of the communicant and of the alleged victims and whether an individual purporting to act in a representative capacity for the victims has been so accepted by them.

The terms of the communications indicate that Chief Ominayak is claiming a violation of an alleged collective right of the Band. The Government of Canada does not contest the assertion made at page 1 of the communication dated February 14, 1985, that Chief Ominayak is the leader and representative of the Lubicon Lake Band. However, if contrary to the views of Canada, members of the Band can submit a communication as individuals acting in common, the Band has nevertheless failed to establish that its members are in fact acting in common.

The Government of Canada submits that, in the present case, the Committee has to determine, but from the face of the

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communications is unable to assess, the extent to which any individual Band member:

- (1) is actually or potentially a victim of the alleged violation,
- (2) claims to be a victim of the alleged violation for the purposes of the communications, and
- (3) accepts the representative character of the nominal author of the communications⁴ (emphasis added).

The Government of Canada contends that the wording of Articles 1 and 2 of the Optional Protocol does not extend to communications by or on behalf of a group where no individual victims of the alleged violation are shown. The Government of Canada therefore contends that the communications should be declared inadmissible.

C. Misrepresentations

It is the position of the Government of Canada that the communications misrepresent the findings of the Courts which considered the interlocutory proceedings. Furthermore, the communications contain unacceptable statements relating to the integrity and honesty of Canadian Judges, as well as the Canadian Government. These statements are completely unfounded.

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Examples of misrepresentations contained in the communications follow:

- (1) The communication dated February 14, 1984 states at page 5 that among the effects of the Court's decision in dismissing the interim application was that "the aboriginal and treaty rights of the aboriginal peoples of Canada [though] now a constitutionally enshrined right has no practical significance in the context of protecting such rights from damage or destruction." The presiding Judge in his decision did not address the Canadian Constitution. This is a substantive issue which, if the Band takes steps to bring its action on to trial, will be dealt with at a trial on the merits, rather than on an interlocutory application.
- (2) The communication dated March 27, 1985 misrepresents at pages 6 to 8 the issues which were before the Supreme Court of Canada. In denying leave to appeal from the dismissal of the motion for an interim injunction, the Supreme Court of Canada would have considered the application by the lower courts of the law as it relates to interim injunctions (emphasis added). Contrary to the author's communication, constitutional issues relating to aboriginal rights and equality were not before the Supreme Court. These are substantive issues which will be raised if the

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Band takes steps to bring on to trial the substantive issues and addressed at such time.

(3) Page 3 of the communication dated March 27, 1985, slurs government officials and the judiciary by stating that "... it is difficult to believe that the court could be truly impartial given the extremely large sums of money to be gained by the Province and the energy corporations... and taking into account the close business and personal relationships that exists among the corporations, Provincial officials, and members of the court." This is a totally unfounded statement directed at judicial and government representatives who have a long history of performing their tasks with integrity and honesty.

(4) Similarly, page 9 of the communication dated March 27, 1985, alleges that "... cultural, if not physical genocide is successfully being practiced upon the Cree of Lubicon Lake with the concurrence and complicity of the Federal Government of Canada." This allegation is completely unfounded.

The Government of Canada submits that the making of such serious and unsubstantiated allegations are an abuse of the right of submission under the Optional Protocol, and the communications should be dismissed on this basis pursuant to Article 3 of the Protocol.

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III. Conclusion

For the reasons mentioned above, the Government of Canada submits that Chief Ominayak's communications dated February 14, 1984 and November 27, 1985 should be considered inadmissible by the Committee.



External Affairs
Canada

Affaires extérieures
Canada

MESSAGE

Align first character of Security Classification under this arrow
Alignez le premier caractère de la Sécurité sous cette flèche

Accession/Référence
File/Dossier
45-CDA-13-1-3-LUBICON
31 MAY 85 22 12 19 2 10

SECURITY
SÉCURITÉ

R E S T R I C T E D

FM/DE

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TO/A

TO GENEV DELIVERBY 030900

INFO

INFO JUSTOTT/LOW/WEISER PRMNY

DISTR

DISTR JLO IMU SIS JCD

REF

SUBJ/SUJ

---HUMAN RIGHTS CTTEE:LUBICON LAKE BAND

TEXT OF CDAS OBSERVATIONS ON ADMISSIBILITY OF COMMUNICATION 167/1984
HAS NOW BEEN APPROVED BY MINISTER OF JUSTICE AND BY ACTING SSEA.WE
ARE AWAITING MINISTER CROMBIES ENDORSEMENT THAT WE EXPECT BY MONDAY
03JUN.

2.COLLEEN SWORDS OF JLO WHO IS LEAVING FOR GENEV ~~THAT~~ IS TAKING
COPYING OF CDAS RESPONSE WITH HER.SHE WILL TAKE ^{IT} TO YOUR MISSION
03
JUN.

3.GRATEFUL YOU PREPARE COVERING DIPLO NOTE DATED ^{3 JUN} ~~31 MAY~~ (NOTE SHOULD
INDICATE ^{THAT} ~~THE~~ FRENCH VERSION OF CDN OBSERVATIONS IS UNDER PREPARATION
AND WILL BE PROVIDED ONCE COMPLETED) ^{NOTE} DO NOT RELEASE ^{HOWEVER} UNTIL
YOU RECEIVE WORD FROM US THAT MINISTER CROMBIE HAS APPROVED.

4.AS YOU KNOW,AUTHOR OF COMMUNICATIONS MUST BE GIVEN FOUR WEEKS TO
COMMENT ON OBSERVATIONS.HRC WG MEETS 01-05JUL IN GENEV.

5. WOULD SECT WISH US TO CONVEY ADVANCE COPY TO
AUTHOR?

DRAFTER/RÉDACTEUR

DIVISION/DIRECTION

TELEPHONE

APPROVED/APPROUVÉ

JACQUES GAUDREAU/OL

JLO

2-1360

SIC DIRECTOR

Department of Justice / Ministère de la Justice
Canada / Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification - Cote de sécurité
CONFIDENTIAL
File number - numéro de dossier
277269
Date
May 29, 1985

TO/À: DISTRIBUTION

FROM/DE: General Counsel
Human Rights Law Section

cc	DATE
FILE	DOSSIER
45-60A-B-1-3-Lubicon Lake Band	

SUBJECT/OBJET: LUBICON LAKE BAND - COMMUNICATION TO THE
U.N. HUMAN RIGHTS COMMITTEE.

Comments/Remarques

Attached is Canada's response to the communication submitted by the Lubicon Lake Band to the United Nations Human Rights Committee and corresponding Briefing Note.

Canada's response must be delivered to the Committee in Geneva by June 3, 1985. Your Minister's approval is therefore urgently required. Please notify me of your Minister's position by Thursday, May 30, 1985.


D. Martin Low
/mad

Attachment

DISTRIBUTION: Colleen Swords/
Claire Kelly
Dick Nolan

For Information: Martin Freeman
Fred Caron
Lynn Elliott Sherwood

C O N F I D E N T I A L

INTERNATIONAL COVENANT ON CIVIL
AND POLITICAL RIGHTS COMMUNICATION OF
CHIEF BERNARD OMINAYAK ON BEHALF OF THE LUBICON LAKE BAND

ISSUE

Canada's response to a communication submitted to the United Nations Human Rights Committee on behalf of the Lubicon Lake Band, concerning the rights of self-determination and control over natural resources under the International Covenant on Civil and Political Rights.

BACKGROUND

Canada is a party to the International Covenant on Civil and Political Rights and to the Optional Protocol to the International Covenant on Civil and Political Rights.

Under the Optional Protocol, individuals who claim to be victims of a violation by Canada of any of the rights set forth in the Covenant may submit communications (or complaints) to the United Nations Human Rights Committee. Article 1 of the Covenant confers on all peoples the right of self-determination, including a degree of control over natural resources.

Communications are dealt with under a two stage process. First, the Committee ascertains whether they are admissible. The Optional Protocol provides that communications are not admissible if they are anonymous, an abuse of the right of submission or incompatible with the provisions of the Covenant. In addition, the Committee cannot consider any communication until it ascertains that all effective domestic remedies have been exhausted, provided however, that the application of remedies has not been unreasonably prolonged. The Committee requests the views of an interested State Party prior to making a determination on the question of admissibility. The present response by Canada addresses this request.

If the Committee decides that a communication is indeed admissible, it then asks the parties involved to submit pleadings on the merits and thereafter express its views on the matter.

STATUS

Chief Bernard Ominayak is the leader of the Lubicon Lake Band, a group of Cree Indians residing in Northern Alberta. Pursuant to the Optional Protocol, Chief Ominayak, on behalf of the Lubicon Lake Band, alleges that Canada is in breach of Article 1 of the

C O N F I D E N T I A L

C O N F I D E N T I A L

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Covenant. The basis of the Band's allegations are that the province of Alberta has improperly leased the Band's territory to oil companies for the purpose of energy exploration. The communication alleges that the effect of this exploration has been to deny the Band the physical means for it to subsist in its traditional way and to deprive it of the right to dispose of its natural wealth and resources. Without suggesting that these allegations are unfounded, it must be recognized that they represent the Band's perception of an extremely complex factual situation.

The Lubicon Lake Band has initiated three separate legal proceedings in Canadian courts. In this regard, it is requesting the Committee to make an exception to the above-mentioned requirement that all domestic remedies be exhausted prior to filing a communication, on the grounds that the application of such remedies has been unreasonably prolonged.

The first legal proceeding undertaken by the Band involved the filing of a caveat in Alberta on October 27, 1976. The Provincial Government, on March 25, 1977, amended the Land Titles Act retroactive to January 1975 to preclude the filing of caveats on unpatented Crown land, thus rendering the Band's case moot.

An action for title to lands based on treaty and aboriginal rights and damages was brought by the Band on April 25, 1980 in the Federal Court against the Federal Government, the Province of Alberta and several corporations. The two latter defendants successfully contested the jurisdiction of the Federal Court, it being a well-established principle of law that the Federal Court of Canada had jurisdiction only in actions against the Crown in right of Canada (including Crown corporations). The Band nevertheless appealed the decision without success to the Federal Court of Appeal.

The Federal Court action is presently on hold pending the outcome of another action instituted in the Alberta Court of Queen's Bench on February 21, 1982 against the Province and certain corporate defendants. In addition to the remedies sought in the Federal Court action, the Band is also seeking a permanent injunction prohibiting further oil exploration. Pending trial, the Band applied for an interim injunction and has contested proceedings on this interlocutory matter. The application was originally denied on November 17, 1983 by the Court of Queen's Bench. An appeal to the Court of Appeal was dismissed and leave to appeal was denied by the Supreme Court of Canada. Most

C O N F I D E N T I A L

C O N F I D E N T I A L

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recently, on May 13, 1985, the Supreme Court of Canada refused the Band's request to rehear the application for leave to appeal.

The Government of Canada, in its comments on the admissibility of Chief Ominayak's communication, has put forward three main arguments. Firstly, it argues that the communication is inadmissible because the Band has not exhausted domestic remedies and further, that if proceedings have been unreasonably delayed, responsibility for such delays does not lie with the Government of Canada. Rather, they have resulted from the Band's continued pursuit of interlocutory proceedings on well-settled points of law.

Secondly, Canada has taken the position that the Lubicon Lake Band is not a "people" entitled to assert a right of self-determination within the meaning of Article 1 of the Covenant. In this regard, Canada's response notes that the Lubicon Lake Band comprises only one of 582 Indian Bands in Canada and a small portion of a larger group of Cree Indians residing in Northern Alberta.

Lastly, Canada has taken the view that self-determination as contained in Article 1 of the Covenant is a collective right, which provides the contextual background necessary for the exercise of individual human rights. It therefore cannot be the subject of a communication under the Optional Protocol which is confined to complaints by individuals. Even if the collective right of self-determination can be brought under the Optional Protocol, it must be claimed by the members of a group acting in common. The communication does not establish that members of the Lubicon Lake Band are acting in concert.

POINTS TO NOTE

It is a well-established principle of international law that domestic courts must be given an opportunity to resolve internal disputes prior to their being addressed by an international forum. Therefore, it is appropriate for the Government of Canada to insist that the Lubicon Lake Band follow through to completion the domestic legal actions it has commenced.

The plight of the Lubicon Lake Indians has received much sympathetic press. Canada's position that the communication to the Human Rights Committee is inadmissible may spark public criticism.

C O N F I D E N T I A L

C O N F I D E N T I A L

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The matter is an extremely complex one which also involves competing claims for land from six other native communities. The Federal Government is continuing to seek means of resolving the disputes. In this regard, the Minister of Indian and Northern Affairs in March of 1985 appointed David Fulton, a former Judge of the British Columbia Supreme Court, as a special envoy to meet with representatives from the Band, the six native communities and the Province, review the entire situation and make recommendations. The response places some emphasis on this important initiative to resolve the substantive problems that are at the root of this dispute.

Canada's response takes into account and is compatible with initiatives taken in the constitutional debates and negotiations on Indian self-government. Representatives from the Indian communities may nevertheless argue that Canada's submission is at odds with the federal approach in that context.

RECOMMENDATIONS

It is recommended that the Minister approve Canada's response to the communication submitted to the United Nations Human Rights Committee on behalf of the Lubicon Lake Band. The same recommendation is being submitted to the Minister of Indian and Northern Affairs, the Secretary of State for External Affairs and to the Secretary of State.

May 29, 1985

C O N F I D E N T I A L



Department of Justice Ministère de la Justice
Canada Canada

MEMORANDUM/NOTE DE SERVICE

45-CDA-13-1-73

Security Classification - Cote de sécurité
CONFIDENTIAL
File number - numéro de dossier
Date
May 28, 1985

TO/À:

DISTRIBUTION

FROM/DE:

General Counsel
Human Rights Law Section

SUBJECT/OBJET:

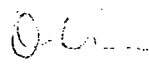
LUBICON LAKE BAND - COMMUNICATION TO THE
U.N. HUMAN RIGHTS COMMITTEE

ACC	102289	DATE
FILE	45-CDA-13-1-3-LUBICON	DOSSIER
	LAKE BAND	

Comments/Remarques

Please find attached a copy of an amended version of Canada's response to the communications of Chief Ominayak and a corresponding briefing note. The response reflects the changes that were discussed at the meeting of May 27, 1985.

In order that this document may be sent to the U.N. Human Rights Committee in Geneva by the end of this week, I would appreciate your comments by Wednesday, May 29, 1985.


D. Martin Low
/mad

DISTRIBUTION: Colleen Swords JLO Martin Freeman JUST
 Claire Kelly INA Ivan Whitehall
 Guy Faggiolo JUST Dick Nolan
 Jacques Gaudreau JLO Fred Caron
 John C. Tait JUST Lynn Elliott Sherwood

C O N F I D E N T I A L

INTERNATIONAL COVENANT ON CIVIL
AND POLITICAL RIGHTS COMMUNICATION OF
CHIEF BERNARD OMINAYAK ON BEHALF OF THE LUBICON LAKE BAND

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Canada's response to a communication submitted to the United Nations Human Rights Committee on behalf of the Lubicon Lake Band, concerning the rights of self-determination and control over natural resources under the International Covenant on Civil and Political Rights.

BACKGROUND

Canada is a party to the International Covenant on Civil and Political Rights and to the Optional Protocol to the International Covenant on Civil and Political Rights.

Under the Optional Protocol, individuals who claim to be victims of a violation by Canada of any of the rights set forth in the Covenant may submit communications (or complaints) to the United Nations Human Rights Committee. Article 1 of the Covenant confers on all peoples the right of self-determination, including a degree of control over natural resources.

Communications are dealt with under a two stage process. First, the Committee ascertains whether they are admissible. The Optional Protocol provides that communications are not admissible if they are anonymous, an abuse of the right of submission or incompatible with the provisions of the Covenant. In addition, the Committee cannot consider any communication until it ascertains that all effective domestic remedies have been exhausted, provided however, that the application of remedies has not been unreasonably prolonged. The Committee requests the views of an interested State Party prior to making a determination on the question of admissibility. The present response by Canada addresses this request.

If the Committee decides that a communication is indeed admissible, it then asks the parties involved to submit pleadings on the merits and thereafter express its views on the matter.

STATUS

Chief Bernard Ominayak is the leader of the Lubicon Lake Band, a group of Cree Indians residing in Northern Alberta. Pursuant to the Optional Protocol, Chief Ominayak, on behalf of the Lubicon Lake Band, alleges that Canada is in breach of Article 1 of the

C O N F I D E N T I A L

C O N F I D E N T I A L

-2-

Covenant. The basis of the Band's allegations are that the province of Alberta has improperly leased the Band's territory to oil companies for the purpose of energy exploration. The communication alleges that the effect of this exploration has been to deny the Band the physical means for it to subsist in its traditional way and to deprive it of the right to dispose of its natural wealth and resources. Without suggesting that these allegations are unfounded, it must be recognized that they represent the Band's perception of an extremely complex factual situation.

The Lubicon Lake Band has initiated three separate legal proceedings in Canadian courts. In this regard, it is requesting the Committee to make an exception to the above-mentioned requirement that all domestic remedies be exhausted prior to filing a communication, on the grounds that the application of such remedies has been unreasonably prolonged.

The first legal proceeding undertaken by the Band involved the filing of a caveat in Alberta on October 27, 1976. The Provincial Government, on March 25, 1977, amended the Land Titles Act retroactive to January 1975 to preclude the filing of caveats on unpatented Crown land, thus rendering the Band's case moot.

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The Federal Court action is presently on hold pending the outcome of another action instituted in the Alberta Court of Queen's Bench on February 21, 1982 against the Province and certain corporate defendants. In addition to the remedies sought in the Federal Court action, the Band is also seeking a permanent injunction prohibiting further oil exploration. Pending trial, the Band applied for an interim injunction and has contested proceedings on this interlocutory matter. The application was originally denied on November 17, 1983 by the Court of Queen's Bench. An appeal to the Court of Appeal was dismissed and leave to appeal was denied by the Supreme Court of Canada. Most

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-3-

recently, on May 13, 1985, the Supreme Court of Canada refused the Band's request to rehear the application for leave to appeal.

The Government of Canada, in its pleadings on the admissibility of Chief Ominayak's communication, has put forward three main arguments. Firstly, it argues that the communication is inadmissible because the Band has not exhausted domestic remedies and further, that if proceedings have been unreasonably delayed, responsibility for such delays does not lie with the Government of Canada. Rather, they have resulted from the Band's continued pursuit of interlocutory proceedings on well-settled points of law.

Secondly, Canada has taken the position that because the Band is seeking title to lands, the communicant's claim to a right of self-determination is in reality a claim for a right to property. The Covenant does not provide for a right to property and therefore cannot be used as the basis for a complaint under the Optional Protocol.

Lastly, Canada has taken the view that self-determination as contained in Article 1 of the Covenant is a collective one, which provides the contextual background necessary for the exercise of individual human rights. It therefore cannot be the subject of a communication under the Optional Protocol which is confined to complaints by individuals. Even if the collective right of self-determination can be brought under the Optional Protocol, it must be claimed by the members of a group acting in common. The communication does not establish that members of the Lubicon Lake Band are acting in concert.

POINTS TO NOTE

It is a well-established principle of international law that domestic courts must be given an opportunity to resolve internal disputes prior to their being addressed by an international forum. Therefore, it is appropriate for the Government of Canada to insist that the Lubicon Lake Band follow through to completion the domestic legal actions it has commenced.

The plight of the Lubicon Lake Indians has received much sympathetic press. Canada's position that the communication to the Human Rights Committee is inadmissible may spark public criticism.

C O N F I D E N T I A L

C O N F I D E N T I A L

-4-

The matter is an extremely complex one which also involves competing claims for land from six other native communities. The Federal Government is continuing to seek means of resolving the disputes. In this regard, the Minister of Indian and Northern Affairs in March of 1985 appointed David Fulton, a former Judge of the British Columbia Supreme Court, as a special envoy to meet with representatives from the Band, the six native communities and the Province, review the entire situation and make recommendations.

RECOMMENDATIONS

It is recommended that the Minister approve Canada's response to the communication submitted to the United Nations Human Rights Committee on behalf of the Lubicon Lake Band. The same recommendation is being submitted to the Minister of Indian and Northern Affairs, the Secretary of State for External Affairs and to the Secretary of State.

May 27, 1985

C O N F I D E N T I A L

RESPONSE OF THE GOVERNMENT OF CANADA RESPECTING THE
COMMUNICATIONS DATED FEBRUARY 14, 1984 AND MARCH 27, 1985 FROM
CHIEF BERNARD OMINAYAK AND THE LUBICON LAKE BAND TO THE HUMAN
RIGHTS COMMITTEE

I. General

The Secretary-General of the United Nations, in his note No. G/SO 215/51 CANA (38), 167/1984 dated November 21, 1984 requested Canada's comments on a communication submitted on February 14, 1984 to the Human Rights Committee by Chief Ominayak and the Lubicon Lake Band. By note dated April 4, 1985 the Secretariat of the United Nations (Centre for Human Rights) transmitted to the Permanent Mission of Canada to the United Nations at Geneva a supplement dated March 27, 1985 to the original communication submitted by Chief Ominayak and the Lubicon Lake Band. In the communications, Chief Ominayak alleges that Canada is in breach of Article 1 of the International Covenant on Civil and Political Rights because of Canada's alleged denial of the rights of the Lubicon Lake Band of self-determination and to freely dispose of its natural wealth and resources for its own ends.

II. Inadmissibility of Chief Ominayak's Communications

The communications submitted to the Human Rights Committee raise issues relating to the exhaustion of domestic

-2-

remedies, the scope of the right of self-determination and the identity and status of the communicant and victim.

A. Failure to Exhaust Domestic Remedies

The author of the communication has failed to exhaust all available domestic remedies as required by Article 5, paragraph (2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights.

1. Remedies Commenced by the Lubicon Lake Band Have Not Been Exhausted

Article 5(2)(b) of the Optional Protocol provides that the Committee shall not consider a communication from an individual unless all available domestic remedies have been exhausted, although the Committee may consider a communication if "the application of the remedies is unreasonably prolonged." It is the position of the Government of Canada that the Lubicon Lake Band has not pursued to completion domestic remedies commenced by it and that responsibility for any delays in the application of such remedies does not lie with the Government of Canada.

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Lubicon Lake Band suing in its own legal right, and Chief Ominayak suing in his personal capacity, and with other Band Councillors in a representative capacity, have initiated three different legal procedures as indicated in the communication dated February 14, 1984 (pages 4-6). For convenience hereafter, the Band will be described as the litigant with carriage of the proceedings. Only the litigation concerning the caveat filed by the Band has been finally determined. Two other legal actions, one in the Federal Court of Canada and one in the Alberta Court of Queen's Bench, are pending.

The remedies sought by the Lubicon Lake Band include, in the provincial court action, a permanent injunction enjoining the defendant corporations from conducting further oil exploration activities, and in both actions, damages and a declaration that the Band has subsisting Indian title over specific lands and natural resources based on treaty and aboriginal rights. With respect to the Federal Court action, either party has a right of appeal to the Federal Court of Appeal and from there to the Supreme Court of Canada, provided leave is obtained. A decision of the Alberta Court of Queen's Bench may be appealed by either party to

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the Provincial Court of Appeal and from there to the Supreme Court of Canada, assuming once again that leave is granted. No court has yet had the opportunity to decide on the substantive issues involved in the Band's claims or therefore, to make any corresponding orders.

With regard to the Federal Court action referred to in the author's communication dated February 14, 1984 at pages 4-5, the Band and its experienced legal advisors in April 1980, sought to sue the Province of Alberta and private corporations in proceedings in the Federal Court of Canada. In the circumstances of this case, neither the Province nor private entities could have been sued as defendants in the Federal Court of Canada; pursuant to the Federal Court Act that Court has jurisdiction only in actions against the Crown in right of Canada, including Crown corporations such as Petro-Canada. This jurisdictional issue was conclusively determined by the Supreme Court of Canada in 1976 in the case of Quebec North Shore Paper Co. v. C.P. Ltd. [1977], 2 S.C.R. 1054, and the legal position in Canada on this point is well-known.

Rather than reconstitute the proceedings in a forum that had jurisdiction over the defendant

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Province and the defendant corporations, the Band contested interlocutory proceedings brought by these defendants concerning the issue of jurisdiction. These interlocutory proceedings resulted in a determination against the Band in November 1980. An appeal by the Band from the decision of the Federal Court was dismissed by the Federal Court of Appeal in May 1981.

The Federal Government filed its defence in the main action within the prescribed time limits on July 29, 1980. It argues that the Band's right to land and natural resources derives solely from a treaty concluded in 1899 and that there is no entitlement on the basis of aboriginal rights. The action, however, has been left in abeyance by the Band. As plaintiff, the Band has carriage of the proceedings and the right at any time to take steps to bring the action to a state of readiness for trial.

Following the interlocutory proceedings relating to the jurisdiction of the Federal Court, a new action was instituted on February 21, 1982, against the Province and certain corporate defendants in the Court of Queen's Bench of Alberta. As indicated in the communications, the Band sought an interim injunction. In November

-6-

1983, after extensive proceedings, the Band's interim application was dismissed by the Court of Queen's Bench based on the case of Erickson v. Wiggins Adjustments Ltd., [1980] 6 W.R.R. 188 which set out the criteria that must be present for a court to grant an interim injunction. Pursuant to this case, an applicant for an interim injunction must establish:

- (1) that there exists a serious issue to be tried,
- (2) that irreparable harm will be suffered prior to trial if no injunction is granted, and
- (3) that the balance of convenience between the parties favours relief to the applicant.

The Alberta Court denied the Band's application on the grounds that the Band had failed to prove irreparable harm and that it could be adequately compensated in damages if it was ultimately successful at trial.

At one of the preliminary proceedings prior to the hearing on the application for an interim

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injunction, the presiding judge, while making clear that he was not attempting to interfere with the rights of the plaintiffs to proceed in whatever fashion they saw fit, suggested that the extensive time and preparation required for the interim injunction hearing "might better be spent in preparation for the trial itself with the trial going forward at the earliest possible date." (Judgment of the Honourable Mr. Justice Forsyth dated March 2, 1983).

Rather than proceed with a trial on the merits, the Band appealed against the dismissal of the interim application. Its appeal was dismissed by the Alberta Court of Appeal on January 11, 1985. The Band's application for leave to appeal the dismissal of the interim injunction to the Supreme Court of Canada was refused on March 14, 1985. Almost two months later, on May 13, 1985, the Supreme Court of Canada denied another request by the Band that the court bend its own rules to rehear the application. The Court upheld its well-established rule prohibiting the rehearing of applications for leave to appeal.

It still remains open to the Band, which has carriage of these proceedings, to take measures to prepare the case for trial on the merits, as

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indeed has been the case since the interlocutory proceedings were first initiated.

After such extensive delays caused by interim proceedings and the contesting of clearly-settled procedural matters of law, the author's claim that the application of domestic remedies is being unreasonably prolonged has no merit. It has been open to the Band as plaintiff to press on with the substantive steps in either of its legal actions so as to bring the matters to trial. It is the position of the Government of Canada that the author cannot rely on the plaintiff's own inaction to claim that the application of remedies have been unreasonably prolonged.

The Committee has considered that the question of admissibility should be interpreted and applied in accordance with the generally accepted principles concerning the matter in the field of human rights. This implies that the practices of similar bodies, particularly those of the European Commission of Human Rights under Article 26 of the European Convention, will be of considerable significance.¹

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The Commission has consistently held that remedies that do not in reality offer any chance of redress need not be exhausted. On the other hand, the mere existence of doubts as to prospects of success does not absolve an applicant from exhausting a given remedy since it is for the domestic courts to determine the matter in the first instance: Retimag v. Federal Republic of Germany 712/60, 4 Yearbook 384; X and Y v. Belgium 1661/62, 6 Yearbook 360; 9843/82 5 E.H.R.R. 465. Therefore, in X. v. U.K. 6406/73, 3 E.H.R.R. 302, where a question concerning statutory interpretation had not been the subject of any decision by the higher courts, it was incumbent upon the applicant to appeal the matter to the Court of Criminal Appeal, and then if necessary, to the highest court in the land.

By the Band's own submission, (communication dated March 27, 1985 at page 7), the Supreme Court of Canada has not yet interpreted the scope of aboriginal and treaty rights as they are set out in the Constitution Act, 1981. This issue of substance was not before the Supreme Court of Canada when it considered the Band's application for leave to appeal from denial of an interim injunction (discussed infra). In effect, the Band is requesting the Committee to conclude that

-10-

no effective remedies are available because the Band was unsuccessful on the separate question of whether or not it was entitled to an interim injunction pending trial of its action on the merits. It is the position of the Government of Canada that, until there has been a final judicial determination on the Band's rights under the Constitution, there are no grounds for concluding that domestic redress is unavailable or, in the present circumstances, that remedies have been so unduly delayed as to constitute an effective denial of domestic redress.

2. Additional Remedies

The term "domestic remedies", in accordance with the prevailing doctrine of international law, should be understood as applying broadly to all established municipal procedures of redress. Article 2(3)(b) of the Covenant recognizes that in addition to judicial remedies, a State Party to the Covenant can also provide administrative and other remedies.²

Following the filing of its defence in the Federal Court action, the Federal Government proposed late in 1981 that the claim be settled by providing the Band with reserve land pursuant

-11-

to a treaty concluded in 1899. The conditions proposed by the Province (which holds legal title to the lands) were not acceptable to the Band and it accordingly rejected the proposed resolution to the dispute.

The Lubicon Lake Band's claim to certain lands in Northern Alberta is part of an extremely complex situation, that involves competing claims from several other native communities in the area. In June 1980, approximately two months after the Band commenced its action in the Trial Division of the Federal Court, six other native communities filed with the Department of Indian Affairs a separate land claim asserting aboriginal title to lands which overlap with the property sought by the Lubicon Lake Band's claim. Subsequently, in June 1983, the Big Stone Cree Band filed a claim with the Department of Indian Affairs - this time claiming treaty entitlement - to an area which also overlaps with land claimed by the Lubicon Lake Band. The Big Stone Cree Band allegedly represents five of the native communities that filed the June 1980 claim based on aboriginal title.

To deal with this very complex situation, in March 1985 the Minister of Indian and Northern

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Affairs appointed a former Judge of the British Columbia Supreme Court as a special envoy of the Minister to meet with representatives from the Band, other native communities and the Province, review the entire situation and formulate recommendations. A consideration of the Lubicon Lake Band's claim in isolation from the competing claims of the other native communities will jeopardize the domestic remedy of negotiated settlement selected by the latter.

Canada is also taking steps to enhance the local autonomy and self-governing status of native peoples through on-going discussions. Early in April, the Prime Minister of Canada and the Provincial Premiers met with native leaders to discuss entrenching native self-government in the Constitution. These discussions will be continued at a federal-provincial ministerial conference on native rights scheduled for June 5-6, 1985.

With two pending actions by the Band still before the Courts, and the appointment referred to above of a special envoy to assist in solving this extremely complicated dispute, it is the position of the Government of Canada that it has a right to have domestic remedies of a legal and

-13-

conciliatory character followed to completion prior to the Committee examining the matter. Furthermore, it is Canada's view that it clearly has not been responsible for an unreasonable prolongation of remedies in the circumstances of this case.

B. Right of Self-Determination

As a preliminary point, the Government of Canada totally rejects the communicant's contention that genocide is being practiced on the Lubicon Lake Band. The Government of Canada interprets the communications as alleging solely a violation of the right of self-determination as contained in Article 1 of the Covenant. However, if the Committee deems it necessary to consider the issue of genocide, the Government of Canada reserves the right to make submissions on this issue at a later date.

The Government of Canada submits that the communications, as they pertain to the right of self-determination, are inadmissible for two reasons. First, the communications are incompatible ratione materiae with the provisions of the Covenant because the right of self-determination, as recognized by Article 1 of the Covenant, is not applicable in the present case. The communication should therefore be

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found inadmissible under Article 3 of the Optional Protocol to the International Covenant on Civil and Political Rights which requires the Human Rights Committee to find inadmissible any communication incompatible with the provisions of the Covenant. Secondly, the right of self-determination applies to "peoples" and it is the position of the Government of Canada that the Lubicon Lake Band is not a people within the meaning of Article 1 of the Covenant. Lastly, communications under the Optional Protocol can only be made by individuals and must relate to the breach of a right conferred on individuals. The present communication relates to a collective right and the author therefore lacks standing to bring a communication pursuant to Articles 1 and 2 of the Optional Protocol.

1. Incompatibility Ratione Materiae

The communicant asserts at pages 2-3 of the communication dated February 14, 1984 a right to self-determination under Articles 1(1), 1(2) and 1(3) of the Covenant. The Government of Canada, after considering the nature of the contents of the communications, interprets the Band's claim to be an alleged denial of the means for it to subsist in its traditional manner, rather than a right of secession.

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The International Covenant on Civil and Political Rights does not make any provision for a right to property as such. Therefore, an individual cannot claim such a right under the Optional Protocol. It is the position of the Government of Canada that the communicant's claim, in so far as it asserts a right to title to particular lands, is not in effect a claim to a right of self-determination, but a claim to a right to property. As part of its domestic legal proceeding, the Lubicon Lake Band is asserting a right to title to certain lands in Northern Alberta, based in part on the alleged failure of the Government of Canada to set up a Federal Reserve at Lubicon Lake.

It is the Government of Canada's view that the Covenant makes no provision for a right to ownership of or title to property and therefore cannot be used as the basis for a complaint under the Optional Protocol. It is submitted that the communicant's claim to a right to title to certain lands and the incidents that flow from a right to title, (i.e. the right to dispose of resources on the property), is not a claim to a right of self-determination, but rather a claim to property. As such, it is incompatible ratione materiae with the provisions of the Covenant and must be found inadmissible under Article 3 of the Optional Protocol.

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2. Incompatibility Ratione Personae

The Government of Canada submits that, even if the Committee accepts that the facts relied upon by the communicant might constitute a violation of the right of self-determination, the Lubicon Lake Band does not constitute a people for the purposes of Article 1 of the Covenant and it therefore, is not entitled to assert under the Protocol the right of self-determination.

In the present state of international law, a thinly scattered minority group living within the midst of a more numerous population grouping and occupying territory co-extensive with that grouping cannot claim to be a people within the meaning of Article 1 of the Covenant.

This principle has been acknowledged by authors commenting on the right of self-determination. Thus, Emerson indicates that:

Where there is such intermingling, no form of self-determination, short of mass migration, can be invoked to satisfy such demands as the minority community may make for recognition of its separate identity.³

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The Lubicon Lake Band comprises only one of 582 Indian Bands in Canada and a small portion of a larger group of Cree Indians residing in Northern Alberta. It is therefore the position of the Government of Canada that the Lubicon Lake Indians are not a "people" within the meaning of Article 1 of the Covenant.

As indicated above, the contested area of land is also the subject of claims by several other native communities in the area, in addition to the Lubicon Lake Band. The dispute is further complicated by reason of individuals who may be claimed as members of more than one Band. This factor is significant because calculation of the size of a land claim is dependent upon the number of members comprising a Band.

These complications highlight the difficulty of defining a people in the present circumstances. Furthermore, a ruling in favour of the Band at this point in time could have the effect of attributing rights to the Lubicon Lake Band over the disputed lands, to the detriment of the other claimants.

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3. The Effect of Collective Rights Under the
Optional Protocol

As a preliminary matter, the Government of Canada requests clarification of the status of the International Indian Treaty Council in relation to the present communications. The communication dated February 14, 1984 states at page 1 that "[i]t is authored by the International Indian Treaty Council at the request of Chief Bernard Ominayak and the Cree Band of the Lubicon Lake in Alberta, Canada." If, in fact, the International Indian Treaty Council is the author of the communications, the Government of Canada submits that Articles 1 and 2 of the Optional Protocol, which speak of "individuals", do not encompass non-governmental organizations and that therefore, the communications are inadmissible. The Government of Canada requests clarification on the status of the author. However, for the purpose of the present response, the Government of Canada will assume that the author is Chief Ominayak.

- (a) Article 1 of the Optional Protocol provides that:

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A State party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.

(emphasis added)

Further, Article 2 of the Optional Protocol states that "individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies" may complain to the Committee (emphasis added).

Article 1 of the Covenant recognizes that: "all peoples have the right of self-determination" (emphasis added). It is the Government of Canada's view that the right of self-determination, being a collective right, is not in and of itself available to an individual. The Optional Protocol which relates to breaches of rights given to individuals, cannot therefore be invoked.

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The Government of Canada submits that self-determination as contained in Article 1 of the Covenant is not an individual right, but rather provides the necessary contextual background for the exercise of individual human rights. This view is supported by the following phrase from the Committee's General Comments on Article 1 (CCPR/C/21/Add. 3, 5 October 1984) which provides that the realization of self-determination is:

an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. (emphasis added)

The General Comment goes on to recognize that the rights embodied in Article 1 are set apart from, and before, all the other rights in the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. The rights in Article 1, which are contained in Part I of the Covenant are, in the

-21-

submission of Canada, different in nature and kind from the rights in Part III. The former are collective, the latter individual. Thus, the structure of the Covenant, when viewed as a whole, further supports the argument that the right of self-determination is a collective one available to peoples. As such, it cannot be invoked by an individual under the Optional Protocol.

The Government of Canada contends that the Committee's jurisdiction, as defined by the Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right. Therefore, the present communications pertaining to self-determination for the Lubicon Lake Band should be dismissed.

- (b) It is the position of the Government of Canada that even if an individual can claim, on behalf of a people, a breach of a collective right under the Optional Protocol, the present communications are incomplete. Where a

-22-

communication concerns an alleged violation of a collective right, the communication must establish the identity of the communicant and of the alleged victims and whether an individual purporting to act in a representative capacity for the victims has been so accepted by them.

The terms of the communications indicate that Chief Ominayak is claiming a violation of an alleged collective right of the Band. The Government of Canada does not contest the assertion made at page 1 of the communication dated February 14, 1985, that Chief Ominayak is the leader and representative of the Lubicon Lake Band. However, if contrary to the views of Canada, members of the Band can submit a communication as individuals acting in common, the Band has nevertheless failed to establish that its members are in fact acting in common.

The Government of Canada submits that, in the present case, the Committee has

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to determine, but from the face of the communications is unable to assess, the extent to which any individual Band member:

- (1) is actually or potentially a victim of the alleged violation,
- (2) claims to be a victim of the alleged violation for the purposes of the communications, and
- (3) accepts the representative character of the nominal author of the communications⁴ (emphasis added).

The Government of Canada contends that the wording of Articles 1 and 2 of the Optional Protocol does not extend to communications by or on behalf of a group where no individual victims of the alleged violation are shown.

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The Government of Canada therefore
contends that the communications should
be declared inadmissible.

D. Misrepresentations

It is the position of the Government of Canada that the communications misrepresent the findings of the Courts which considered the interlocutory proceedings. Furthermore, the communications contain unacceptable statements relating to the integrity and honesty of Canadian Judges, as well as the Canadian Government. These statements are completely unfounded.

Examples of misrepresentations contained in the communications follow:

- (1) The communication dated February 14, 1984 states at page 5 that among the effects of the Court's decision in dismissing the interim application was that "the aboriginal and treaty rights of the aboriginal peoples of Canada

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[though] now a constitutionally enshrined right has no practical significance in the context of protecting such rights from damage or destruction." The presiding Judge in his decision did not address the Canadian Constitution. This is a substantive issue which, if the Band takes steps to bring its action on to trial, will be dealt with at a trial on the merits, rather than on an interlocutory application.

- (2) The communication dated March 27, 1985 misrepresents at pages 6 to 8 the issues which were before the Supreme Court of Canada. In denying leave to appeal from the dismissal of the motion for an interim injunction, the Supreme Court of Canada would have considered the application by the lower courts of the law as it relates to interim injunctions (emphasis added). Contrary to the author's communication, constitutional issues relating to aboriginal rights and equality were not before the Supreme Court. These are substantive issues which will be raised

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if the Band takes steps to bring on to trial the substantive issues and addressed at such time.

- (3) Page 3 of the communication dated March 27, 1985, slurs government officials and the judiciary by stating that "... it is difficult to believe that the court could be truly impartial given the extremely large sums of money to be gained by the Province and the energy corporations ... and taking into account the close business and personal relationships that exists among the corporations, Provincial officials, and members of the court." This is a totally unfounded statement directed at judicial and government representatives who have a long history of performing their tasks with integrity and honesty.

- (4) Similarly, page 9 of the communication dated March 27, 1985, alleges that "... cultural, if not physical genocide is successfully being practiced upon the Cree of Lubicon Lake with the concurrence and complicity of the

-27-

Federal Government of Canada." This allegation is completely unfounded.

The Government of Canada submits that the making of such serious and unsubstantiated allegations are an abuse of the right of submission under the Optional Protocol, and the communications should be dismissed on the basis pursuant to Article 3 of the Protocol.

III. Conclusion

For the reasons mentioned above, the Government of Canada submits that Chief Ominayak's communications dated February 14, 1984 and November 27, 1985 should be considered inadmissible by the Committee.

FOOTNOTES

1. Möse, E. and Opsahl, T., "The Optional Protocol to the International Covenant on Civil and Political Rights" (1981), 21 Santa Clara Law Review 271 at 303.
2. Trindade, A.A. Cançado, "Exhaustion of Local Remedies Under the United Nations Covenant on Civil and Political Rights and its Optional Protocol" (1979), 28 International and Comparative Law Quarterly 734 at 755; Tardu, M.E., Human Rights: The International Petition System, Dobbs Ferry, New York: Oceana Publications, Inc., 1980, Vol. 2, Part I, at 49.
3. Emerson, R., "Self Determination" (1971), 65 American Journal of International Law 459 at 472.
4. Möse, E. and Opsahl, T., supra note 1, at 299-302; Schwelb, E., "The International Measures of Implementation of the International Covenant on Civil and Political Rights and the Optional Protocol" (1977), 12 Texas International Law Journal 141 at 182.

31 MAY 85 09 38

Colleen Swords
Legal Operations Division
996-5407

May 24, 1985

Minister Kelleher has
approved the observations.
31 May 85. JCK

CONFIDENTIAL

JLO-793

395466

45-Cda-13-1-3-

Lubicon Lake
Band.

Memorandum for:
The Secretary of State for External Affairs

c.c. The Minister for International Trade
c.c. The Minister for External Relations

Subject: Complaint against Canada by the Lubicon Lake
Band to the Human Rights Committee at the United
Nations

PURPOSE:

To seek your approval of the proposed response to the complaint of the Lubicon Lake Band to the Human Rights Committee. The Band alleges a violation of its right of self-determination. A similar memorandum is going forward to your colleagues, the Ministers of Justice and Indian and Northern Affairs.

BACKGROUND

Since 1976, Canada has been a party to the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) that permits individuals to bring a complaint to the Human Rights Committee alleging a violation of the rights in the ICCPR. Chief Bernard Ominayak, the leader of the Lubicon Lake Band, a group of Cree Indians residing in Northern Alberta, has made a complaint to the Human Rights Committee alleging that Canada has violated article 1 of the ICCPR. Article 1 confers on all peoples the right of self-determination, including a degree of control over natural resources. The basis of the Band's allegations is that the province of Alberta has improperly leased the Band's territory to oil companies for the purpose of energy exploration. The communication alleges that the effect of this exploration has been to deny the Band the physical means for it to

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subsist in its traditional way and to deprive it of the right to dispose of its natural wealth and resources.

Communications to the Human Rights Committee are dealt with in two stages (1) admissibility and (2) on the merits. Relevant issues at the admissibility stage are whether domestic remedies have been exhausted, whether the complaint is an abuse of process and whether the facts are compatible with the provisions of the ICCPR. Only if the Committee considers these criteria are met does it proceed to consider the complaint on the merits. At both stages the state concerned and the complainant are given the opportunity to present written observations.

The attached response by Canada to the first stage (admissibility) has been drafted by the Department of Justice in close consultation with this department and the Department of Indian and Northern Affairs. It puts forward three main arguments. First it outlines in detail the numerous legal proceedings that the Band has initiated in Canada and submits that the Band has not carried its case to its conclusion in Canadian courts since most of its proceedings have been interlocutory in nature, i.e. have not addressed the merits of the case. In addition it is pointed out that extra-judicial domestic remedies are underway through the appointment of the Honourable Davie Fulton, former judge of the B.C. Supreme Court, who has a mandate to meet with representatives from the Band, six native communities claiming rights in the area and the Province, review the entire situation and make recommendations.

Secondly, Canada is submitting that for the purposes of article 1 of the ICCPR, one single Indian band does not constitute a people.

Thirdly, a technical argument is made essentially to the effect that article 1 provides a right to peoples, i.e. a collectivity, and only individuals may make complaint under the Optional Protocol. Therefore a single individual may not claim a right to self-determination, a right accruing to a collectivity.

This case is important for this Department as in the United Nations context, self-determination has been equated with colonial states emerging to statehood. A decision in favour of the applicability of the right of self-determination to individual Indian bands would have major consequences. It is preferable, therefore, that

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this matter be dismissed at the admissibility stage. The Department of Indian and Northern Affairs is anxious not to prejudice any chance for a domestic resolution of this case through comments made in this international forum.

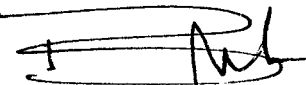
It is a well-established principle of international law that domestic courts must be given an opportunity to resolve internal disputes prior to their being addressed by an international forum. Therefore, it is appropriate for the Government of Canada to insist that the Lubicon Lake Band follow through to completion the domestic legal action it has commenced. Indeed, we consider the case strong on this point and hope that it will be dismissed on the basis of non-exhaustion of domestic remedies.


In our view the response is appropriate to the admissibility stage and meets both our international and domestic concerns. At the same time, one might anticipate that Canada's position that this complaint is inadmissible might spark public debate since the Lubicon Lake Band has received much sympathetic press.

To respect the Human Rights Committee's schedule and to avoid any further delay, Canada's observations should be submitted to the Secretary General of the UN in Geneva no later than the 31st of May.

RECOMMENDATIONS

It is recommended that you approve the attached observations to the Human Rights Committee as Canada's response to the complaint of the Lubicon Lake Band.


H. H. Legault
Legal Adviser


Gordon S. Smith

may 31/85
OK
J Kelleher
action 554#

RECEIVED - REÇU

MAY 31 1985

Minister for
Legal Operations Division (JLO)
Direction des Opérations juridiques

Ministre du
Commerce extérieur

MINISTER KELLEHER HAS REVIEWED ✓

approves of observations

ORIGINAL RETURNED TO

CARR

ON

May 31/85

delivered by hand

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ACC	395466	DATE
FILE	45-Cda-13-1-3-Lubicon	DOSSIER
Lake Band.		

Colleen Swords
Legal Operations Division
996-5407

May 24, 1985

CONFIDENTIAL

JLO-793

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c.c. The Minister for International Trade
c.c. The Minister for External Relations

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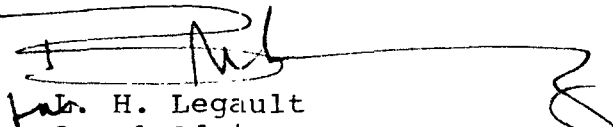
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It is recommended that you approve the attached observations to the Human Rights Committee as Canada's response to the complaint of the Lubicon Lake Band.


H. H. Legault
Legal Adviser

Gordon S. Smith

RESPONSE OF THE GOVERNMENT OF CANADA
RESPECTING THE COMMUNICATIONS DATED
FEBRUARY 14, 1984 AND MARCH 27, 1985 FROM CHIEF BERNARD
OMINAYAK AND THE LUBICON LAKE BAND TO THE HUMAN RIGHTS COMMITTEE

I. General

The Secretary-General of the United Nations, in his note No. G/SO 215/51 CANA (38), 167/1984 dated November 21, 1984 requested Canada's comments on a communication submitted on February 14, 1984 to the Human Rights Committee by Chief Ominayak and the Lubicon Lake Band. By note dated April 4, 1985 the Secretariat of the United Nations (Centre for Human Rights) transmitted to the Permanent Mission of Canada to the United Nations at Geneva a supplement dated March 27, 1985 to the original communication submitted by Chief Ominayak and the Lubicon Lake Band. In the communications, Chief Ominayak alleges that Canada is in breach of Article 1 of the International Covenant on Civil and Political Rights because of Canada's alleged denial of the rights of the Lubicon Lake Band of self-determination and to freely dispose of its natural wealth and resources for its own ends.

II. Inadmissibility Of Chief Ominayak's Communications

The communications submitted to the Human Rights Committee raise issues relating to the exhaustion of domestic remedies, the scope of the right of self-determination and the identity and status of the communicant and victim.

-2-

A. Failure To Exhaust Domestic Remedies

The author of the communication has failed to exhaust all available domestic remedies as required by Article 5, paragraph (2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights.

1. Remedies Commenced By The Lubicon Lake Band Have Not Been Exhausted

Article 5(2)(b) of the Optional Protocol provides that the Committee shall not consider a communication from an individual unless all available domestic remedies have been exhausted, although the Committee may consider a communication if "the application of the remedies is unreasonably prolonged." It is the position of the Government of Canada that the Lubicon Lake Band has not pursued to completion domestic remedies commenced by it and that responsibility for any delays in the application of such remedies does not lie with the Government of Canada.

Lubicon Lake Band suing in its own legal right, and Chief Ominayak suing in his personal capacity, and with other Band Councillors in a representative capacity, have initiated three different legal procedures as indicated in the communication dated February 14, 1984 (pages 4-6). For convenience hereafter, the Band will be described as the litigant

-3-

with carriage of the proceedings. Only the litigation concerning the caveat filed by the Band has been finally determined. Two other legal actions, one in the Federal Court of Canada and one in the Alberta Court of Queen's Bench, are pending.

The remedies sought by the Lubicon Lake Band include, in the provincial court action, a permanent injunction enjoining the defendant corporations from conducting further oil exploration activities, and in both actions, damages and a declaration that the Band has subsisting Indian title over specific lands and natural resources based on treaty and aboriginal rights. With respect to the Federal Court action, either party has a right of appeal to the Federal Court of Appeal and from there to the Supreme Court of Canada, provided leave is obtained. A decision of the Alberta Court of Queen's Bench may be appealed by either party to the Provincial Court of Appeal and from there to the Supreme Court of Canada, assuming once again that leave is granted. No court has yet had the opportunity to decide on the substantive issues involved in the Band's claims or therefore, to make any corresponding orders.

With regard to the Federal Court action referred to in the author's communication dated February 14, 1984 at pages 4-5, the Band and its experienced legal

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advisors in April 1980, sought to sue the Province of Alberta and private corporations in proceedings in the Federal Court of Canada. In the circumstances of this case, neither the Province nor private entities could have been sued as defendants in the Federal Court of Canada; pursuant to the Federal Court Act, that Court has jurisdiction only in actions against the Crown in right of Canada, including Crown corporations such as Petro-Canada. This jurisdictional issue was conclusively determined by the Supreme Court of Canada in 1976 in the case of Quebec North Shore Paper Co. v. C.P. Ltd. [1977], 2 S.C.R. 1054. As a result of this case, it was clearly the provincial court that had jurisdiction in the Band's action against the Province of Alberta and private corporations.

Rather than reconstitute the proceedings in the proper forum, the Band contested interlocutory proceedings brought by these defendants concerning the issue of jurisdiction. These interlocutory proceedings resulted in a determination against the Band in November 1980. An appeal by the Band from the decision of the Federal Court was dismissed by the Federal Court of Appeal in May 1981.

The Federal Government filed its defence in the main action within the prescribed time limits on July 29, 1980. It argues that the Band's right to land and

-5-

natural resources derives solely from a treaty concluded in 1899 and that there is no entitlement on the basis of aboriginal rights. The action, however, has been left in abeyance by the Band. As plaintiff, the Band has carriage of the proceedings and the right at any time to take steps to bring the action to a state of readiness for trial.

Following the interlocutory proceedings relating to the jurisdiction of the Federal Court, a new action was instituted on February 21, 1982, against the Province and certain corporate defendants in the Court of Queen's Bench of Alberta. As indicated in the communications, the Band sought an interim injunction. In November 1983, after extensive proceedings, the Band's interim application was dismissed by the Court of Queen's Bench based on the case of Erickson v. Wiggins Adjustments Ltd., [1980] 6 W.R.R. 188 which set out the criteria that must be present for a court to grant an interim injunction. Pursuant to this case, an applicant for an interim injunction must establish:

- (1) that there exists a serious issue to be tried,
- (2) that irreparable harm will be suffered prior to trial if no injunction is granted, and
- (3) that the balance of convenience between the parties favours relief to the applicant.

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The Alberta Court denied the Band's application on the grounds that the Band had failed to prove irreparable harm and that it could be adequately compensated in damages if it was ultimately successful at trial.

At one of the preliminary proceedings prior to the hearing on the application for an interim injunction, the presiding judge, while making clear that he was not attempting to interfere with the rights of the plaintiffs to proceed in whatever fashion they saw fit, suggested that the extensive time and preparation required for the interim injunction hearing "might better be spent in preparation for the trial itself with the trial going forward at the earliest possible date." (Judgment of the Honourable Mr. Justice Forsyth dated March 2, 1983).

Rather than proceed with a trial on the merits, the Band appealed against the dismissal of the interim application. Its appeal was dismissed by the Alberta Court of Appeal on January 11, 1985. The Band's application for leave to appeal the dismissal of the interim injunction to the Supreme Court of Canada was refused on March 14, 1985. Almost two months later, on May 13, 1985, the Supreme Court of Canada denied another request by the Band that the court bend its own rules to rehear the application. The Court upheld

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its well-established rule prohibiting the rehearing of applications for leave to appeal.

It still remains open to the Band, which has carriage of these proceedings, to take measures to prepare the case for trial on the merits, as indeed has been the case since the interlocutory proceedings were first initiated.

After such extensive delays caused by interim proceedings and the contesting of clearly-settled procedural matters of law, the author's claim that the application of domestic remedies is being unreasonably prolonged has no merit. It has been open to the Band as plaintiff to press on with the substantive steps in either of its legal actions so as to bring the matters to trial. It is the position of the Government of Canada that the author cannot rely on the plaintiff's own inaction to claim that the application of remedies have been unreasonably prolonged.

The Committee has considered that the question of admissibility should be interpreted and applied in accordance with the generally accepted principles concerning the matter in the field of human rights. This implies that the practices of similar bodies, particularly those of the European Commission of Human

-8-

Rights under Article 26 of the European Convention, will be of considerable significance.¹

The Commission has consistently held that remedies that do not in reality offer any chance of redress need not be exhausted. On the other hand, the mere existence of doubts as to prospects of success does not absolve an applicant from exhausting a given remedy since it is for the domestic courts to determine the matter in the first instance: Retimag v. Federal Republic of Germany 712/60, 4 Yearbook 384; X and Y v. Belgium 1661/62, 6 Yearbook 360; 9843/82 5 E.H.R.R. 465. Therefore, in X. v. U.K. 6406/73, 3 E.H.R.R. 302, where a question concerning statutory interpretation had not been the subject of any decision by the higher courts, it was incumbent upon the applicant to appeal the matter to the Court of Criminal Appeal, and then if necessary, to the highest court in the land.

By the Band's own submission, (communication dated March 27, 1985 at page 7), the Supreme Court of Canada has not yet interpreted the scope of aboriginal and treaty rights as they are set out in the Constitution Act, 1982. This issue of substance was not before the Supreme Court of Canada when it considered the Band's application for leave to appeal from denial of an interim injunction (discussed infra). In effect, the

-9-

Band is requesting the Committee to conclude that no effective remedies are available because the Band was unsuccessful on the separate question of whether or not it was entitled to an interim injunction pending trial of its action on the merits. It is the position of the Government of Canada that, until there has been a final judicial determination on the Band's rights under the Constitution, there are no grounds for concluding that domestic redress is unavailable or, in the present circumstances, that remedies have been so unduly delayed as to constitute an effective denial of domestic redress.

2. Additional Remedies

The term "domestic remedies", in accordance with the prevailing doctrine of international law, should be understood as applying broadly to all established municipal procedures of redress. Article 2(3)(b) of the Covenant recognizes that in addition to judicial remedies, a State Party to the Covenant can also provide administrative and other remedies.²

Following the filing of its defence in the Federal Court action, the Federal Government proposed late in 1981 that the claim be settled by providing the Band with reserve land pursuant to a treaty concluded in 1899. The conditions proposed by the Province (which

-10-

holds legal title to the lands) were not acceptable to the Band and it accordingly rejected the proposed resolution to the dispute.

The Lubicon Lake Band's claim to certain lands in Northern Alberta is part of an extremely complex situation, that involves competing claims from several other native communities in the area. In June 1980, approximately two months after the Band commenced its action in the Trial Division of the Federal Court, six other native communities filed with the Department of Indian Affairs a separate land claim asserting aboriginal title to lands which overlap with the property sought by the Lubicon Lake Band's claim. Subsequently, in June 1983, the Big Stone Cree Band filed a claim with the Department of Indian Affairs - this time claiming treaty entitlement - to an area which also overlaps with land claimed by the Lubicon Lake Band. The Big Stone Cree Band allegedly represents five of the native communities that filed the June 1980 claim based on aboriginal title.

To deal with this very complex situation, in March 1985 the Minister of Indian and Northern Affairs appointed a former Judge of the British Columbia Supreme Court as a special envoy of the Minister to meet with representatives from the Band, other native communities and the Province, review the

000340

-11-

entire situation and formulate recommendations. A consideration of the Lubicon Lake Band's claim in isolation from the competing claims of the other native communities will jeopardize the domestic remedy of negotiated settlement selected by the latter.

Canada is also taking steps to enhance the local autonomy and self-governing status of native peoples through on-going discussions. Early in April, the Prime Minister of Canada and the Provincial Premiers met with native leaders to discuss entrenching native self-government in the Constitution. These discussions will be continued at a federal-provincial ministerial conference on native rights scheduled for June 5-6, 1985.

With two pending actions by the Band still before the Courts, and the appointment referred to above of a special envoy to assist in solving this extremely complicated dispute, it is the position of the Government of Canada that it has a right to have domestic remedies of a legal and conciliatory character followed to completion prior to the Committee examining the matter. Furthermore, it is Canada's view that it clearly has not been responsible for an unreasonable prolongation of remedies in the circumstances of this case.

-12-

B. Right Of Self-Determination

As a preliminary point, the Government of Canada totally rejects the communicant's contention that genocide is being practiced on the Lubicon Lake Band. The Government of Canada interprets the communications as alleging solely a violation of the right of self-determination as contained in Article 1 of the Covenant. However, if the Committee deems it necessary to consider the issue of genocide, the Government of Canada reserves the right to make submissions on this issue at a later date.

The Government of Canada submits that the communications, as they pertain to the right of self-determination, are inadmissible for two reasons. Firstly, the right of self-determination applies to a "people" and it is the position of the Government of Canada that the Lubicon Lake Band is not a people within the meaning of Article 1 of the Covenant. The communications are therefore incompatible with the provisions of the Covenant and as such, should be found inadmissible under Article 3 of the Protocol. Secondly, communications under the Optional Protocol can only be made by individuals and must relate to the breach of a right conferred on individuals. The present communication relates to a collective right and the author therefore lacks standing to bring a communication pursuant to Articles 1 and 2 of the Optional Protocol.

-13-

1. Incompatibility Ratione Personae

The Government of Canada submits that the Lubicon Lake Band does not constitute a people for the purposes of Article 1 of the Covenant and it therefore, is not entitled to assert under the Protocol the right of self-determination.

In the present state of international law, a thinly scattered minority group living within the midst of a more numerous population grouping and occupying territory co-extensive with that grouping cannot claim to be a people within the meaning of Article 1 of the Covenant.

This principle has been acknowledged by authors commenting on the right of self-determination. Thus, Emerson indicates that:

Where there is such intermingling, no form of self-determination, short of mass migration, can be invoked to satisfy such demands as the minority community may make for recognition of its separate identity.³

The Lubicon Lake Band comprises only one of 582 Indian Bands in Canada and a small portion of a larger group of Cree Indians residing in Northern Alberta. It is therefore the position of the Government of Canada that the Lubicon

-14-

Lake Indians are not a "people" within the meaning of Article 1 of the Covenant.

As indicated above, the contested area of land is also the subject of claims by several other native communities in the area, in addition to the Lubicon Lake Band. The dispute is further complicated by reason of individuals who may be claimed as members of more than one Band. This factor is significant because calculation of the size of a land claim is dependent upon the number of members comprising a Band.

These complications highlight the difficulty of defining a people in the present circumstances. Furthermore, a ruling in favour of the Band at this point in time could have the effect of attributing rights to the Lubicon Lake Band over the disputed lands, to the detriment of the other claimants.

2. The Effect Of Collective Rights Under The Optional Protocol

As a preliminary matter, the Government of Canada requests clarification of the status of the International Indian Treaty Council in relation to the present communications. The communication dated February 14, 1984 states at page 1 that "[i]t is authored by the International Indian Treaty Council at the request of Chief Bernard Ominayak and the Cree Band of the Lubicon Lake in Alberta, Canada." If, in

-15-

fact, the International Indian Treaty Council is the author of the communications, the Government of Canada submits that Articles 1 and 2 of the Optional Protocol, which speak of "individuals", do not encompass non-governmental organizations and that therefore, the communications are inadmissible. The Government of Canada requests clarification on the status of the author. However, for the purpose of the present response, the Government of Canada will assume that the author is Chief Ominayak.

(a) Article 1 of the Optional Protocol provides that:

A State party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. (emphasis added)

Further, Article 2 of the Optional Protocol states that "individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies" may complain to the Committee (emphasis added).

Article 1 of the Covenant recognizes that: "all peoples have the right of self-determination" (emphasis added). It is the Government of Canada's view that the right of self-determination, being a collective right, is not in and of itself available to an individual. The Optional

-16-

Protocol which relates to breaches of rights given to individuals, cannot therefore be invoked.

The Government of Canada submits that self-determination as contained in Article 1 of the Covenant is not an individual right, but rather provides the necessary contextual background for the exercise of individual human rights. This view is supported by the following phrase from the Committee's General Comments on Article 1 (CCPR/C/21/Add. 3, 5 October 1984) which provides that the realization of self-determination is:

an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. (emphasis added)

The General Comment goes on to recognize that the rights embodied in Article 1 are set apart from, and before, all the other rights in the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. The rights in Article 1, which are contained in Part I of the Covenant are, in the submission of Canada, different in nature and kind from the rights in Part III. The former are collective, the latter individual. Thus, the structure of the Covenant, when viewed as a whole, further supports the argument that the right of self-determination is a collective one available to peoples. As such, it cannot be invoked by an individual under the Optional Protocol.

-17-

The Government of Canada contends that the Committee's jurisdiction, as defined by the Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right. Therefore, the present communications pertaining to self-determination for the Lubicon Lake Band should be dismissed.

(b) It is the position of the Government of Canada that even if an individual can claim, on behalf of a people, a breach of a collective right under the Optional Protocol, the present communications are incomplete. Where a communication concerns an alleged violation of a collective right, the communication must establish the identity of the communicant and of the alleged victims and whether an individual purporting to act in a representative capacity for the victims has been so accepted by them.

The terms of the communications indicate that Chief Ominayak is claiming a violation of an alleged collective right of the Band. The Government of Canada does not contest the assertion made at page 1 of the communication dated February 14, 1985, that Chief Ominayak is the leader and representative of the Lubicon Lake Band. However, if contrary to the views of Canada, members of the Band can submit a communication as individuals acting in common, the Band has nevertheless failed to establish that its members are in fact acting in common.

-18-

The Government of Canada submits that, in the present case, the Committee has to determine, but from the face of the communications is unable to assess, the extent to which any individual Band member:

- (1) is actually or potentially a victim of the alleged violation,
- (2) claims to be a victim of the alleged violation for the purposes of the communications, and
- (3) accepts the representative character of the nominal author of the communications⁴ (emphasis added).

The Government of Canada contends that the wording of Articles 1 and 2 of the Optional Protocol does not extend to communications by or on behalf of a group where no individual victims of the alleged violation are shown. The Government of Canada therefore contends that the communications should be declared inadmissible.

C. Misrepresentations

It is the position of the Government of Canada that the communications misrepresent the findings of the Courts which considered the interlocutory proceedings. Furthermore, the communications contain unacceptable statements relating to the integrity and honesty of Canadian Judges, as well as the Canadian Government. These statements are completely unfounded.

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Examples of misrepresentations contained in the communications follow:

- (1) The communication dated February 14, 1984 states at page 5 that among the effects of the Court's decision in dismissing the interim application was that "the aboriginal and treaty rights of the aboriginal peoples of Canada [though] now a constitutionally enshrined right has no practical significance in the context of protecting such rights from damage or destruction." The presiding Judge in his decision did not address the Canadian Constitution. This is a substantive issue which, if the Band takes steps to bring its action on to trial, will be dealt with at a trial on the merits, rather than on an interlocutory application.
- (2) The communication dated March 27, 1985 misrepresents at pages 6 to 8 the issues which were before the Supreme Court of Canada. In denying leave to appeal from the dismissal of the motion for an interim injunction, the Supreme Court of Canada would have considered the application by the lower courts of the law as it relates to interim injunctions (emphasis added). Contrary to the author's communication, constitutional issues relating to aboriginal rights and equality were not before the Supreme Court. These are substantive issues which will be raised if the Band takes steps to bring on to trial the substantive issues and addressed at such time.
- (3) Page 3 of the communication dated March 27, 1985, slurs government officials and the judiciary by stating that "... it is difficult to believe that the court could be truly impartial given the extremely large sums of money to be gained by the Province and the energy corporations ... and taking into account the close business and personal relationships that exists among the corporations, Provincial officials, and members of the court." This is a totally unfounded statement directed at judicial and government representatives who have a long history of performing their tasks with integrity and honesty.

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-20-

- (4) Similarly, page 9 of the communication dated March 27, 1985, alleges that "... cultural, if not physical genocide is successfully being practiced upon the Cree of Lubicon Lake with the concurrence and complicity of the Federal Government of Canada." This allegation is completely unfounded.

The Government of Canada submits that the making of such serious and unsubstantiated allegations are an abuse of the right of submission under the Optional Protocol, and the communications should be dismissed on the basis pursuant to Article 3 of the Protocol.

III. Conclusion

For the reasons mentioned above, the Government of Canada submits that Chief Ominayak's communications dated February 14, 1984 and November 27, 1985 should be considered inadmissible by the Committee.

FOOTNOTES

1. Möse, E. and Opsahl, T., "The Optional Protocol to the International Covenant on Civil and Political Rights" (1981), 21 Santa Clara Law Review 271 at 303.
2. Trindade, A.A. Cançado, "Exhaustion of Local Remedies Under the United Nations Covenant on Civil and Political Rights and its Optional Protocol" (1979), 28 International and Comparative Law Quarterly 734 at 755; Tardu, M.E., Human Rights: The International Petition System, Dobbs Ferry, New York: Oceana Publications, Inc., 1980, Vol. 2, Part I, at 49.
3. Emerson, R., "Self Determination" (1971), 65 American Journal of International Law 459 at 472.
4. Möse, E. and Opsahl, T., supra note 1, at 299-302; Schwelb, E., "The International Measures of Implementation of the International Covenant on Civil and Political Rights and the Optional Protocol" (1977), 12 Texas International Law Journal 141 at 182.

FILE



External Affairs Affaires extérieures
Canada Canada

TRANSMITTAL SLIP - NOTE D'ENVOI

TO/À DMF (through JEX AND JCD)

FROM/DE JLO

SUBJECT/SUJET Complaint against Canada by
 the Lubicon Lake Band to the
 Human Rights Committee at the United Nations

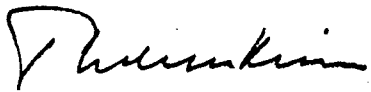
ATTACHMENT
PIÈCE JOINTE Memorandum to the Secretary of State for External
 Affairs (JLO-793)

Security Sécurité	CONFIDENTIAL
File Dossier	45-CDA-13-1-3-LUBICON
Date	May 29, 1985

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The attached memorandum is for
your signature, if you agree.

REQUIRED BY/DEMANDÉ POUR
5:00 p.m. May 30, 1985


Philippe Kirsch
Director
Legal Operations Division

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OFFICE DES NATIONS UNIES A GENÈVE



UNITED NATIONS OFFICE AT GENEVA

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CENTRE FOR HUMAN RIGHTS

Télégrammes : UNATIONS, GENÈVE

Télex : 28 96 96

Téléphone : 34 60 11 31 02 11

RÉF. N°: G/SO 215/51 CANA (38)
(à rappeler dans la réponse) 167/1984

ACC	399 561	DATE	
FILE	45-COA-13-13-Lubicon Lake Band	DOSSIER	

Palais des Nations
CH-1211 GENEVE 10



2/3

The Secretariat of the United Nations (Centre for Human Rights) presents its compliments to the Permanent Mission of Canada to the United Nations Office at Geneva and has the honour to acknowledge the receipt of the Permanent Mission's note No.24, dated 7 May 1985, addressed to the Secretary-General, concerning communication No.167/1984 (Lubicon Lake Band) before the Human Rights Committee.

It has been noted, that the State party intends to provide its response regarding the admissibility of communication No.167/1984 very shortly, so as to enable the Human Rights Committee to examine the communication at its session in July 1985.

.....

The Secretariat should like to point out in this connection that, pursuant to paragraph 3 of the decision adopted on 9 November 1984 (copy enclosed for ready reference), the author of the communication is to be given four weeks to comment on the State party's response. This means that the Secretariat would have to transmit the State party's submission to the author not later than by the end of May 1985 to ensure that the communication could be examined at the July session. (The Working Group of the Human Rights Committee, which reviews all communications before they are considered by the Committee itself, meets from 1 to 5 July 1985.)

15 May 1985

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File: 45-13-2 (LUBICON)

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FM GENEV YTGR3485 21MAY85

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---HUMAN RIGHTS CTTEE:COMMUNICATION NO. 167/1984

TEXT OF SEC NOTE G/SO 215/51/CANA(38) OF 15MAY AND ATTACHMENT
RE DEADLINE FOR SUBMISSION.

*Submitted June 3 under note
dated 31 May
JR*

1/3

GVA 003/22

EXT 518-2

D. Jha
D. DHAVERNAS/mc

J.F. Tanguay
J.F. TANGUAY



**INTERNATIONAL
COVENANT
ON CIVIL AND
POLITICAL RIGHTS**



Distr.

CCPR/C/WG/23/D/167/1984
12 November 1984

Original: ENGLISH

3/3

HUMAN RIGHTS COMMITTEE
Twenty-third session
Working Group

DECISIONS

Communication No. 167/1984

Submitted by: Bernard Ominayak, Chief of the Lubicon Lake Band (assisted by J. Lefevre)

Alleged victims: The Lubicon Lake Band

State party concerned: Canada

Date of communication: 14 February 1984

Documentation references: Prior decision - none

The Working Group of the Human Rights Committee meeting on 9 November 1984, decides:

1. That the communication be transmitted, under rule 91 of the provisional rules of procedure, to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication;

2. That the State party be informed that its information and observations should reach the Human Rights Committee in care of the Centre for Human Rights, United Nations Office at Geneva, within two months of the date of the request;

3. That the Secretary-General transmit any information or observations received to the author of the communication as soon as possible to enable him to comment thereon if he so wishes. Any such comments should reach the Human Rights Committee in care of the Centre for Human Rights, United Nations Office at Geneva, within four weeks of the date of transmittal;

4. That this decision be communicated to the State party and the author.

*/ All persons handling this document are requested to respect and observe its confidential nature.

GE.84-18371



JLO/C. Swords/6-5407/ch

TO/À • IMU
FROM/DE • JLO

REFERENCE • IMU telegramme 0842 01MAY85
RÉFÉRENCE

SUBJECT • Human Rights Committee: Complaint of
SUJET Lubicon Lake Band

Security/Sécurité UNCLASSIFIED
Accession/Référence
File/Dossier 45-COA-13-1-3- Lubicon Lake Band
Date May 13, 1985
Number/Numéro JLO-721

ENCLOSURES
ANNEXES

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SECSTATE/Page
INA/Lahey

PRMNY
GENEV

In order for the Committee to examine Canada's response at its summer session, the response would have to reach the Centre for Human Rights at the latest the end of May to allow time for translation and the forwarding of the report to the communicant for comment. The Committee's Working Group on Communications meets July 1-5, 1985.

Philippe Kirsch
Director
Legal Operations Division

JLO/C. SWORDS/3-5407/OL

TO/A

JCA and JCD (through P. Kinsch)

FROM/DE

JLO/Colleen Swords

REFERENCE
RÉFÉRENCE

JLO memorandum 1837 of 27 December 1984.

SUBJECT
SUJET

Human Rights Committee: Complaints against Canada: Lubicon Lake Band

Security/Sécurité

CONFIDENTIAL

Accession/Référence

385932

File/Dossier CDA-13-1-3

Lubicon Lake Band

DOSSIER

Date

April 22, 1985

Number/Numéro

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ENCLOSURES

ANNEXES

MAY 2 1985

Legal Operations Division (ILO)

Division des opérations juridiques

The purpose of this memorandum is to update information on the status of the Lubicon Lake Band Complaint to the Human Rights Committee.

IMU
SIS

2. As you know, IMU is the lead division on these complaints. However, in light of the important legal questions raised, I thought you might wish to be kept informed.

Background

3. As the memorandum under reference outlined, the Lubicon Lake Band of Alberta has launched a complaint against Canada before the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) alleging, essentially, that expropriation of lands in Northern Alberta for gas exploration is a violation of their right to self-determination.

4. The Committee requested that the Canadian Government forward comments on admissibility in reply to this complaint by January 21, 1985. You will recall that complaints to the Committee are treated in two stages; (1) admissibility (exhaustion of domestic remedies, *prima facie* case, preliminary jurisdiction questions), (2) merits.

Update

5. For reasons related to ongoing litigation and domestic concerns surrounding the First Ministers Conference held early in April, the Department of Justice was reluctant to forward a reply on the admissibility question by that deadline. Instead, a telegram was sent by IMU to the Committee indicating that comments from the Canadian government would be delayed.

...2

Colleen

I agree with your approach and your suggestion as to rationale materials.

The Justice draft, I must say, contains some very odd turns of phrase and many typos. I hope it will be cleaned up.

(By the way, the copy you sent me had three page 5's and seems to be incomplete.)

Myaugh

- 2 -

CONFIDENTIAL

6. On March 14, 1985 the Supreme Court of Canada denied the Band leave to appeal against the refusal of an interlocutory injunction pending the resolution of its litigation. In addition, in February this year, the government announced the appointment of D. Fulton (former judge of B.C. Supreme Court) as a special envoy to bring about a settlement of the dispute by conciliation. On March 27, 1985, legal counsel for the Lubicon Lake Band, a firm from Washington D.C., made a supplemental communication to the Committee referring to the March 14, 1985 decision of the Supreme Court of Canada. In this supplemental communication, the Band through its legal counsel, attacks the impartiality of the Alberta Court of Appeal and questions the validity of the decision by the Supreme Court of Canada to deny leave to appeal.

7. On March 29, 1985 at the Conference on the Charter of Rights and Freedoms held in Vancouver, Martin Low provided me with the attached preliminary draft of a Canadian response on admissibility in the Lubicon Lake case. He stressed that it was very much a preliminary draft that required refinement. It has not yet been finalized by the Department of Justice. At the time of drafting he had not received the March 27, 1985 communication referred to in paragraph 5.

8. This preliminary draft concentrates on the technical question of whether the right to self-determination can be the subject of a complaint under the optional protocol -- the right to self-determination being a right of peoples and only individuals being entitled to make a complaint under the Optional Protocol. The draft reply reviews ongoing litigation on the case in Canada to indicate domestic remedies have not been exhausted. The question of self-determination itself is dealt with very briefly and not in the detail that this was considered in the Denny-Mikmaq case.

9. We believe this is the correct approach to take. Ongoing litigation and discussion within Canada on native self-government require a careful, nuance approach in international fora to the merits of the issue of the application of the right to self-determination to native groups. In the Denny case, the band expressly claimed to be a sovereign state whereas in the Lubicon Lake Case, the band is

...3

- 3 -

CONFIDENTIAL

asserting that the expropriation of lands they claim to be theirs is a violation of the right to self-determination. Thus from a strategic point of view, and in light of ongoing domestic developments, it is preferable to make the Canadian case on the applicability of self-determination to Canada's indigenous population (whether an Indian band is a "people") only if required, i.e. only if the Committee rules the complaint admissible.

10. The Department of Justice is familiar with the Band's Canadian counsel and [REDACTED]

s.23

11. We have provided Martin Low with informal comments on his draft and suggested he may wish to consider adding argumentation that the Band's complaint is implicitly founded on a right to property. The ICCPR does not contain a right to property and therefore it can be argued that the complaint is inadmissible rationae materiae. The attacks on the impartiality of the Court of Appeal of Alberta contained in the March 27th, 1985 comments by the Band's counsel are unprofessional to say the least and may require some comment to set the record straight.

12. The Canadian comments on admissibility are overdue. The Committee sent a note on April 4, 1985 to the Permanent Mission in Geneva specifically requesting information as to when Canada intends to provide its submission on admissibility. It is, therefore, important that Canada respond to this note and supply comments on admissibility without delay and certainly in advance of the next meeting of the Human Rights Committee working group on complaints that meets 1-5 July 1985 in Geneva. We have so informed IMU and the Department of Justice.

Charr

Colleen Swords
Legal Operations Division

File

**ACTION
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45-CDR-13-1-3-Lubicon

FM GENEV YTGR2671 22APR85

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---HUMAN RIGHTS CTTEE:COMMUNICATION NO 167/1984(LUBICON BAND)

WE ARE SENDING BY BAG ORIGINAL COPY OF NOTE G/SO 215/51 CANA(38)

DATED APR4 AND RECD(FROM NEW YORK)AT MISSION ON 22APR WITH

TEXT OF FURTHER SUBMISSION(DATED MAR27,1985)FROM CHIEF OMINAYAK

OF LUBICON LAKE BAND.NOTE INDICATES THAT CTTEE HAS ASKED TO BE

INFORMED OF DATE AT WHICH IT CAN EXPECT CDN GOVTS SUBMISSION.

2.NOTE AND ENCLOSURES TOTAL 11 PAGES.GRATEFUL ADVISE IF MATERIAL
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45-13-2 (Lubicon Band)
Sh.

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REFERENCE: G/SO 215/51 CANA (38)
167/1984

ACC	39 0561	DOSSIER
FILE	45-COA-13-1-3-Lubicon Lake Band	

..... The Secretariat of the United Nations (Centre for Human Rights) presents its compliments to the Permanent Mission of Canada to the United Nations Office at Geneva and, further to the material transmitted with the Secretary-General's note No. G/SO 215/51 CANA (38), 167/1984 of 21 November 1984, has the honour to transmit herewith, to complete the files of the State party, the text of a further submission, dated 27 March 1985, from Chief Bernard Ominayak and the Lubicon Lake Band of Alberta, to be placed before the Human Rights Committee as a supplement to communication No. 167/1984, which is before the Committee under the Optional Protocol to the International Covenant on Civil and Political Rights.

With reference to the Permanent Mission's note No.144, dated 20 December 1984, informing the Secretary-General that the State party would not be in a position to make its submission under rule 91 of the Committee's provisional rules of procedure by 21 January 1985, as requested in the Secretary-General's note referred to above, the Secretariat should like to take this opportunity to inquire at which later date the State party intends to make its submission. This inquiry is made at the Committee's request.

4 April 1985 *[Signature]*

cc: Permanent Mission, New York.



EXTERNAL AFFAIRS



AFFAIRES EXTÉRIEURES

file

TO
A The Under-Secretary of State
for External Affairs (IMU)
Ottawa

FROM
De The Permanent Mission of Canada
Geneva

REFERENCE
Référence Our telegram YTGR-2671 of 22 April 1985

SUBJECT
Sujet Human Rights Committee:
Communication No. 167/1984 (LUBICON BAND)

SECURITY UNCLASSIFIED
Sécurité

DATE April 25, 1985

NUMBER Numéro	2672	MAY MAI - 6 1985
FILE	OTTAWA	DOSSIER
MISSION	45-13-2 (LUBICON BAND)	

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Annexes

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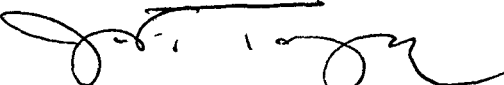
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Permanent
Mission,
New York

SISS

JLO

--- You will find attached the original copy of
a U.N. Note No. G/SO 215/51 CANA(38) dated April 4, 1985,
concerning a further submission (dated 27 March 1985) from
Chief Ominayak of Lubicon Lake Band.


The Permanent Mission

VAN NESS, FELDMAN, SUTCLIFFE, CURTIS & LEVENBERG

A PROFESSIONAL CORPORATION

1050 THOMAS JEFFERSON STREET, N. W.

SEVENTH FLOOR

WASHINGTON, D. C. 20007

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CYNTHIA INGERSOLL
JESSICA S. LEFEVRE
LYNN MINNA
D. ERIC HULTMAN
OF COUNSEL

March 27, 1985

Mr. Jakob Th. Moller
Chief, Communications Unit
Center for Human Rights
c/o United Nations Liaison Office
Room 3660
United Nations Secretariat
New York, NY 10017

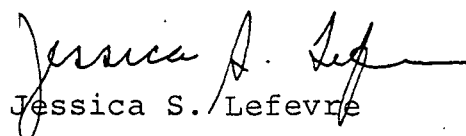
RE: Communication No. 167/1984

Dear Mr. Moller:

On behalf of Chief Bernard Ominayak and the Lubicon
Lake Band, I am sending the Human Rights Committee the
enclosed Supplement to Communication No. 167/1984.

We are grateful for your consideration and assistance
in this matter.

Respectfully yours,


Jessica S. Lefevre

Enclosure

VAN NESS, FELDMAN, SUTCLIFFE, CURTIS & LEVENBERG

A PROFESSIONAL CORPORATION

1050 THOMAS JEFFERSON STREET, N. W.

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March 27, 1985

SUPPLEMENT TO COMMUNICATION NO. 167/1984

SUBMITTED BY CHIEF BERNARD OMINAYAK

AND THE LUBICON LAKE BAND OF ALBERTA, CANADA

On February 14, 1984, Chief Bernard Ominayak and the Lubicon Lake Band, with the assistance of Jessica S. Lefevre, submitted Communication No. 167/1984 ("the Communication") to the Human Rights Committee for its consideration. The facts and arguments contained herein are submitted as a supplement to the Communication.

In the Communication, the Lubicon Lake Band requested that, with respect to this case, the Committee waive its requirement that all domestic remedies be exhausted. Such waiver is provided for by Article 5(2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights, which states that the exhaustion of domestic remedies "shall not be the rule where the application of the remedies is being unreasonably prolonged." As set forth more fully below,

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events which have occurred since the submission of the Communication make it clear that the Lubicon Lake Band will not survive the exhaustion of its domestic remedies and that, in any event, effective redress is unavailable for the People of Lubicon Lake within Canada's domestic system.

1. The Alberta Court of Appeal

In "Domestic Remedies, § C," pp. 5-6 of the Communication, the Lubicon Lake Band's action in the Provincial Court of Alberta (the Court of Queen's Bench of Alberta) is discussed. This action was initially filed on February 16, 1982, and included a request for an interim injunction to halt development in the area until issues raised by the Band's land and natural resource claims were settled. The main purpose of the interim injunction was to prevent the Alberta Government and the oil companies ("Defendants") from further destroying the traditional hunting and trapping territory of the Lubicon Lake People. This would have permitted the Cree Aboriginal People of Lubicon Lake to continue to hunt and trap for their livelihood and subsistence and as a part of their aboriginal way of life. As stated in the Communication, the Provincial Court did not render its decision for almost two years, during which time oil and gas development continued, along with gross and unnecessary destruction of the Band's economic base. On November 17, 1983, the request for an interim injunction was denied and the Band, though financially destitute, was

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subsequently held liable for all court costs and attorneys' fees associated with the action.

The decision of the Court of Queen's Bench was appealed to the Court of Appeal of Alberta. It was dismissed by the Court of Appeal on January 11, 1985.

It is the respectful submission of the Band that the court exercised less than impartial judgment in reaching its decision. In fact, it is difficult to believe that the court could be truly impartial given the extremely large sums of money to be gained by the Province and the energy corporations now working in the Band's traditional area and taking into account the close business and personal relationships that exist among the corporations, Provincial officials, and members of the court.

In reaching its decision, the Court of Appeal agreed with the lower court's finding that the Band's claim of aboriginal title to the land presents a serious question of law to be decided at trial. Nonetheless, the Court of Appeal found that the Aboriginal People of Lubicon Lake would suffer no irreparable harm if resource development continued fully and that the balance of convenience, therefore, favored denial of the injunction.^{1/}

^{1/} It is notable that the Aboriginal Peoples' attempts to convince the court that the Defendants' activities threaten imminent destruction of their livelihood, their way of life and of their society were dismissed by the Court of Appeal as "hyperbolic claims of cultural harm."

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The Defendants attempted to convince the court that the Aboriginal Peoples of Lubicon Lake have no right to any possession of any sort in any part of the subject lands, which, logically, included even their homes. In response, the Court pointed out that any attempt to force the Lubicon People from their dwellings might indeed prompt interim relief, as would attempts to deny them access to traditional burial grounds or other special places, or to hunting and trapping areas. In its complaint, the Band alleged denial of access to all of these areas, supporting its allegations with photographs of damage and with several uncontested affidavits. Yet, the Court overlooked the Band's evidence and concluded that the Band had failed to demonstrate that such action had been taken or indeed threatened by the Defendants.

The legal basis for the Court of Appeal's decision was its own definition of irreparable injury. This test was: injury which is of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice. The People of Lubicon Lake clearly met this test by demonstrating, with uncontested proof, injury to their livelihood, to their subsistence economy, to their culture and to their way of life as a social and political entity. Yet, the court found that the Band had not demonstrated irreparable harm.

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Among the Band's submissions of fact was undisputed evidence that substantial parts of its hunting and trapping territory had already been destroyed and that the welfare dependency of the People would increase imminently and dramatically. (In fact, it has now increased from 10 percent to 90 percent.) In the face of this evidence, the Court of Appeal stated that it would be sheer speculation to find that before the trial of this matter in 1986, the Band's traplines will cease to be commercially viable and that the people will suffer serious red meat shortage. The court justified this conclusion by stating that, in any event, the Plaintiffs could, if successful at trial, gain money damages sufficient to restore the wilderness and compensate themselves for interim losses.

In effect, the Court of Appeal held that an injunction would not lie since, given the effects of oil and gas exploration in the area, the Band no longer has a subsistence economy and traditional way of life to be destroyed. This was found despite the Band's clear and incontrovertible evidence of its continuing struggle to survive. In the alternative, the court held that the destruction of the Band's subsistence economy, its land, resources, and ultimately its social structure and culture could be compensated by money damages -- if the Band succeeds at trial in another year, in the same courts that currently refuse to recognize the rights of the

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Aboriginal People of Lubicon Lake to their land, livelihood, and culture.

Thus, both lower court decisions demonstrated a total lack of concern for the health and welfare of the members of the Band, no comprehension of subsistence economics and the aboriginal way of life, and both decisions constituted a fundamental denial of justice to the Aboriginal Peoples of Lubicon Lake.

2. The Supreme Court of Canada

On February 18, 1985, the Aboriginal Peoples of Lubicon Lake presented arguments to a panel of three (3) judges of the Supreme Court of Canada, requesting leave to appeal from the judgment of the Alberta Court of Appeal.

By a judgment without opinion, rendered on March 14, 1985, the Supreme Court of Canada simply dismissed the application for leave to appeal, with costs. The three (3) judge panel consisted of Justices Estey, McIntyre and LeDain.

Generally, the criteria for granting leave to appeal are: whether the questions presented are of public importance, whether the case contains important issues of law, or whether the proceedings are for any reason of such a nature or significance as to warrant a decision by the Supreme Court of Canada.

The issues presented by the Lubicon Lake Band involved such questions as: the interpretation of the constitutional

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rights of Aboriginal Peoples, the existence of which was recently confirmed by the Constitution Act, 1982; the remedies available to Aboriginal Peoples; the rights of Aboriginal Peoples to carry out traditional subsistence activities in traditional hunting and trapping grounds; the legal regime applicable to a large area of land in Northern Alberta; conflicts between Canada's traditional, land-based societies and its industrial society; public interests and minority interests; the competing rights of public authorities and individuals; considerations of fundamental and equitable justice; equality before the law; and the right to equal protection and benefit of the law.

At least the first four questions have not yet been adjudicated by the Supreme Court of Canada and they incontrovertibly fall within the criteria set out for granting leave to appeal. Furthermore, precedent within the Supreme Court clearly indicates that this is precisely the type of case the Supreme Court should consider. Thus, the Supreme Court's refusal to give the Aboriginal Peoples of Lubicon Lake the right even to be heard on the merits of their interim injunction application is, at best, arbitrary. Moreover, it constitutes a denial of fundamental justice in that it provides a clear signal to the Provincial Government of Alberta that it may, with impunity, dispose of the Indian lands at Lubicon Lake (lands promised to the Lubicon Lake Band by the Federal

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Government of Canada in 1939) while the dispute over title to those lands is waged in the courts over the next several years.

Given the probability of appeals and cross-appeals on a multitude of procedural points, the penniless state of the Aboriginal Peoples of Lubicon Lake and the determination of the Province of Alberta, with the tacit consent of Canada, to suppress the Lubicon Lake Band, the decision of the Supreme Court of Canada means that these people are doomed to live as trespassers in their own homeland, with no chance of survival as a hunting and trapping society.

The Supreme Court of Canada has, by this decision, not only confirmed that in Canada there is one justice for the rich and powerful and another justice for the poor and powerless, especially the Aboriginal Peoples of Canada, but the decision also provides legal sanction to the certain destruction of an aboriginal way of life.

3. Conclusion

The Lubicon Lake Band will soon be extinguished as a People, with the full knowledge and consent of the Federal Government of Canada and without any possible redress within Canada's domestic system. Even if such redress were possible, the Band has absolutely no financial resources left with which to continue legal proceedings on the merits of the action; and in any event, such a pursuit would be purely academic at this point since final judgment would not be rendered for several

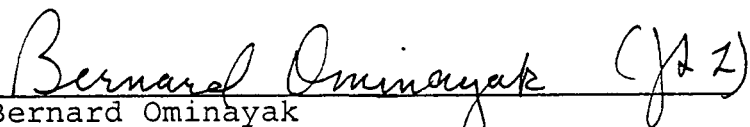
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years, long after the battle for survival will inevitably have been lost.

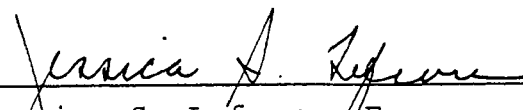
With all due respect, we must inform the United Nations Committee on Human Rights that, at the very least, cultural, if not physical genocide is successfully being practiced upon the Crees of Lubicon Lake with the concurrence and complicity of the Federal Government of Canada.

The author of this communication is prepared to provide further information or clarification which may be desired, and reserves the right under Provisional Rule 93(3) to submit additional information and observations after receiving the reply of the Government of Canada.

Submitted by:


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External Affairs
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Accession/Référence

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File/Dossier

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