

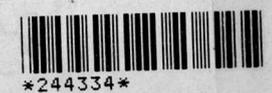
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File No. Dossier 45-CDA-13-1-3-LUBICON LAKE BAND

Volume 16 From-De 89-12-01 To-À 90-04-30

VOLS ACCESSION NO. 244334



45-CDA-13-1-3-LUBICON LAKE  
Vol 16

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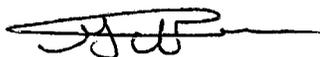
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# Information

## STATUS OF LUBICON LAKE CLAIM

### BACKGROUND

In 1933, the heads of fourteen Indian families living near Lubicon Lake petitioned the federal government. They stated that they were treaty Indians and mostly members of the Whitefish Lake Band, which had received a reserve in 1908. However, the families said they lived apart from the Whitefish Lake Band and that they wanted a reserve of their own at Lubicon Lake.

In 1939, the government agreed to recognize them as a band and to provide a 25.4 square mile reserve for their population of 127 people, in accordance with the provisions of Treaty 8.

The Second World War intervened and, in the years following, the claim was not pursued. During this period the band was treated like all other bands. It received government support for housing, band salaries and administration, education and social assistance.

### THE LUBICON CLAIM

In 1980 the Lubicon Lake Band filed a statement of claim in the Federal Court of Canada against Canada, Alberta and various oil companies.

The Lubicon claim was in three parts:

- they had aboriginal title; failing that,
- they were within the Treaty 8 area and were entitled to a settlement based upon its benefits; and failing that,
- they were promised a reserve which they had yet to receive.

- 2 -

In their statement of claim, the band maintained that it represented approximately 200 people who sought title to 25,000 square miles -- approximately 10 per cent of the province of Alberta -- along with \$1 billion in damages. Since the federal court can only hear actions against the federal government and its institutions, the band later initiated a second action against Alberta and 11 oil companies in the Alberta courts.

The band's billion dollar claim, and a later demand that oil and gas activity be shut down, captured the attention of the media.

The federal government has not accepted the band's claim to have aboriginal title -- thereby rejecting their claim to 25,000 square miles -- since aboriginal rights to land had been dealt with by Treaty 8. It is, therefore, the second or third parts of the claim which Canada has accepted and has been trying to settle.

The basis of the claim is found in Treaty No. 8, signed in 1899 between the Federal Crown and the Indians of Northern Alberta, among others. The Treaty provides for one square mile of land for a family of five, or 128 acres per Indian, plus other benefits. Both the federal and provincial governments acknowledge that the land is owed and that the Treaty claim is valid. The main obstacle to final settlement is the band's continued demands for monetary compensation.

Alberta has offered the Lubicon Lake Cree 95 square miles of land for a reserve, inclusive of mines and minerals. This meets a demand of the band and has been accepted by it. It would create the sixth largest reserve in Alberta, even though the Lubicon Lake Band is only the 29th largest band in the province.

In addition, in a formal offer made in January 1989, Canada offered \$34 million to build a new community including up to 133 new houses, a band office, sewer and water system, community hall and school. Canada also offered to provide another \$10.4 million for an economic development package, all of which would not prejudice any further court challenges the Lubicon Band might launch to win additional compensation under Treaty 8.

Both the Alberta and Canadian governments have tried repeatedly to resolve the claim. Numerous attempts have been made to settle outstanding differences but to date all offers have been rejected. Fortunately, land is no longer an issue as the band has agreed to the provincial offer of 95 square miles to create a reserve.

Compensation is the remaining issue in this dispute. Both governments are offering a total of \$15,000,000 to be used for socio-economic development without restriction on its use. There would be no tax on any of these funds.

The band now seeks \$170,000,000. Its case against Canada is a demand for the band's share of programs and services since 1899 -- an issue which Canada has invited the band to pursue in the courts. The Lubicon Lake Band has refused to do this.

In 1984, it started an appeal to the United Nations Human Rights Committee. The Committee's finding confirmed what the Government of Canada has already acknowledged -- that an obligation to the Lubicons exists which must be settled.

The Human Rights Committee found that the offer which Canada has already made to the band is fair and reasonable and would meet any obligation Canada has under the International Covenant on Civil and Political Rights. After examining the facts, the U.N. agreed that the government offer to the Lubicon Lake Indians is an appropriate remedy. When this decision was released in May, 1990 the Minister for Indian Affairs and Northern Development, Tom Siddon, indicated the government's desire to resolve this matter and expressed the hope that band leaders would accept the offer.

The Lubicon leadership has so far refused. The government cannot impose a settlement on the band.

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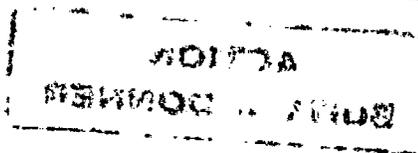
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(à rappeler dans la réponse)  
167/1984

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The Secretary-General of the United Nations presents his compliments to the Permanent Representative of Canada to the United Nations Office at Geneva and has the honour to transmit herewith, the text, in English and in French, of the views adopted by the Human Rights Committee on 26 March 1990, concerning communication No. 167/1984, submitted to the Committee under the Optional Protocol to the International Covenant on Civil and Political Rights by Bernard Ominayak, Chief of the Lubicon Lake Band. The text of two individual opinions is attached to the Committee's views.

In accordance with the established practice of the Human Rights Committee, the text of the views and of the individual opinions appended thereto, as contained in document CCPR/C/38/D/167/1984 will be made public.

27 April 1990

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CCPR

Pacte international  
relatif aux droits civils  
et politiquesDistr.  
RESTREINTE\*

CCPR/C/38/D/167/1984

28 mars 1990

FRANCAIS

ORIGINAL : ANGLAIS

COMITE DES DROITS DE L'HOMME  
Trente-huitième session

## DECISIONS

Communication No 167/1984

Présentée par : Bernard Ominayak, Chef de la bande du lac Lubicon  
(représenté par un avocat)

Au nom de : La bande du lac Lubicon

Etat partie concerné : Canada

Date de la communication : 14 février 1984

Références : Décisions antérieures - CCPR/C/WG/23/D/167/1984  
(décision du 9 novembre 1984 prise en application de l'article 91)  
- CCPR/C/27/D/167/1984 (décision provisoire du 10 avril 1986)  
- CCPR/C/30/D/167/1984 (décision du 22 juillet 1987 sur la recevabilité)  
- CCPR/C/36/D/167/1984 (nouvelle décision provisoire, du 14 juillet 1989)

Date de la présente décision : 26 mars 1990

Le 26 mars 1990, le Comité des droits de l'homme a adopté le texte de ses constatations, conformément à l'article 5, paragraphe 4 du Protocole facultatif, concernant la communication No 167/1984. Ce texte est reproduit en annexe au présent document.

\* Rendu public par décision du Comité des droits de l'homme.

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ANNEXE

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CONSTATATIONS DU COMITE DES DROITS DE L'HOMME (ARTICLE 5, PARAGRAPHE 1, DU PROTOCOLE FACULTATIF CONCERNANT LE PACTE INTERNATIONAL RELATIF AUX DROITS CIVILS ET POLITIQUES) - TRENTE-HUITIEME SESSION

concernant

La communication No 167/1984

Présentée par : Le chef Bernard Ominayak et la bande du lac Lubicon (représentés par un avocat)

Au nom de : La bande du lac Lubicon

Etat partie concerné : Canada

Date de la communication : 14 février 1984 (date de la communication initiale)

Date de la décision sur la recevabilité : 22 juillet 1987

Le Comité des droits de l'homme, créé en vertu de l'article 28 du Pacte international relatif aux droits civils et politiques,

Réuni le 25 mars 1990,

Ayant achevé l'examen de la communication No 167/1984, présentée par Le chef B. Ominayak et la bande du lac Lubicon en application du Protocole facultatif concernant le Pacte international relatif aux droits civils et politiques,

Ayant tenu compte de toutes les informations écrites qui lui ont été fournies par l'auteur de la communication et par l'Etat partie,

Adopte le texte ci-après :

Constatations présentées en application de l'article 5, paragraphe 4, du Protocole facultatif \*\*/

1. L'auteur de la communication (première lettre datée du 14 février 1984, et lettres postérieures) est le chef Bernard Ominayak (ci-après appelé l'auteur), de la bande du lac Lubicon (Canada). Il est représenté par un avocat.

2.1 L'auteur fait état de violations, par le Gouvernement canadien, du droit que possède la bande du lac Lubicon de disposer d'elle-même et, en vertu de ce droit, de déterminer librement son statut politique et poursuivre son développement économique, social et culturel, ainsi que de son droit de disposer de ses richesses et ressources naturelles et de ne pas être privée de ses propres moyens de subsistance. Ces violations seraient contraires aux obligations contractées par le Canada aux termes des paragraphes 1, 2 et 3 de l'article premier du Pacte international relatif aux droits civils et politiques.

\*\*/ Les textes de deux opinions individuelles soumis respectivement par MM. Nisuke Ando et Bertil Wennergren figurent en appendice.

2.2 Le chef Ominayak dirige et représente la bande du lac Lubicon, qui regroupe des Indiens cree vivant à l'intérieur des frontières du Canada, dans la province de l'Alberta. Ceux-ci sont soumis à la juridiction du Gouvernement fédéral du Canada, prétendument en vertu de la tutelle exercée par le Gouvernement canadien sur les nations indiennes et leurs terres situées en territoire canadien. La bande du lac Lubicon, qui a conscience de son identité, constitue un groupe économique et socio-culturel relativement autonome. Depuis des temps immémoriaux, ses membres habitent, chassent, pêchent et pratiquent le commerce des fourrures sur un territoire de 10 000 kilomètres carrés en Alberta du Nord. Comme son territoire est difficile d'accès, jusqu'à une date récente elle a eu peu de contacts avec des non-Indiens. Les membres de la bande parlent essentiellement le cree. Nombreux sont ceux qui ne savent ni parler, ni lire, ni écrire l'anglais. La bande conserve sa culture, sa religion, sa structure politique traditionnelles et son économie de subsistance.

2.3 Par la loi sur les Indiens de 1970 et le Traité No 8 du 21 juin 1899 (concernant les droits fonciers des autochtones en Alberta du Nord), le Gouvernement canadien aurait reconnu le droit des habitants originels de cette région à poursuivre leur mode de vie traditionnel. Malgré ces lois et accords, le Gouvernement canadien a autorisé le Gouvernement de la province de l'Alberta à exproprier le territoire de la bande du lac Lubicon au profit d'intérêts de sociétés privées (octroi de concessions pour la prospection de pétrole et de gaz). Le Canada est accusé d'avoir ainsi violé le droit de la bande à déterminer librement son statut politique et à poursuivre son développement économique, social et culturel comme le garantit le paragraphe 1 de l'article premier du Pacte. Qui plus est, les activités de prospection de ressources énergétiques sur le territoire de la bande violeraient le paragraphe 2 de l'article premier du Pacte, qui accorde à tous les peuples le droit de disposer de leurs richesses et ressources naturelles. En détruisant l'environnement et en sapant l'assise économique de la bande, elles priveraient la bande de ses moyens de subsistance et de la jouissance du droit à l'autodétermination garantie par l'article premier du Pacte.

3.1 L'auteur déclare qu'il n'a été recouru pour cette même affaire à aucune autre procédure d'enquête internationale ou de règlement international.

3.2 Pour ce qui est de l'épuisement des recours internes, il est déclaré que la bande du lac Lubicon continue de faire valoir ses revendications par les voies politiques et juridiques internes. L'administration et les représentants des sociétés pétrolières se serviraient des moyens politiques et juridiques disponibles au Canada pour empêcher et retarder les actions en justice de la bande jusqu'à ce que celle-ci finisse par ne plus pouvoir défendre sa cause, parce que si le développement industriel de la région, qui s'accompagne de la destruction du milieu écologique et de l'assise économique de la bande, se poursuit au rythme actuel, celle-ci ne pourra pas survivre longtemps en tant que nation.

3.3 Le 27 octobre 1975, des représentants de la bande du lac Lubicon ont déposé auprès du Secrétaire de district chargé du cadastre de la province de l'Alberta une demande de notification d'opposition (gaveat) qui informerait toutes les parties intéressées par les terres en question que la bande revendique un titre de propriété autochtone sur ces terres, comme le prévoit la loi sur les titres fonciers provinciaux. La Cour suprême de l'Alberta a reçu les conclusions présentées au nom

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du gouvernement provincial, qui vont à l'encontre de la notification d'opposition, et celles présentées au nom de la bande du Lac Lubicon. Le 7 septembre 1976, le Procureur général de la province a déposé une demande d'ajournement, dans l'attente du règlement d'une affaire similaire. Il a été fait droit à ladite requête. Le 25 mars 1977, le Procureur général a toutefois présenté à la législature provinciale un amendement à la loi sur les titres fonciers visant à empêcher le dépôt de notifications d'opposition; l'amendement a été adopté avec effet rétroactif au 13 janvier 1975, soit une date antérieure au dépôt de la notification d'opposition par la bande du lac Lubicon. Dans ces conditions, la procédure engagée devant la Cour suprême, n'ayant plus de raison d'être, a été annulée.

3.4 Le 25 avril 1980, la bande a introduit une action auprès de la Cour fédérale du Canada lui demandant de déclarer son droit sur ses terres, à leur utilisation et au produit de leurs ressources naturelles. L'action contre le gouvernement provincial et toutes les sociétés pétrolières à l'exception d'une seule (Pétro-Canada) a été rejetée pour une question de conflit d'attribution. L'action assignant en justice le gouvernement fédéral et Pétro-Canada a été déclarée recevable.

3.5 Le 16 février 1982, une action a été introduite auprès du Court of Queen's Bench de l'Alberta, demandant l'adoption d'une ordonnance conservatoire pour arrêter la mise en valeur de la zone jusqu'à ce que les questions relatives au droit revendiqué par la bande à ses terres et à ses ressources naturelles aient été réglées. Le but principal de l'ordonnance, déclare l'auteur, était d'empêcher le Gouvernement de l'Alberta et les sociétés pétrolières (c'est-à-dire les défendeurs) de continuer à détruire le territoire traditionnel de chasse et de piégeage de la nation du lac Lubicon. Cela aurait permis aux populations autochtones du lac Lubicon de continuer à gagner leur vie et assurer leur subsistance en chassant dans le cadre de leur genre de vie traditionnel. Selon la communication, la Cour provinciale s'est abstenue de rendre sa décision durant près de deux ans, pendant que les prospections de pétrole et de gaz se poursuivaient, en même temps que la destruction accélérée de l'assise économique de la bande. Le 17 novembre 1981, la demande d'ordonnance conservatoire a été rejetée et la bande, bien que sans ressources financières, a été ultérieurement condamnée à payer tous les frais de justice et honoraires d'avocats afférents à l'action.

3.6 La décision du Court of Queen's Bench a fait l'objet d'un recours devant la Cour d'appel de l'Alberta. La Cour d'appel a rejeté ce recours le 11 janvier 1985. Dans son arrêt, la Cour d'appel a admis avec la juridiction inférieure que la revendication de la bande tendant à obtenir un titre de propriété autochtone sur ces terres soulevait une importante question de droit qui devait être tranchée par un jugement. Elle a néanmoins estimé que la nation autochtone du lac Lubicon ne subirait aucun dommage irréparable si la mise en valeur des ressources se poursuivait intégralement et que, tout pris en considération, il y avait donc lieu de refuser l'ordonnance.

3.7 Les défendeurs, déclare l'auteur, se sont efforcés de convaincre la Cour que les populations autochtones du lac Lubicon n'ont strictement aucun droit de possession au regard de l'une quelconque des terres dont il s'agit, c'est-à-dire en toute logique, au regard de leurs habitations mêmes. Sur ce point, la Cour a

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déclaré que toute tentative d'expulser les membres de la bande du lac Lubicon de ses résidences pourrait effectivement donner lieu à des mesures conservatoires d'urgence, tout comme une tentative visant à lui interdire d'accéder à ses cimetières traditionnels ou autres lieux communautaires, ou à ses zones de chasse. Dans sa requête, la bande du lac Lubicon, alléguant l'interdiction d'accès à toutes ces zones, a étayé ses dires par des photographies qui illustrent l'étendue des dommages et par plusieurs déclarations sous serment non contestées. Mais la Cour, négligeant les preuves fournies par les demandeurs, a conclu que ceux-ci n'avaient pas démontré que les défendeurs aient pris, ni même menacé de prendre, les mesures dont il s'agit.

3.8 L'auteur déclare que la Cour d'appel a, en droit, fondé sa décision sur sa propre définition du dommage irréparable. Le critère retenu est que le dommage doit être tel qu'il ne prête pas à un recours équitable et raisonnable devant un tribunal et qu'il y aurait déni de justice à refuser de procéder à l'injonction. L'auteur estime que la nation du lac Lubicon a manifestement satisfait à ce critère en produisant des preuves non contestées concernant les atteintes portées à ses moyens d'existence, à son économie de subsistance, à sa culture et au mode de vie lié à sa personnalité tant sociale que politique. Et pourtant, la Cour a conclu que la bande du lac Lubicon n'avait pas démontré l'existence d'un dommage irréparable.

3.9 Le 18 février 1985, les populations autochtones du lac Lubicon ont présenté leurs arguments à une chambre composée de trois juges de la Cour suprême, pour demander l'autorisation d'interjeter appel contre l'arrêt de la Cour d'appel de l'Alberta. Le 14 mars 1985, la Cour suprême canadienne a rejeté la demande. D'une manière générale, déclare l'auteur, l'autorisation d'interjeter appel est accordée en fonction des critères suivants : les questions soulevées doivent être d'ordre public, l'affaire doit porter sur des questions de droit importantes, ou bien, à un titre ou à un autre, le dossier est d'une telle nature ou d'une telle portée qu'il justifie une décision au niveau de la Cour suprême canadienne. L'auteur déclare que les questions soulevées par la bande du lac Lubicon portaient notamment sur l'interprétation des droits constitutionnels des nations autochtones, droits dont l'existence a été récemment confirmée par la loi constitutionnelle de 1982 sur les recours ouverts aux nations autochtones, sur les droits de ces populations concernant la poursuite de leurs activités de subsistance traditionnelles dans leurs territoires de chasse traditionnels, sur le régime juridique applicable à une vaste partie de l'Alberta du Nord, sur les conflits qui opposent les sociétés terriennes traditionnelles du Canada et la société industrielle de ce pays, sur l'intérêt général et les intérêts des minorités, sur la délimitation des droits des autorités par rapport aux droits des individus, sur des considérations de justice fondamentale et d'équité, sur l'égalité devant la loi et sur le droit à une protection et à une application égales de la loi. Les quatre premières de ces questions, pour le moins, estime l'auteur, n'ont pas encore été tranchées par la Cour suprême canadienne, et elles relèvent indiscutablement des critères applicables au regard de l'autorisation d'interjeter appel.

4. Par sa décision du 16 octobre 1984, le Groupe de travail du Comité des droits de l'homme a transmis la communication à l'Etat partie concerné, en vertu de l'article 91 du règlement intérieur provisoire, et l'a prié de soumettre des renseignements et des observations se rapportant à la question de la recevabilité de

la communication. Les principaux points qui ressortent des renseignements et observations reçus de l'Etat partie sont repris ci-après dans les paragraphes 5.1 à 5.7 et 6.1 à 6.4.

#### Epuisement des recours internes

5.1 Dans sa communication datée du 31 mai 1985, l'Etat partie soutient que la bande du lac Lubicon n'a pas mené à leur terme tous les recours internes qu'elle a intentés et que la responsabilité des retards ayant pu survenir dans les procédures de recours n'incombe pas au Gouvernement canadien. L'Etat partie rappelle que la bande du lac Lubicon, agissant en vertu de son droit légal propre, et le chef Bernard Ominayak, agissant à titre personnel, ainsi que conjointement avec d'autres conseillers de la bande pour compte d'autrui, ont engagé trois procédures différentes, et il fait observer que leur le litige concernant la demande de notifications d'opposition (savear) déposée par la bande a été tranché. Deux autres actions intentées, l'une devant la Cour fédérale du Canada et l'autre devant la Cour provinciale (Court of Queen's Bench) de la province de l'Alberta, seraient pendantes.

5.2 S'agissant de l'action intentée devant la Cour fédérale, mentionnée dans la communication, l'Etat partie rappelle que la bande et ses conseils juridiques ont, en avril 1980, tenté d'engager contre la province de l'Alberta et des sociétés privées des poursuites devant la Cour fédérale du Canada. Or, estime l'Etat partie, ni la province de l'Alberta, ni des entités privées n'auraient pu être assignées comme défendeurs devant la Cour fédérale du Canada. Au lieu de reprendre la procédure devant la juridiction compétente, déclare l'Etat partie, la bande a contesté l'exception préjudicielle soulevée par les défendeurs concernant la question de la compétence. Cette procédure a abouti, en novembre 1980, à une décision juridique défavorable à la bande. Ayant fait appel de cette décision devant la Cour fédérale d'appel, la bande a été déboutée en mai 1981.

5.3 Après la procédure concernant la question préjudicielle de la compétence de la Cour fédérale, une nouvelle action a été intentée, le 21 février 1982, devant la Cour provinciale de l'Alberta, contre la province et certaines personnes morales défenderesses. Comme il ressort de la communication, la bande demandait que soit rendue une injonction provisoire. En novembre 1983, à l'issue d'une longue procédure, la Cour provinciale a rejeté la demande de la bande en se fondant sur l'affaire Erickson c. Wiggins Adjustments Ltd. [1980] 6 W.R.R. 188, où étaient exposés les critères sur la base desquels un tribunal était habilité à rendre une injonction provisoire. Selon ce qui a été jugé dans cette dernière affaire, tout demandeur qui sollicite une injonction provisoire est tenu d'établir :

- a) Qu'il existe une question grave qui doit être tranchée par un jugement;
- b) Qu'un préjudice irréparable serait causé avant que ce jugement soit rendu si aucune injonction n'était émise; et
- c) Que le principe de l'équilibre des avantages milite en faveur de l'octroi d'une réparation au demandeur.

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L'Etat partie fait observer que la Cour provinciale de l'Alberta a rejeté la demande de la bande au motif que les demandeurs n'avaient pas prouvé qu'il y aurait préjudice irréparable et qu'une réparation suffisante leur serait accordée si, en fin de compte, ils gagnaient leur procès.

5.4 Au lieu d'engager un procès sur le fond, la bande a fait appel du rejet de sa demande d'injonction provisoire. La Cour d'appel de l'Alberta l'a déboutée de cet appel le 11 janvier 1985. La demande d'autorisation, présentée par la bande, de faire appel à la Cour suprême du Canada de la décision rejetant sa demande d'injonction provisoire a été rejetée le 14 mars 1985. Près de deux mois plus tard, le 13 mai 1985, ajoute l'Etat partie, la Cour suprême du Canada a refusé d'accéder à une autre demande de la bande tendant à ce que la Cour déroge à ses propres règles et réexamine la demande d'autorisation. Ainsi, déclare l'Etat partie, la Cour a maintenu sa règle bien établie, qui interdit le réexamen des demandes d'autorisation de faire appel.

5.5 L'Etat partie estime qu'après des retards aussi importants causés par la procédure préliminaire et la contestation de règles de procédure bien établies, l'auteur n'est pas fondé à se plaindre que les procédures de recours internes excèdent des délais raisonnables. Il estime que la bande, en sa qualité de demanderesse, a eu la possibilité d'accélérer, dans le cadre de l'une ou l'autre de ses actions, l'accomplissement des actes de procédure nécessaires pour que la cause soit en état.

Recours supplémentaires

5.6 L'Etat partie déclare qu'en vertu de la doctrine dominante en droit international, l'expression "recours interne" est censée s'appliquer, d'une façon générale, à toutes les procédures internes établies de réparation. L'alinéa b) du paragraphe 3 de l'article 2 du Pacte, déclare-t-il, reconnaît qu'outre les recours juridictionnels, un Etat partie au Pacte peut garantir des recours administratifs et autres. Après avoir déposé ses conclusions dans la procédure engagée devant la Cour fédérale, le Gouvernement fédéral a proposé, à la fin de 1981, de régler la question en offrant à la bande des terres de réserve en application du traité conclu en 1899. Les conditions proposées par la province (qui détient un titre de propriété sur les terres) n'ayant pas rencontré l'agrément de la bande, celle-ci a rejeté la solution envisagée pour ce conflit.

5.7 L'Etat partie estime que la revendication, par la bande du lac Lubicon, de certaines terres situées dans la partie septentrionale de l'Alberta n'est qu'un élément d'une situation qui est extrêmement complexe, du fait des revendications concurrentes de plusieurs autres communautés autochtones de la région. En juin 1980, environ deux mois après que la bande avait engagé son action devant la Division de première instance de la Cour fédérale, six autres communautés indiennes ont saisi le Ministère des affaires indiennes d'une demande distincte faisant valoir un titre de propriété aborigène sur des terres qui chevauchent celles revendiquées par la bande du lac Lubicon. Puis, en juin 1983, la bande cree de Big Stone a revendiqué auprès du Ministère des affaires indiennes - en invoquant, e l'occurrence un traité - un droit de propriété sur une région chevauchant également des terres revendiquées par la bande du lac Lubicon. La bande cree de Big Stone représenterait cinq des communautés autochtones ayant déposé en juin 1980 une

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demande tendant à faire valoir un titre de propriété aborigène. Face à cette situation extrêmement complexe, le Ministre des affaires indiennes et du développement du Nord a, en mars 1985, désigné un ancien juge de la Cour suprême de la Colombie britannique pour exercer les fonctions de délégué spécial du Ministre chargé de prendre contact avec des représentants de la bande, d'autres communautés autochtones et de la province, d'examiner avec eux l'ensemble de la situation et de formuler des recommandations. L'Etat partie estime qu'un examen des revendications de la bande du lac Lubicon qui ne prendrait pas en considération, simultanément, les revendications concurrentes des autres communautés autochtones compromettrait le recours interne choisi par celles-ci, c'est-à-dire le règlement négocié.

#### Droit à l'autodétermination

6.1 Le Gouvernement canadien soutient que la communication, dans la mesure où elle vise le droit à l'autodétermination, est irrecevable pour deux motifs. Premièrement, le droit à l'autodétermination s'applique à un "peuple", et le Gouvernement canadien considère que la bande du lac Lubicon n'est pas un peuple au sens de l'article premier du Pacte. Le Gouvernement canadien estime donc que la communication est incompatible avec les dispositions du Pacte et devrait, en tant que telle, être jugée irrecevable en vertu de l'article 3 du Protocole. Deuxièmement, les communications soumises au titre du Protocole facultatif ne peuvent émaner que de particuliers et doivent concerner la violation d'un droit conféré à des particuliers. La présente communication, estime l'Etat partie, concerne un droit collectif, et son auteur n'a par conséquent pas qualité pour présenter une communication en application des articles premier et 2 du Protocole facultatif.

6.2 Le Gouvernement canadien soutient que la bande du lac Lubicon ne constitue pas un peuple aux fins de l'article premier du Pacte et qu'elle n'est par conséquent pas en droit de revendiquer, en vertu du Protocole, le droit de disposer d'elle-même. Il fait observer que la bande du lac Lubicon n'est qu'une seule des 582 bandes indiennes du Canada et qu'une faible fraction d'un groupe plus important d'Indiens crie, résidant dans la partie septentrionale de la province de l'Alberta. Le Gouvernement canadien considère par conséquent que les Indiens du lac Lubicon ne constituent pas un "peuple" au sens de l'article premier du Pacte.

6.3 Le Gouvernement canadien soutient que le droit à l'autodétermination, tel qu'il est défini à l'article premier du Pacte, n'est pas un droit individuel; il offre plutôt le cadre nécessaire à l'exercice de droits individuels. Cet avis, affirme-t-il, est étayé par un membre de phrase extrait des Observations générales formulées sur l'article premier par le Comité (document CCPR/C/21/Add.3, du 5 octobre 1984), et aux termes duquel la réalisation du droit de tous les peuples de disposer d'eux-mêmes est "une condition essentielle de la garantie et du respect effectif des droits individuels de l'homme ainsi que de la promotion et du renforcement de ces droits". Le Comité, ajoute l'Etat partie, reconnaît par là que les droits consacrés par l'article premier sont placés séparément, au-dessus de tous les autres droits énoncés dans le Pacte international relatif aux droits civils et politiques et dans le Pacte international relatif aux droits économiques, sociaux et culturels. De l'avis du Canada, les droits qui sont énoncés à l'article premier, et donc dans la première partie du Pacte relatif aux droits civils et politiques, sont d'une autre nature et d'une autre espèce que ceux qui sont énoncés

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dans la troisième partie. Les premiers sont collectifs, les deuxièmes individuels. Ainsi la structure du Pacte, considéré dans son ensemble, corrobore à son tour l'argument selon lequel le droit à l'autodétermination est un droit collectif reconnu aux peuples. En tant que tel, affirme l'Etat partie, il ne saurait être invoqué par un particulier en vertu du Protocole facultatif.

6.4 Le Gouvernement canadien affirme que la juridiction du Comité, telle qu'elle est définie dans le Protocole facultatif, ne saurait être invoquée par un particulier dès lors que la violation présumée concerne un droit collectif. Il soutient, en conséquence, que la communication considérée, qui concerne l'autodétermination de la bande du lac Lubicon, devrait être déclarée irrecevable.

7. Dans une réponse détaillée, datée du 8 juillet 1985, à la communication de l'Etat partie, l'auteur récapitule ses arguments comme suit : dans sa réponse, le Gouvernement canadien avance trois arguments principaux. Il affirme tout d'abord que la bande du lac Lubicon n'a pas épuisé les recours internes disponibles. Or, la bande a en fait épuisé ces recours dans la mesure où ceux-ci lui permettraient effectivement d'obtenir justice et d'empêcher la destruction de ses moyens de subsistance. Deuxièmement, le Gouvernement canadien prétend que le droit à l'autodétermination ne peut pas être revendiqué par la bande du lac Lubicon. Or, il s'agit d'un peuple autochtone qui a conservé son économie et son style de vie traditionnel et qui occupe ses propres terres depuis des temps immémoriaux. Il doit pour le moins être en mesure d'exercer son droit à l'autodétermination puisqu'il s'agit du droit d'un peuple à ses propres moyens d'existence. Enfin, le Gouvernement canadien formule certaines allégations au sujet de l'identité et de la qualité de l'auteur... Or, "l'auteur" est identifié dans la première communication de la bande. Les "victimes" sont les membres de la bande du lac Lubicon, qui sont représentés par Bernard Ominayak, leur chef élu à l'unanimité.

8.1 Par sa décision provisoire du 10 avril 1986, le Comité, rappelant que l'Etat partie l'avait informé que le Ministère des affaires indiennes et du développement du Nord avait désigné un envoyé spécial et l'avait chargé d'étudier la situation, a prié l'Etat partie de lui communiquer le rapport de l'envoyé spécial et tous renseignements sur ses recommandations et sur les mesures que l'Etat partie avait prises ou envisageait de prendre à cet égard.

8.2 Dans la même décision, le Comité a prié l'auteur de l'informer de tout fait nouveau touchant les actions en justice pendantes devant les tribunaux canadiens.

9.1 Dans sa réponse, datée du 30 juin 1986, à la décision provisoire du Comité, l'auteur affirme qu'il n'y a guère eu de progrès en ce qui concerne aucune des actions engagées devant les tribunaux. Il réitère son argument selon lequel :

"La demande d'ordonnance provisoire que la bande avait présentée pour que l'exploitation des ressources pétrolières qui a détruit les moyens de subsistance de ses membres soit arrêtée, a été rejetée, et la Cour suprême du Canada lui a refusé le droit d'interjeter appel... Les activités d'exploitation et la destruction se poursuivent donc sans répit. L'avocat de la bande tente toujours de faire valoir les droits de celle-ci devant les tribunaux bien que la bande ne dispose pas des ressources financières à cette

fin et qu'il n'y ait aucun espoir de solution avant plusieurs années. La bande n'a donc aucune raison de modifier sa conclusion antérieure, à savoir qu'en pratique, les recours judiciaires internes ont été épuisés."

9.2 La bande signale aussi que l'enquêteur spécial du Gouvernement fédéral, M. E. Davie Fulton, a été déchargé de ses responsabilités à la suite de la présentation de son "document de travail" au Gouvernement fédéral du Canada.

"Dans le document de travail ..., M. Fulton parvenait pratiquement à la même conclusion que la bande elle-même, à savoir que le Gouvernement canadien doit porter le blâme pour la situation existant au lac Lubicon et que c'est au Gouvernement fédéral qu'il appartient de régler le problème. Dans son rapport, M. Fulton proposait également un arrangement foncier basé sur la population actuelle de la bande, et il reconnaissait l'importance de donner à la bande qualité pour gérer les ressources en faune et en flore sauvages sur toute l'étendue de son territoire de chasse et de piégeage. L'arrangement foncier proposé par M. Fulton, en vertu duquel la bande se serait vu assigner une réserve sensiblement plus grande que la réserve de 25 miles carrés qui lui avait été promise en 1940, est compatible avec la position de la bande sur cette question... M. Fulton a également recommandé que l'Alberta indemnise la bande pour le préjudice causé par l'exploitation intensive des ressources de pétrole et de gaz pour laquelle cette province a accordé des concessions sur le territoire de la bande. Indépendamment du fait qu'il a déchargé M. Fulton de ses responsabilités en la matière, le Gouvernement fédéral, à ce jour, a refusé de rendre public le document de travail que celui-ci avait établi."

10.1 Dans sa réponse, datée du 23 juin 1986, à la décision provisoire du Comité, l'Etat partie a fait parvenir le texte du rapport de M. Fulton et a indiqué qu'il avait désigné M. Roger Tassé pour agir en qualité de négociateur. Il a en outre informé le Comité que, le 8 janvier 1986, le Gouvernement canadien avait versé à la bande 1,5 million de dollars à titre gracieux pour financer les frais de justice et autres frais connexes.

10.2 Dans une communication supplémentaire du 20 janvier 1987, l'Etat partie soutient qu'à la suite du rejet de la demande d'injonction intérimaire de la bande :

"La bande aurait alors dû faire diligence pour demander son injonction permanente avant de former un recours devant les instances internationales. Dans le mémoire qu'elle a présenté ..., la bande allègue que la lenteur des procédures lui causera un préjudice irréparable. Or une injonction permanente, si elle était accordée, aurait pour effet d'éviter ce préjudice de façon permanente."

11.1 Les 23 et 25 février 1987, l'auteur a présenté deux suppléments à sa communication, examinant notamment les questions de fond, telles que le document de travail Fulton, et soutenant que "le Canada n'[avait] pas retenu les principales recommandations du document de travail Fulton" et que "le Canada [tentait] d'appliquer rétroactivement à la bande une loi que le Comité [avait] jugée contraire à l'article 27 du Pacte international relatif aux droits civils et politiques et que le Canada [avait] modifiée conformément aux conclusions du Comité".

11.2 Au sujet des actions en justice pendantes devant les tribunaux, la bande réaffirme qu'une injonction permanente ne constituerait pas un remède efficace car elle arriverait trop tard, expliquant ce qui suit :

"La reconnaissance de droits aborigènes ou même de droits conventionnels par une décision définitive des tribunaux ne remédiera pas au préjudice irréparable causé à la société de la bande du lac Lubicon, ne ramènera pas les animaux, ne restaurera pas l'environnement, ne rétablira pas l'économie traditionnelle de la bande, ne remplacera pas le mode de vie traditionnel détruit et ne réparera pas les atteintes portées aux liens spirituels et culturels qui l'attachent à la terre. Ainsi, tous les recours internes ont été effectivement épuisés pour ce qui est de la protection de la bande, ainsi que de son mode de vie unique en son genre et auquel elle est profondément attachée."

12. Dans une communication additionnelle datée du 12 juin 1987, l'auteur déclare :

"La bande du lac Lubicon ne demande pas une décision sur des droits territoriaux mais seulement que le Comité des droits de l'homme l'aide à tenter de convaincre le Gouvernement canadien que : 1) l'existence de la bande est gravement menacée par la prospection pétrolière et gazière qu'on a laissée se poursuivre sans aucun contrôle dans ses territoires de chasse traditionnels et sans aucun égard pour la communauté humaine vivant dans la région, et que 2) le Canada est responsable de la situation actuelle et doit contribuer à y remédier, conformément à l'article premier du Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques."

13.1 Avant d'examiner une communication quant au fond, le Comité doit s'assurer qu'elle répond à toutes les conditions de recevabilité prévues par le Protocole facultatif.

13.2 En ce qui concerne la règle, énoncée à l'alinéa b) du paragraphe 2 de l'article 5 du Protocole facultatif, selon laquelle les auteurs doivent épuiser les recours internes avant de présenter une communication au Comité des droits de l'homme, l'auteur de la présente communication a invoqué la disposition dudit article selon laquelle cette règle ne s'applique pas "si les procédures de recours excèdent des délais raisonnables". L'auteur a en outre soutenu que le seul recours efficace en l'espèce était une requête en injonction provisoire car, a-t-il dit, "si le statu quo n'est pas maintenu, tout jugement définitif quant au fond, même s'il était en faveur de la bande, resterait sans effet", dans la mesure où "même s'il reconnaissait les droits aborigènes ou les droits conventionnels, le jugement définitif ne pourrait jamais restituer à la bande son mode de vie, ses traditions et ses moyens d'existence". Se référant à sa jurisprudence bien établie, selon laquelle "la règle qui impose d'épuiser tous les recours internes ne s'applique que si ces recours sont disponibles et efficaces", le Comité a conclu qu'il n'y avait en l'espèce pas de remède efficace encore ouvert à la bande du lac Lubicon.

13.3 En ce qui concerne l'affirmation de l'Etat partie selon laquelle la communication de l'auteur, qui concerne l'autodétermination, devrait être déclarée irrecevable car "la juridiction du Comité, telle qu'elle est définie dans le Protocole facultatif, ne saurait être invoquée par un particulier dès lors que la

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violation présumée concerne un droit collectif", le Comité a réaffirmé que le Pacte reconnaît et protège dans les termes les plus nets le droit d'un peuple à l'autodétermination et son droit de disposer de ses ressources naturelles en tant que condition essentielle de la garantie et du respect effectif des droits individuels de l'homme ainsi que de la promotion et du renforcement de ces droits. Cependant, le Comité a fait observer que l'auteur, en tant que particulier, ne peut se prétendre, en vertu du Protocole facultatif, victime d'une violation du droit à l'autodétermination consacré par l'article premier du Pacte, qui traite des droits conférés aux peuples en tant que tels.

13.4 Le Comité a noté cependant que les faits présentés peuvent soulever des questions au regard d'autres articles du Pacte, y compris l'article 27. Ainsi, dans la mesure où les événements que l'auteur a décrits portent préjudice à l'auteur et aux autres membres de la bande du lac Lubicon, ces questions pourraient être examinées quant au fond afin de déterminer si elles révèlent des violations de l'article 27 ou d'autres articles du Pacte.

14. En conséquence, le Comité des droits de l'homme a décidé le 22 juillet 1987 que la communication était recevable dans la mesure où elle pouvait soulever des questions au regard de l'article 27 ou d'autres articles du Pacte. Il a prié l'Etat partie, conformément à l'article 86 du règlement intérieur, de prendre des mesures provisoires pour éviter qu'un préjudice irréparable ne soit causé au chef Ominayak et aux autres membres de la bande du lac Lubicon.

15. Dans les observations qu'il a présentées le 7 octobre 1987 en application du paragraphe 2 de l'article 4, l'Etat partie invoque le paragraphe 4 de l'article 93 du règlement intérieur provisoire du Comité, et demande à celui-ci de réexaminer sa décision de recevabilité, en faisant valoir que la bande n'a pas entièrement épuisé les voies de recours internes utiles. L'Etat partie fait observer que la décision du Comité semble reposer sur l'idée qu'une injonction provisoire serait le seul recours utile disponible pour remédier à la violation alléguée des droits de la bande du lac Lubicon. Cette hypothèse, à son avis, ne résiste pas à l'examen. La position de l'Etat partie, fondée sur les faits examinés par la Cour du Banc de la Reine (Court of Queen's Bench) de l'Alberta et par la Cour d'appel - les deux juridictions qui ont eu à connaître de la demande de mesures conservatoires présentée par la bande - ainsi que sur la situation socio-économique de la bande, est que son mode de vie et ses moyens de subsistance n'ont pas été atteints de manière irréparable et ne sont pas menacés de manière imminente. C'est pourquoi une injonction provisoire n'est pas le seul recours utile dont dispose la bande, et un procès sur le fond et le processus de négociation proposé par le Gouvernement fédéral offrent un recours interne efficace. L'Etat partie estime donc qu'en application du paragraphe 2 b) de l'article 5 du Protocole facultatif, il est fondé à demander que tous les recours internes soient épuisés avant que le Comité n'examine l'affaire. L'Etat partie estime que l'expression "recours internes" doit, conformément aux principes pertinents du droit international, être comprise comme s'appliquant à toutes les procédures locales existantes en matière de recours. Tant qu'il n'y aura pas eu une décision judiciaire finale sur les droits de la bande au regard de la loi canadienne, il n'existe pas de base, ni en fait ni en droit international, pour conclure que les recours internes sont inefficaces et que la communication est recevable conformément au Protocole facultatif. A l'appui

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de ses observations, l'Etat partie présente un examen détaillé des procédures engagées devant la Cour du Banc de la Reine de l'Alberta et fait valoir qu'il a pour politique de s'efforcer de résoudre par la négociation les revendications foncières justifiées et en suspens de bandes indiennes.

16.1 Répondant aux observations de l'Etat partie, l'auteur, dans une lettre en date du 12 janvier 1988, soutient que ses allégations et celles de la bande du lac Lubicon sont tout à fait fondées. Selon le chef Ominayak, l'Etat partie fonde sa demande de réexamen de la décision de recevabilité sur ce qui n'est rien d'autre qu'un nouvel énoncé des faits et cherche à pousser le Comité à rapporter sa décision, en prétendant étayer ses observations précédentes mais sans présenter en fait de nouveaux arguments. Rappelant que le Comité a déclaré que la communication était recevable dans la mesure où elle soulève des questions qui relèvent de l'article 27 "ou d'autres articles du Pacte", l'auteur donne la liste des articles du Pacte qui, selon lui, ont été violés. D'abord, il allègue que le Canada a violé les paragraphes 1 à 3 de l'article 2 du Pacte : le paragraphe 1, parce qu'il aurait traité la bande du lac Lubicon sans prendre en considération des éléments de nature sociale, économique et foncière inhérents à l'organisation communautaire autochtone de la bande; le paragraphe 2, car il continuerait de refuser de donner une solution à certains problèmes dont se plaint la bande alors que les droits enfreints pourraient encore être mis en oeuvre; et le paragraphe 3 parce que le Canada n'aurait pas mis à la disposition de la bande du lac Lubicon un recours utile en ce qui concerne ses droits en vertu du Pacte.

16.2 L'auteur allègue en outre que l'Etat partie, par des actes qui ont eu des conséquences pour le mode de vie de la bande, a créé des circonstances qui "ont indirectement, sinon directement, causé la mort de 21 personnes et menacent la vie de pratiquement tous les autres membres de la communauté. De plus, la capacité de la communauté à se renouveler est menacée, le nombre de fausses-couches et d'enfants mort-nés ayant monté en flèche, et celui des anomalies à la naissance étant ... passé de près de zéro à presque 100 %". Selon l'auteur, cela constituerait une violation de l'article 6 du Pacte. De plus, il est allégué que l'appropriation des terres traditionnelles de la bande sans son consentement, la destruction de son mode de vie et de ses moyens d'existence et les effets dévastateurs causés à la communauté constituent des traitements cruels, inhumains et dégradants, au sens de l'article 7 du Pacte, dont la responsabilité incombe à l'Etat partie.

16.3 L'auteur soulève plusieurs autres questions relatives à la non-observation par l'Etat partie du paragraphe 1 de l'article 14, et de l'article 26 du Pacte. Il rappelle que la procédure engagée par la bande du lac Lubicon devant une juridiction interne, fondée sur les droits et titres de propriété autochtones, conteste certains des pouvoirs et certaines des responsabilités que s'arroge l'Etat: qui, fait-il valoir, sont "par nature même des droits et des titres qui sont susceptibles d'être violés, ce qui est précisément ce que visent à empêcher l'article 14, paragraphe 1, et l'article 26 du Pacte". Dans ce contexte, il fait valoir que "la partialité des tribunaux canadiens est un obstacle majeur aux efforts déployés par la bande pour protéger ses terres, sa communauté et ses moyens d'existence, et que cette partialité procède pour l'essentiel de différences fondées sur la race et la situation politique, sociale et économique". En outre,

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les partis pris d'ordre économique et social auxquels se heurte la bande devant les tribunaux canadiens, en particulier dans le système judiciaire de l'Alberta, sont exacerbés par "le fait que plusieurs des juges siégeant et statuant dans ces tribunaux entretiennent manifestement des liens économiques et personnels avec les parties adverses".

16.4 En outre, il est allégué que, violant l'article 17 et le paragraphe 1 de l'article 23 du Pacte, l'Etat partie a permis que la bande du lac Lubicon vive dans des conditions telles que le résultat direct en est la destruction des familles et des foyers. L'auteur explique que dans une communauté autochtone, le système familial repose tout entier sur les liens spirituels et culturels qui l'unissent à la terre et sur les activités traditionnelles auxquelles chacun se livre. Lorsque les uns et les autres disparaissent, comme dans le cas de la bande, l'élément essentiel de la société, la famille, subit un préjudice irréparable. De même, il est allégué que l'Etat partie a violé le paragraphe 1 de l'article 18 du Pacte car, par suite de la destruction de leurs terres, les habitants de la bande du lac Lubicon sont "spoliés du substrat physique qui sert de support à leur religion, à leur système de croyances spirituelles".

16.5 En ce qui concerne l'épuisement des recours internes, l'auteur réfute l'assertion de l'Etat partie selon laquelle un procès sur le fond offrirait à la bande du lac Lubicon un recours effectif contre le gouvernement fédéral et réparation pour la perte de son économie et de son mode de vie. D'abord, cette assertion repose sur l'hypothèse qu'il peut être porté remède à des violations passées des droits de l'homme par le versement de paiements compensatoires; deuxièmement, il est évident que l'économie et le mode de vie de la bande ont subi des atteintes irréparables. En outre, le requérant prétend qu'il n'est plus possible à la bande d'intenter un procès sur le fond contre le gouvernement fédéral car, en octobre 1986, la Cour suprême du Canada a décidé que les droits sur les terres aborigènes situées à l'intérieur des limites provinciales mettant en cause les droits fonciers des provinces, il appartenait aux tribunaux provinciaux de statuer. C'est pour cette raison que le 30 mars 1987, la bande du lac Lubicon s'est adressée à la Cour du Banc de la Reine de l'Alberta pour obtenir l'autorisation de modifier sa plainte en désignant aussi le Gouvernement canadien comme défendeur. Le 22 octobre 1987, la Cour du Banc de la Reine de l'Alberta a rejeté cette demande. Ainsi, alors que d'après la Constitution canadienne toute question concernant les Indiens et les terres indiennes au Canada relève exclusivement de l'autorité du gouvernement fédéral, il est allégué que la bande se trouve, dans l'état actuel des choses, impuissante à intenter une action contre le gouvernement fédéral auprès d'un tribunal canadien portant sur ces questions mêmes.

17.1 Dans des observations complémentaires soumises le 3 mars 1988, l'Etat partie affirme que des efforts réels et sérieux continuent d'être faits pour trouver une solution acceptable aux points soulevés par l'auteur et la bande du lac Lubicon. En particulier, il explique que :

"Le 3 février 1988, le Ministre des affaires indiennes et du Nord a transmis au Procureur général de l'Alberta une demande officielle de terres de réserve pour la bande du lac Lubicon. Dans sa demande, il a informé le Procureur général de l'Alberta que le refus d'y accéder amènerait le Canada à intenter une action en justice en vertu de la loi constitutionnelle de 1930 pour

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résoudre le différend qui porte sur la quantité de terres à laquelle la bande du lac Lubicon a droit. Quoi qu'il en soit, le Ministre des affaires indiennes et du développement du Nord a prié l'Alberta d'envisager, à titre de mesure provisoire, la cession immédiate de 25,4 miles carrés de terres [...] à la bande [...], sans préjudice de toute action en justice.

Dans une lettre datée du 10 février 1988, le négociateur fédéral a communiqué à l'avocat de la bande les événements décrits ci-dessus et a demandé d'entreprendre les négociations sur tous les aspects de la requête qui ne dépendaient pas de la réponse que l'Alberta ferait à la demande officielle [...]. L'auteur, dans une lettre du 29 février 1988, a rejeté l'offre tout en indiquant qu'il serait prêt à considérer une cession provisoire des 25,4 miles carrés sans préjudice des négociations et de toute action en justice. Suite à ces développements, les négociateurs des gouvernements fédéral et provincial se sont rencontrés les 1er et 2 mars 1988. Ils ont conclu un accord provisoire en vertu duquel 25,4 miles carrés de terres réservées, y compris les mines et les minerais, étaient cédés à la bande. Cet accord ne porta pas atteinte aux positions respectives des parties, y compris à celle de la bande..."

17.2 En ce qui concerne l'efficacité des recours internes existants, l'Etat partie est en désaccord avec les observations de l'auteur qui figurent au paragraphe 16.5 ci-dessus. Le Gouvernement canadien soutient qu'elles ne correspondent pas à la situation juridique qui prévaut entre la bande et les gouvernements fédéral et provincial. Il répète que la bande a intenté deux actions en justice, celles-ci étant encore pendantes. Une des actions a été intentée contre le gouvernement fédéral en Cour fédérale du Canada; l'autre a été intentée en Cour du Banc de la Reine de l'Alberta contre la province et certaines sociétés privées. Dans la mesure où la demande de terres de l'auteur est fondée sur un titre aborigène par opposition à un traité, la jurisprudence établit que l'action en justice doit être intentée contre la province, et non contre le gouvernement fédéral.

17.3 L'Etat partie ajoute que, dans l'action intentée en Cour de l'Alberta :

"L'auteur a demandé que le gouvernement fédéral se joigne à l'action intentée devant la Cour du Banc de la Reine. La Cour a décidé, en s'appuyant sur la jurisprudence, qu'une cour provinciale n'a pas compétence pour entendre une demande de redressement dirigée contre le gouvernement fédéral. L'action devait être intentée en Cour fédérale du Canada. C'est ce que le requérant a fait et, tel qu'indiqué précédemment, l'affaire est pendante. En conséquence, la bande peut toujours exercer un recours en Cour fédérale du Canada contre le Gouvernement canadien. De plus, le requérant a porté la décision de la Cour du Banc de la Reine devant la cour d'appel de l'Alberta."

17.4 Enfin, l'Etat partie affirme catégoriquement que la plupart des allégations de l'auteur qui figurent aux paragraphes 16.2 et 16.3 ci-dessus ne sont pas fondées, et soutient qu'elles constituent un usage abusif de la procédure et devraient entraîner le rejet de la communication conformément à l'article 3 du Protocole facultatif.

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18.1 Dans des observations complémentaires soumises le 28 mars 1988, l'auteur commente l'aperçu général que l'Etat partie a donné de l'évolution de l'affaire (voir par. 17.1) et ajoute les remarques suivantes : a) la bande du lac Lubicon n'était pas partie à la négociation de l'offre de règlement; b) l'offre de règlement repose sur une conception "extrêmement partisane" des droits de la bande du lac Lubicon au titre de la législation canadienne et sur une détermination également partisane de la qualité de membre de cette bande; c) le gouvernement fédéral négocierait avec moins de la moitié de la bande du lac Lubicon des questions non territoriales comme celle du logement; d) à l'exception de 25,4 miles carrés, le Canada a donné à bail la totalité des terres traditionnelles de la bande en vue de leur exploitation par une usine de pâte à papier qui serait construite près de Peace River, dans l'Alberta, par la Daishowa Canada Company Limited; e) le projet d'usine de pâte à papier de la Daishowa met un point final à tout espoir de la part des membres de la bande de pouvoir poursuivre certaines de leurs activités traditionnelles; et f) la Commission parlementaire permanente chargée des questions autochtones, organe officiel de contrôle du Parlement canadien compétent pour ces questions, n'approuve pas la manière dont le Ministre des affaires indiennes et du développement du Nord a abordé la question du règlement.

18.2 L'auteur réaffirme que les actions en justice que la bande a engagées devant les tribunaux reposent essentiellement sur des revendications touchant ses droits autochtones et que, eu égard à la décision prise le 22 octobre 1987 par la Cour du Banc de la Reine de l'Alberta et aux décisions récentes de la Cour suprême évoquées par l'Etat partie, la bande continue à se voir dénier un recours contre le Gouvernement fédéral du Canada.

18.3 L'auteur réfute ensuite l'allégation de l'Etat partie suivant laquelle les observations qu'il a présentées le 12 janvier 1988 ne sont pas fondées et constituent un abus du droit de présenter une communication en vertu du Protocole facultatif; il réaffirme qu'il est tout prêt à fournir des détails sur les "21 décès non naturels dont la cause directe ou indirecte a été la destruction de l'économie et du mode de vie traditionnel de la population du Lubicon". Enfin, il fait observer que l'Etat partie continue à ne pas accéder à la demande du Comité tendant à la prise de mesures conservatoires conformément à l'article 86 de son règlement intérieur, comme le montre le soutien que le gouvernement fédéral a apporté à la Daishowa pour son projet d'usine de pâte à papier. Ce soutien signifie que loin d'adopter les mesures conservatoires qui éviteraient à la bande un préjudice irréparable, le Canada a fait sien un projet qui pourrait accélérer la dégradation des terres traditionnelles de la bande.

19.1 Dans de nouvelles observations qu'il a présentées le 17 juin 1988, l'Etat partie décrit l'évolution récente de l'affaire et souligne à nouveau que la bande du lac Lubicon n'a pas épuisé les recours disponibles. Il explique que depuis le 11 mars 1988, date à laquelle la bande a refusé la proposition du Gouvernement tendant à lui céder à titre provisoire 25,4 miles carrés de terres de réserve,

"des négociations ont été engagées entre le gouvernement fédéral, la province de l'Alberta et l'auteur. Toutefois, aucun progrès réel n'a été réalisé sur la voie d'un règlement. En conséquence, le 17 mai 1988, le gouvernement fédéral a engagé une action en justice contre la province de l'Alberta et la

bande du lac Lubicon, afin que le Canada puisse s'acquitter de ses obligations conventionnelles à l'égard de la bande en vertu du Traité No 8. Selon l'acte introductif d'instance, la Cour du Banc de la Reine de l'Alberta doit faire une déclaration selon laquelle la bande du lac Lubicon a droit à une réserve et indiquer la superficie de cette réserve [...]. Le 9 juin 1988, la bande du lac Lubicon a présenté les conclusions de la défense et a déposé une demande reconventionnelle. Le 10 juin 1988, toutes les parties au différend se sont présentées devant le juge Moore de la Cour du Banc de la Reine de l'Alberta et ont décidé que tous les efforts devaient être faits pour accélérer le règlement de l'affaire, le procès devant en principe avoir lieu le 16 janvier 1989".

19.2 L'Etat partie reconnaît l'obligation qui lui est faite, en vertu du Traité No 8, de fournir une réserve à la bande du lac Lubicon. Il fait observer que l'affaire à l'origine du différend interne et de la communication à l'étude concerne la superficie des terres qui doivent constituer la réserve et les questions qui en découlent. C'est pourquoi l'Etat partie soutient que la communication ne relève en réalité d'aucune des dispositions du Pacte et que l'allégation de violation est en conséquence infondée.

20.1 Dans des observations soumises le 5 juillet 1988, l'auteur apporte de nouveaux renseignements et commente les dernières observations présentées par l'Etat partie. Il relève les "nombreux problèmes" que pose l'action en justice que le gouvernement fédéral a engagée devant la Cour du Banc de la Reine de l'Alberta contre le gouvernement provincial, entre autres le fait a) qu'elle ne tiendrait absolument aucun compte des revendications de la bande concernant des terres autochtones; b) que le gouvernement fédéral cherche à obtenir un jugement déclaratif concernant l'effectif de la bande, "apparemment fondé sur une méthode singulière et très controversée de calcul de cet effectif qui a été exposée dans de précédentes observations", et c) que les problèmes considérés ont déjà été, quant au fond, soumis aux tribunaux dans le cadre des procédures en cours relatives à l'affaire du Lubicon. L'auteur fait observer qu'étant donné que "cette action en justice a été intentée devant la juridiction la moins élevée du Canada, et qu'elle entraînera des citations à comparaître et une étude généalogique extrêmement longue et complexe du Lubicon, ainsi que la formation de recours contre toute décision rendue, il n'y a aucune raison de penser qu'elle aura d'autre effet que celui de retarder indéfiniment le règlement des revendications foncières du Lubicon". L'auteur est convaincu que c'est précisément là l'objectif que poursuit le Gouvernement.

20.2 Dans une lettre datée du 28 octobre 1988, l'auteur informe le Comité que le 6 octobre 1988, la bande du lac Lubicon a proclamé sa compétence sur son territoire, le gouvernement fédéral ne lui donnant aucun espoir d'un règlement satisfaisant de la situation dans laquelle elle se trouve. L'Etat partie a continué d'atormoyer, "intoxiquant l'opinion dans les médias et congédiant les conseillers qui préconisaient une solution favorable au peuple du Lubicon". Parallèlement, la bande constate que la province de l'Alberta continue de délivrer des concessions pour la prospection de pétrole et de gaz et, désormais, aussi pour l'exploitation du bois sur les terres traditionnelles du peuple du Lubicon..."

20.3 L'auteur fait également observer que l'initiative du peuple du lac Lubicon a amené

"le gouvernement de la province de l'Alberta à réagir d'une manière positive. Le Premier Ministre, Don Getty, a négocié un accord avec le chef Ominaya, en vertu duquel l'Alberta proposera au gouvernement fédéral de lui vendre 79 miles carrés de terres avec les droits sur le sol et le sous-sol, pour en faire une réserve destinée à la bande du lac Lubicon. La province a accepté de vendre au gouvernement fédéral 16 miles carrés supplémentaires avec les droits sur le sol uniquement, et de subordonner la mise en valeur du sous-sol de cette région à l'approbation de la bande. Ainsi, la superficie totale que la province a convenu de céder s'élève à 95 miles carrés, ce qui correspond à la superficie à laquelle la bande peut prétendre, compte tenu de son effectif actuel, en vertu de la Loi fédérale du Canada sur les Indiens... Le gouvernement fédéral a fait savoir qu'il était disposé à envisager le transfert de 79 miles carrés de terres au profit du peuple du lac Lubicon. Il a toutefois refusé d'accepter le transfert des 16 miles carrés restants, qu'il recommande de céder à la bande en pleine propriété. Cette mesure aurait pour effet d'obliger la bande à payer des impôts et des droits de mutation sur ces terres, tout en libérant le gouvernement fédéral d'une partie de ses obligations envers le peuple du lac Lubicon..."

21.1 Dans une autre communication datée du 2 février 1989, l'Etat partie fait observer qu'en novembre 1988, à la suite d'un accord conclu entre le gouvernement provincial de l'Alberta et la bande du lac Lubicon sur la cession de 95 miles carrés de terres pour établir une réserve, le gouvernement fédéral a entamé des négociations avec la bande sur les modalités du transfert des terres et sur des questions connexes. Pendant les deux mois au cours desquels ont duré les négociations, une entente est intervenue sur la majorité des questions, y compris l'appartenance à la bande, la superficie de la réserve, les constructions destinées à la communauté, les programmes ainsi que les services à fournir. Toutefois, l'accord n'a pas pu se faire sur la question de la compensation en espèces, et le 24 janvier 1989, la bande s'est retirée des négociations au moment où le gouvernement fédéral présentait son offre formelle.

21.2 Après avoir examiné les principaux aspects de cette offre (transfert à la bande de 95 miles carrés de terres pour la réserve; l'acceptation du nombre de membres de la bande tel que calculé par la bande elle-même, l'affectation de 34 millions de dollars canadiens pour des projets de développement communautaire; l'octroi de 2,5 millions de dollars canadiens par année au titre de programmes d'appui fédéraux, proposition concernant la mise au point d'un plan de développement spécial pour aider la bande à établir une économie viable sur sa nouvelle réserve; et la création d'un fonds d'affectation spéciale de 500 000 dollars canadiens pour aider les membres plus âgés de la bande qui souhaitent poursuivre leur mode de vie traditionnel), l'Etat partie fait observer que l'offre formelle du Gouvernement représente au total environ 45 millions de dollars en prestations et programmes, en plus de la réserve de 95 miles carrés. La bande a revendiqué une compensation supplémentaire de 114 à 275 millions de dollars pour prétendu manque à gagner. L'Etat partie a refusé de reconnaître à la bande le

droit à ces sommes, mais lui a fait savoir qu'il était prêt à commencer à donner suite à son offre sous tous ses aspects, sans préjudice du droit de la bande d'intenter une action contre le gouvernement fédéral pour obtenir une compensation supplémentaire.

21.3 L'Etat partie conclut que son offre la plus récente ne manque pas d'être juste et équitable, notamment du fait qu'elle est en accord avec d'autres règlements récemment conclus avec des groupes d'autochtones et qu'elle tient compte des objectifs sociaux et économiques légitimes de la bande. Il ajoute que le processus de négociation communautaire doit être considéré comme un moyen pratique offrant aux communautés indiennes la possibilité d'étendre leur autonomie locale ainsi que leurs responsabilités en matière de prise de décisions. Le gouvernement fédéral prévoit dans sa politique des négociations sur une vaste gamme de questions telles que les institutions chargées de gouverner, la détermination de l'appartenance à un groupe, la responsabilité, les arrangements financiers, l'éducation, les services de santé et le développement social. Sur la base de ce qui précède, l'Etat partie demande au Comité de déclarer la communication irrecevable du fait qu'il n'y a pas eu épuisement de tous les recours internes.

22.1 Dans une autre communication datée du 22 mars 1989, l'auteur s'en prend à la communication de l'Etat partie du 2 février 1989, déclarant que non seulement celle-ci a pour effet d'induire en erreur mais qu'elle est presque entièrement fautive, et il fait valoir que les récentes négociations entre la bande du lac Lubicon et le gouvernement fédéral n'ont pas représenté, de la part du Gouvernement, "une tentative sérieuse de régler les problèmes du Lubicon". En fait, "l'offre formelle" du Gouvernement n'est à son avis qu'une opération de relations publiques et ne comporte pratiquement aucun engagement de la part du gouvernement fédéral. Il fait valoir que cette offre, si elle était acceptée, priverait les membres de la bande de tout moyen légal d'obtenir une modification de la situation en leur faveur.

22.2 Comme preuve de ses allégations, l'auteur indique que l'offre formelle du Gouvernement ne contient rien de plus que l'engagement de fournir des logements et une école. En revanche, on n'y trouve "aucun engagement de fournir des facilités et du matériel nécessaires pour permettre à la bande du lac Lubicon de gérer ses propres affaires, notamment des facilités pour la formation professionnelle, qui est essentielle, et l'appui au développement commercial et économique, ni une base quelconque à partir de laquelle la bande pourrait réaliser son indépendance financière". Il fait en outre valoir que contrairement à ce qu'a déclaré l'Etat partie, à savoir qu'un accord aurait été réalisé sur la majorité des questions pour lesquelles la bande cherchait une solution viable, y compris celles de l'appartenance à la bande, de la superficie de la réserve et des constructions pour la communauté, aucun accord ou consensus n'est intervenu sur l'une quelconque de ces questions. Par ailleurs, l'auteur souligne que l'Etat partie a fait valoir que son offre équivaldrait à environ 45 millions de dollars canadiens en prestations et en programmes sans toutefois indiquer que la majorité de ces fonds n'étaient toujours pas engagés et que la bande du lac Lubicon, en l'absence de moyens de recours, serait incapable à l'avenir d'obtenir des engagements du Gouvernement.

23.1 Dans une communication du 30 mai 1989, l'auteur rappelle que la bande fait valoir ses demandes devant les tribunaux canadiens depuis 14 ans et qu'étant donné la nature de ces demandes et les procédures judiciaires à suivre, la procédure se

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poursuivra pendant bien une dizaine d'années encore. L'Etat partie, indique-t-il, ne nie pas que les procédures et les négociations entamées pour assurer les moyens d'existence de la bande ont été inefficaces et que les procédures ayant trait aux litiges restant à régler en matière de titres fonciers et de dédommagement n'aboutiront pas avant plusieurs années, en admettant qu'elles aboutissent jamais. La bande ayant refusé une offre de règlement qui l'aurait obligée à renoncer à toutes les voies de recours possibles en cas de différend avec le Gouvernement canadien, contre la promesse de négociations ultérieures entre le Canada et la bande, le Gouvernement canadien a interrompu toute négociation. "Au lieu de s'engager sur la voie du compromis et du règlement, le Canada a infiltré des agents dans des communautés non autochtones du nord de l'Alberta, dans un secteur jouxtant le territoire traditionnel de la communauté du Lubicon." Par l'entremise d'un particulier qui aurait encore certains liens avec la bande mais avec laquelle il ne vit plus depuis plus de 40 ans, ces agents chercheraient à inciter d'autres autochtones à traiter directement et individuellement avec le gouvernement fédéral. La plupart de leurs recrues semblent n'avoir aucune attache avec l'une quelconque des sociétés aborigènes reconnues.

23.2 A l'appui de ses dires antérieurs, l'auteur explique que la perte de l'activité économique de la communauté du Lubicon et l'effondrement de ses institutions sociales - y compris le fait qu'elle soit contrainte à une existence sédentaire au lieu d'un mode de vie dominé par la chasse et le piégeage - contribuent aussi à altérer sérieusement la santé de ses membres :

"... leur régime alimentaire se trouve profondément modifié par la disparition du gibier, par l'obligation de consommer des aliments transformés, moins riches en substances nutritives, et par le spectre de l'alcoolisme qui, inconnu auparavant dans cette population, y fait maintenant d'énormes ravages... Ces bouleversements dans l'existence matérielle de la communauté ont considérablement altéré la santé de ses membres et leur résistance aux infections. L'absence des ressources en eau courante et des installations sanitaires qui seraient nécessaires pour remplacer les systèmes traditionnels engendre des maladies liées à la misère et au manque d'hygiène, comme le prouvent l'augmentation étonnante du nombre de naissances anormales et l'épidémie récente de tuberculose, qui touche maintenant près du tiers de la communauté".

24.1 Dans une communication datée du 20 juin 1989, l'Etat partie reconnaît "que la bande du lac Lubicon a été victime d'une injustice et qu'elle a droit à une réserve et à des droits connexes". Il affirme toutefois avoir fait à la bande une offre qui devrait lui permettre de préserver sa culture, d'être maîtresse de son mode de vie et d'être autonome sur le plan financier, offre qui, si elle était acceptée, constituerait une solution interne efficace aux violations du Pacte dénoncées par la bande. Mais cette solution ne peut être qu'offerte à la bande, elle ne peut lui être imposée. L'Etat partie rappelle que les négociations ont eu lieu entre les hauts fonctionnaires du Gouvernement canadien et la bande du lac Lubicon de novembre 1988 à janvier 1989; de plus, le Premier Ministre du Canada a rencontré le chef Ominayak à l'automne de l'année 1988. L'Etat partie fait valoir que, dans presque tous les cas, le Gouvernement canadien a, ou bien satisfait pleinement aux demandes de l'auteur de la communication, ou bien offert à la bande un traitement proche de celui accordé aux autres bandes canadiennes, voire meilleur. L'offre

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faite à la bande comprenait 95 miles carrés de terres, des droits miniers sur 79 miles carrés, des services communautaires pour chaque famille vivant sur la réserve, l'autorité sur la composition de la bande et une aide permettant l'assurance à la bande son autonomie économique. Si l'on considère que la bande compte 500 membres et que les biens et services offerts par le Gouvernement s'élevaient à 45 millions de dollars (sans compter les terres et les droits miniers), l'offre du Gouvernement représente 90 000 dollars par personne, soit près d'un demi-million de dollars par famille de cinq personnes. Certaines demandes de la bande, comme une patinoire et une piscine, ont été rejetées.

24.2 Selon l'Etat partie, le seul point important encore en litige entre le Gouvernement et la bande concerne l'indemnité de 167 millions de dollars que la bande réclame au titre des pertes financières et autres qu'elle aurait subies. Afin de permettre le règlement des questions sur lesquelles les parties se sont entendues, le gouvernement fédéral a fait une proposition qui permettrait à la bande d'accepter son offre en totalité tout en intentant une action en réparation générale devant les tribunaux canadiens. L'Etat partie rejette l'affirmation selon laquelle "pratiquement tous les points importants" de son offre "devaient faire l'objet de négociations ultérieures" et fait valoir que le Gouvernement a fait droit à la plupart des demandes de la bande concernant les terres, les droits miniers, les installations communautaires, l'autorité sur la composition de la bande et l'autonomie économique. Enfin, l'Etat partie rejette l'accusation de mauvaise foi dans les négociations.

24.3 Au chapitre de la procédure, l'Etat partie indique que le Comité, depuis qu'il a pris sa décision sur la recevabilité, n'a toujours pas fourni de précisions qui permettraient à l'Etat partie de réagir aux accusations d'incompatibilité avec le Pacte. Il considère par conséquent que la procédure n'a pas dépassé le stade de la recevabilité. Il fait valoir en outre que, pour se conformer à son mandat, le Comité doit a) préciser, en vertu de l'article 93, paragraphe 4, du règlement intérieur, le résultat du réexamen de sa décision sur la recevabilité; b) s'il déclare la communication recevable, indiquer les articles et les éléments de preuve sur lesquels il fonde cette décision; c) donner au gouvernement fédéral l'occasion de faire connaître dans les six mois ses observations sur le fond.

25. Par décision interlocutoire du 14 juillet 1989, le Comité des droits de l'homme a invité l'Etat partie à lui soumettre, au plus tard le 1er septembre 1989, toutes nouvelles explications ou déclarations complémentaires se rapportant aux allégations de l'auteur quant au fond, et l'a prié à nouveau, conformément à l'article 86 du règlement intérieur du Comité et en attendant sa décision finale, de prendre des mesures pour éviter qu'un préjudice ne soit causé à l'auteur et aux autres membres de la bande du lac Lubicon.

26.1 Dans sa réponse du 31 août 1989 à cette décision interlocutoire, l'Etat partie fait valoir qu'il n'a pas bénéficié d'une procédure régulière, puisque les principes d'impartialité et de loyauté veulent qu'une partie sache précisément ce dont elle est accusée et les éléments de preuve sur lesquels repose l'accusation. N'ayant pas été informé des articles du Pacte prétendument violés, ni des éléments d'appréciation qui ont amené le Comité à déclarer la communication recevable, le gouvernement fédéral estime que les principes d'équité n'ont pas été respectés et que son aptitude à répondre aux allégations de la bande s'en trouve diminuée.

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26.2 Pour ce qui est des violations alléguées de l'article 14, paragraphe 1 et de l'article 26 du Pacte, l'Etat partie rejette comme "totalement infondées" les allégations selon lesquelles il n'aurait pas permis à la bande de se faire entendre par un tribunal, indépendant et impartial en vue du règlement de ses demandes : les tribunaux canadiens ont de tout temps administré la justice de façon impartiale et intègre, et nombreux ont été les plaignants indiens à en bénéficier. Les auteurs de la communication n'apportent aucun élément tendant à montrer que la justice aurait été administrée de façon discriminatoire dans le cas de la bande du lac Lubicon. L'Etat partie ajoute que s'il y a eu des retards dans le cours de la justice, c'est en grande partie le fait de la bande elle-même. Elle n'a pas pris les mesures voulues pour faire progresser les actions qu'elle avait engagées et elle a refusé de coopérer avec le gouvernement fédéral quand celui-ci a entrepris de régler les questions litigieuses; qui plus est, la bande a déclaré le 30 septembre 1988 ne pas reconnaître la compétence des tribunaux canadiens, ce qui a eu pour effet de mettre fin à l'effort entrepris pour trouver une solution par la voie judiciaire.

26.3 L'Etat partie fournit une chronologie judiciaire détaillée de l'affaire. Trois actions sont pendantes en ce qui concerne la bande du lac Lubicon. La première a été intentée par la bande devant la Cour fédérale contre le gouvernement fédéral. Elle est en suspens depuis 1981 et, selon l'Etat partie, c'est à la bande qu'il appartient d'engager l'étape suivante de la procédure. La deuxième action a été intentée devant la Cour du Banc de la Reine (Court of Queen's Bench) de l'Alberta contre cette province et certaines sociétés privées. Depuis 1985, date à laquelle l'ordonnance conservatoire demandée par la bande a été refusée, celle-ci n'a en rien fait avancer la procédure et elle a renoncé à faire appel de la décision par laquelle la Cour avait refusé de mettre également en cause l'Etat canadien. La troisième action a été engagée en mai 1988 par le gouvernement fédéral, qui voulait résoudre les problèmes de compétence en réunissant devant la même juridiction le gouvernement provincial, le gouvernement fédéral et la bande, afin de régler définitivement l'affaire. Or la bande a refusé d'être partie à cette action, malgré la volonté du Président de la Cour du Banc de la Reine de l'Alberta de parvenir rapidement à une solution. Cette action reste elle aussi en suspens. De l'avis de l'Etat partie, chacune de ces trois actions en justice offre à la bande un moyen d'obtenir satisfaction.

26.4 L'Etat partie fait valoir que, parallèlement aux actions judiciaires, le gouvernement fédéral a essayé de régler l'affaire par la négociation. C'est ainsi que les offres faites lors des négociations décrites au paragraphe 24.1 ci-dessus satisfaisaient quasiment toutes les revendications de l'auteur de la demande, soit intégralement soit dans une très large mesure. De plus, une nouvelle série de pourparlers avaient commencé et "aucun effort n'était épargné pour qu'ils aboutissent". Les négociations de la bande avec le gouvernement de la province de l'Alberta avaient repris le 23 août 1989 et d'autres devaient s'ouvrir le 7 septembre 1989 avec le gouvernement fédéral. L'Etat partie confirme que l'offre qu'il a faite à la bande est toujours valable.

26.5 Pour ce qui est de la formule utilisée pour déterminer l'appartenance à la communauté du lac Lubicon, l'Etat partie dit qu'il est "totalement faux" de prétendre, comme le fait la bande, que "le Canada a prétendu appliquer

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rétroactivement l'Indian Act (loi sur les Indiens), dans son texte antérieur à la modification découlant de la décision adoptée dans l'affaire Sandra Lovelace c. Canada. Bien au contraire, déclare l'Etat partie, la bande a soumis en 1985 un règlement d'appartenance à la communauté conforme à la loi sur les Indiens (telle qu'elle avait été modifiée à la suite de la décision du Comité dans l'affaire Lovelace), règlement que le Gouvernement canadien a accepté et qui donne à la bande tous pouvoirs de décision sur l'appartenance à la communauté. Il s'ensuit que la proposition du Gouvernement canadien est fondée sur les quelque 500 habitants dont les dirigeants de la bande ont décidé qu'ils étaient membres de la communauté du lac Lubicon.

26.6 Pour ce qui est des allégations de violation des articles 17, 23, paragraphes 1, 18 et 27, l'Etat partie rejette comme inexacte et tendancieuse la thèse de la bande selon laquelle "le Canada participe à un projet dans le cadre duquel pratiquement toutes les terres traditionnelles du Lubicon ont fait l'objet de concessions d'abattage". Il fait observer que l'usine de pâte à papier de la Daishowa, qui est en construction au nord de la Peace River, dans l'Alberta, n'est ni dans le périmètre des terres prétendument "ancestrales" de la bande, ni dans le territoire constitué en réserve selon les termes de l'accord entre la bande et le gouvernement provincial de l'Alberta. L'Etat partie déclare que la nouvelle usine de pâte à papier est située à environ 80 kilomètres de la limite des terres réservées à la bande. Il poursuit en ces termes :

"S'agissant de la superficie des terres mises à la disposition de l'usine pour s'approvisionner en matières premières, l'accord d'exploitation forestière passé entre la province de l'Alberta et cette usine exclut expressément les terres offertes à la bande du lac Lubicon. De plus, pour garantir une saine exploitation forestière, les coupes annuelles effectuées en dehors des terres proposées à la bande toucheront moins de 1 % de la superficie spécialisée dans l'accord d'exploitation forestière."

26.7 Enfin, l'Etat partie attire l'attention du Comité sur l'évolution récente de la situation de la communauté du lac Cadotte/lac Buffalo, au sein de laquelle vivent la majorité des membres de la bande du lac Lubicon. En décembre 1988, les autorités fédérales ont appris qu'un nouveau groupe de cette communauté avait entrepris de régler la question des droits détenus par ses membres en vertu du Traité No 8, indépendamment de la bande du lac Lubicon. Ce groupe, qui compte environ 350 autochtones, a demandé au Gouvernement de le reconnaître en tant que bande des Cree des forêts. Selon l'Etat partie, il se compose de membres de la bande du lac Lubicon qui ont officiellement annoncé leur intention de s'intégrer dans la nouvelle bande, d'anciens membres de la bande du lac Lubicon expulsés par celle-ci en janvier 1989, et d'autres autochtones vivant dans la communauté. Le gouvernement fédéral a accepté de constituer la bande des Cree des forêts. L'Etat partie ajoute qu'il se reconnaît envers cette bande les mêmes obligations juridiques qu'envers la bande du lac Lubicon.

26.8 Dans une nouvelle communication, datée du 28 septembre 1989, l'Etat partie se réfère aux négociations tripartites entre le gouvernement fédéral, le gouvernement provincial et la bande du lac Lubicon, qui auraient dû se dérouler fin août et début septembre 1989; il affirme qu'alors que la bande s'était engagée à soumettre

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une contre-proposition détaillée en réponse à l'offre du gouvernement fédéral et de fournir une liste des personnes qu'elle représentait dans les négociations, il a été informé le 7 septembre 1989 que la bande n'avait pas préparé de contre-proposition et qu'elle ne fournirait pas de liste. La bande aurait déclaré qu'elle ne négocierait pas en présence de M. Ken Colby, l'un des membres de l'équipe de négociateurs du Canada, parce qu'il faisait office de porte-parole du Gouvernement auprès des médias. La bande ayant ainsi refusé de poursuivre une discussion sérieuse sur ses revendications, les négociations n'ont pas repris.

27.1 Dans ses observations du 2 octobre 1989 sur la réponse de l'Etat partie à la décision interlocutoire du Comité, l'auteur déclare que l'Etat partie ne peut à bon droit se prétendre désavantagé dans la procédure engagée devant le Comité des droits de l'homme, puisque tous les faits et les motifs juridiques sur lesquels repose la plainte de la bande ont été abondamment exposés et discutés. Quant à savoir si des voies de recours internes restent ouvertes à la bande, il fait observer qu'il n'existe aucun recours interne qui permette à la bande du lac Lubicon de rétablir son économie et de retrouver son mode de vie traditionnel, dont la destruction est "la conséquence directe à la fois de la négligence et des actes délibérés du Gouvernement canadien". L'auteur fait observer que, du point de vue juridique, la situation de la bande est conforme à la décision que le Comité a prise dans l'affaire Muñoz c. Pérou 1/, dans laquelle le Comité avait déclaré que la notion de procès équitable au sens de l'article 14, paragraphe 1, du Pacte implique nécessairement que la justice soit rendue sans retard excessif. Dans cette affaire, le Comité avait estimé qu'un retard de sept ans dans la procédure judiciaire interne représentait un retard excessif. Dans l'affaire de la bande, précise l'auteur, les procédures judiciaires internes ont été engagées en 1975. En outre, et alors que la bande avait adressé au Gouvernement fédéral canadien une requête en création d'une réserve dès 1933, la question n'est toujours pas réglée. La bande considère que si elle a été contrainte de mettre un terme à 14 ans de procédure judiciaire, c'est finalement en raison de deux décisions qui ont eu pour effet de lui ôter toute possibilité de poursuivre la revendication de ses droits ancestraux à l'encontre du Gouvernement fédéral canadien. Ainsi, en 1986, la Cour suprême du Canada a décidé dans l'affaire Loe que les tribunaux fédéraux n'étaient pas compétents pour connaître des affaires de droits ancestraux survenant dans le cadre des provinces. Etant donné cette décision, la bande a demandé aux tribunaux de l'Alberta, en 1987, d'inclure le Gouvernement fédéral canadien au nombre des parties aux procédures concernant ces droits ancestraux. Le Gouvernement fédéral s'est opposé à cette demande. En mai 1988, le gouvernement fédéral a intenté une action en justice pour essayer de persuader la Cour du Banc de la Reine (Court of Queen's Bench) de l'Alberta que la bande n'avait qu'un droit conventionnel sur 40 miles carrés de terre. L'auteur fait valoir que, du point de vue du gouvernement fédéral, une décision en ce sens lui permettrait de justifier les concessions d'abattage de la société Daishowa, qui englobent pratiquement tous les territoires traditionnels de la bande du lac Lubicon, et "invaliderait les arguments invoqués par la bande concernant la destruction de son assise économique". L'auteur ajoute que le Président de la Cour du Banc de la Reine (Court of Queen's Bench) a reconnu qu'il fallait régler la question des droits ancestraux avant de prendre une décision sur aucune question concernant les droits issus de traités; il précise que si le Canada avait réellement voulu que les

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tribunaux règlent la question des droits fonciers de la bande du lac Lubicon, au lieu de s'en servir pour retarder une décision en la matière, il aurait renvoyé la question directement devant la Cour suprême du Canada.

27.2 Quant à l'offre d'un règlement négocié faite par l'Etat partie, l'auteur déclare que cette offre n'est pas équitable et ne répond pas aux besoins de la communauté du Lubicon car pratiquement tous les points de quelque importance resteraient à régler et devraient faire l'objet de nouvelles discussions, de décisions du Gouvernement canadien ou de demandes de la bande, en échange de quoi celle-ci devrait renoncer à toute action, sur le plan national ou international, à l'encontre de l'Etat partie, et notamment retirer la communication soumise au Comité des droits de l'homme. L'auteur ajoute que l'accord d'octobre 1988 entre la bande et la province de l'Alberta ne règle en rien la question des revendications territoriales de la bande, "contrairement à ce que veut faire croire" l'Etat partie. A ce propos, l'auteur fait valoir que, contrairement à ce qu'il avait prétendu précédemment, l'Etat partie n'a pas offert de donner effet à l'accord d'octobre 1988 et que, s'il était réellement disposé à appliquer les dispositions de l'accord, il resterait à régler un certain nombre de questions, notamment celle d'une juste indemnisation.

27.3 A l'appui de ses observations antérieures faisant état de violations des articles 14 et 26 du Pacte, l'auteur affirme que non seulement l'Etat partie n'a pas assuré à la bande du lac Lubicon une égale protection par rapport aux groupes non autochtones, mais qu'il a en outre cherché à priver la bande d'une égale protection par rapport aux autres bandes d'Indiens. C'est ainsi que, s'agissant de l'appartenance à la bande, la formule proposée par le Canada en 1986 aurait pour effet de priver de leurs droits aborigènes plus de la moitié des Indiens du Lubicon, qui seraient ainsi l'objet d'un traitement inégal et discriminatoire par rapport à tous les autres aborigènes. L'auteur affirme que, au moins jusqu'en décembre 1988, l'Etat partie a cherché à appliquer à la bande les critères énoncés dans la législation antérieure aux constatations faites par le Comité des droits de l'homme dans l'affaire Lovelace c. Canada 2/, législation qui avait été déclarée contraire à l'article 27 du Pacte.

27.4 Passant à ses allégations de violation des articles 17, 18, 23 et 27, l'auteur réaffirme que l'Etat partie a tenté de dénaturer les faits récents et s'est concentré abusivement sur le projet d'exploitation forestière de la Daishowa pour détourner l'attention du Comité du fait que "c'est sciemment et délibérément qu'il anéantit la communauté du Lubicon". Il rappelle que sept mois seulement après que le Comité eut demandé des mesures conservatoires en application de l'article 86 du règlement intérieur, pratiquement toutes les terres traditionnelles du Lubicon avaient fait l'objet de concessions d'abattage pour le projet de la Daishowa. L'accord d'exploitation forestière destiné à alimenter en arbres la nouvelle usine englobe, selon l'auteur, la totalité des territoires traditionnels de chasse et de piégeage du Lubicon (10 000 kilomètres carrés), à l'exception de 65 kilomètres carrés mis à part mais jamais officiellement constitués en réserve. L'auteur fait valoir que le Canada a contrevenu à la demande de mesures conservatoires formulées par le Comité en vendant à une société japonaise les arbres qui couvrent ces 10 000 kilomètres carrés traditionnellement utilisés par la bande et qu'elle n'a jamais cédés. De plus, le Canada s'efforcerait de minimiser indûment l'impact du

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projet de la Daishowa; l'auteur fait observer que les plans de production actuels prévoient l'abattage de 4 millions d'arbres par an et que l'on a récemment annoncé l'intention de doubler en trois ans la production, qui est actuellement de 340 000 tonnes de pâte à papier par an. Si cette activité économique se poursuit comme prévu, on continuera de détruire l'ensemble du territoire traditionnel des Indiens du Lubicon. Il ne sert à rien que le territoire de 247 kilomètres carrés réservé par l'accord d'octobre 1988 demeure relativement intact, puisque le gibier qui traditionnellement assurait la subsistance de la bande a déjà été chassé de toute la zone de 10 000 kilomètres carrés.

27.5 Enfin, l'auteur fait valoir qu'en créant la "bande des Cree des forêts" et en s'efforçant de faire "revendiquer par d'autres" les terres traditionnelles du Lubicon, l'Etat partie viole une fois de plus les articles premier, 26 et 27 du Pacte. A ce propos, il déclare que la bande des Cree des forêts est un

"groupe hétéroclite formé de personnes tirées d'une douzaine de communautés différentes éparpillées dans toute l'Alberta et la Colombie britannique", qui n'ont aucun passé en tant que société autochtone organisée et qui, en tant que groupe, n'ont aucun lien avec le territoire traditionnel de la bande du lac Lubicon et que sa création "constitue la dernière en date des tentatives faites par le Canada pour ébranler la société traditionnelle du lac Lubicon et abolir ses droits fonciers".

L'auteur ajoute que le gouvernement fédéral a apporté une assistance financière et juridique à la bande des Cree des forêts et qu'il l'a reconnue avec "une célérité sans précédent", lui accordant la priorité sur plus de 70 autres groupes, notamment six communautés Cree homogènes et bien soudées du nord de l'Alberta qui attendent depuis plus de 50 ans d'être reconnues comme bandes. Certains des soi-disant membres de la "bande des Cree des forêts" viendraient de ces communautés-là. L'auteur se réfère à l'article 17 de la loi sur les Indiens, qui donne au Ministre fédéral chargé des affaires indiennes le pouvoir de constituer de nouvelles bandes et de mettre à la disposition d'une nouvelle bande "une partie, déterminée par le Ministre, des terres de la réserve et des fonds de la bande existante". De l'avis de l'auteur, les pouvoirs conférés par l'article 17 de la loi sur les Indiens sont "extraordinaires et inconstitutionnels" et ont été invoqués "pour créer [la] bande des 'Cree des forêts' et déposséder la bande du lac Lubicon de son territoire traditionnel et de sa culture". De plus, alors que l'Etat partie prétend que la bande des Cree des forêts représente quelque 350 personnes, l'auteur indique que la nouvelle bande a toujours refusé d'en publier les noms aux fins de vérification. Le gouvernement fédéral, ajoute-t-il, a reconnu que la bande des Cree des forêts ne compte que 110 membres.

27.6 L'auteur conclut que l'Etat partie n'a pas été en mesure de réfuter ses allégations de violation des articles 2, 6, paragraphes 1, 7, 14, paragraphes 1, 17, 18, paragraphes 1, 23, paragraphes 1, 26 et 27, formulées dans ses communications des 12 janvier 1988 et 30 mai 1989, et prie le Comité de se prononcer contre l'Etat partie en ce qui concerne ces articles. Quand la violation de l'article premier qu'on lui reproche, il fait observer que s'il a signé, en tant que représentant de la bande, toutes les communications adressées au Comité, il a agi uniquement en sa qualité de représentant dûment élu de la bande et non en son

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propre nom. A ce propos, il note que si l'article 2 du Protocole facultatif dispose que seuls les particuliers peuvent présenter une communication au Comité, l'article premier du Pacte garantit "à tous les peuples ... le droit de disposer d'eux-mêmes". Il ajoute : "En décidant qu'un particulier qui soumet une communication au nom d'un groupe, conformément aux dispositions de l'article 2 du Protocole facultatif, ne peut exposer une réclamation au nom de ce même groupe en vertu de l'article premier du Pacte, le Comité déciderait en fait que les droits énoncés à l'article premier du Pacte n'ont pas force de loi." L'auteur ajoute encore qu'"il est évident que telle n'est pas l'intention du Comité et qu'en conséquence la bande estime ... respectueusement qu'en tant que peuple, représenté par son chef dûment élu, M. Bernard Ominayak, la bande du lac Lubicon est victime, de la part du Gouvernement fédéral du Canada, de violations ... des droits énoncés à l'article premier du Pacte international relatif aux droits civils et politiques".

28.1 Dans une dernière communication datée du 8 novembre 1989, l'Etat partie rappelle que pour se faire un avis sur les actions en justice concernant la bande du lac Lubicon, il convient de tenir compte du fait qu'il existe au Canada, en vertu de la Constitution, un partage des pouvoirs entre le gouvernement fédéral et les gouvernements provinciaux et entre les compétences respectives des tribunaux. La Cour suprême du Canada a décidé que, lorsque des terres qui sont la propriété d'une province sont revendiquées (comme dans le cas du lac Lubicon), les plaintes dirigées contre le gouvernement provincial sont déposées devant les tribunaux provinciaux. De l'avis de l'Etat partie, la décision de la Cour suprême définit avec précision les instances judiciaires devant lesquelles la bande peut faire valoir ses droits territoriaux ancestraux. Le fait que les conseils de la bande n'aient pas intenté leur action devant les tribunaux compétents ne signifie pas que les tribunaux canadiens refusent ou soient incapables d'entendre leur cause équitablement.

28.2 Passant à la distinction entre les droits ancestraux et les droits issus de traités, l'Etat partie explique que dans le droit constitutionnel canadien, les droits ancestraux peuvent être remplacés par des droits issus de traités. Lorsqu'il en est ainsi, les bandes indiennes peuvent prétendre à des avantages découlant de ces traités subséquents. L'Etat partie reconnaît que la bande du lac Lubicon peut légitimement revendiquer certains droits en vertu du Traité No 8, conclu en 1899 avec les Indiens cree et les autres Indiens de la province de l'Alberta. Les propositions faites par le Gouvernement canadien et le Gouvernement de l'Alberta à la bande reposent sur les droits énoncés dans le Traité No 8. Les terres offertes par le gouvernement provincial en vertu de l'Accord de 1988 l'ont été dans le cadre des dispositions de ce traité. En revanche, la zone de 10 000 kilomètres carrés mentionnée par la bande dans ses communications relève d'un droit ancestral qui n'est pas reconnu par le gouvernement fédéral. La plainte formulée par la bande à propos de la poursuite de l'exploration et de l'exploitation pétrolières et d'une éventuelle exploitation forestière porte sur des activités menées dans cette vaste zone de 10 000 kilomètres carrés et non pas sur les terres visées dans les projets d'accords entre la bande, le gouvernement fédéral et le gouvernement provincial.

28.3 L'Etat partie réfute la thèse de la bande selon laquelle son mode de vie fondé sur la chasse et le piégeage aurait été irrémédiablement détruit; il fait observer que, dans les zones concédées pour l'exploitation forestière, la forêt dans son

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ensemble reste intacte et peut continuer à faire vivre une population animale suffisante pour permettre aux membres de la bande du lac Lubicon qui le souhaitent de maintenir leur mode de vie traditionnel. Il ajoute que les perturbations apportées aux forêts entraînent en général une augmentation du nombre des grands mammifères, car la nourriture devient de ce fait plus abondante dans les clairières.

28.4 Enfin, l'Etat partie souligne à nouveau que la bande des Cree des forêts s'est constituée à la demande même des intéressés. Il fait observer qu'une minorité d'Indiens souhaitant appartenir à cette bande étaient à un moment donné des membres à part entière de la bande du lac Lubicon. Certains d'entre eux l'ont depuis quittée de leur plein gré; une trentaine d'autres en ont été exclus en 1989. L'Etat partie fait observer que les membres de la bande des Cree des forêts ont demandé au gouvernement fédéral de les reconnaître comme tels, tout comme les membres de la bande du lac Lubicon avaient demandé à être reconnus comme tels dans les années 30. Le gouvernement fédéral a reconnu la nouvelle bande parce que certains de ses membres ont, en vertu du Traité No 8, des droits territoriaux qu'ils souhaitent exercer. L'Etat partie ajoute que la bande des Cree des forêts a été reconnue à la demande des intéressés, qui souhaitent être reconnus comme tels afin de pouvoir vivre collectivement, et que cette bande n'a réclamé aucune des terres revendiquées par la bande du lac Lubicon.

Résumé des communications

29.1 Au début, dans sa réclamation, située dans un ensemble de faits complexes, l'auteur alléguait principalement que la bande du lac Lubicon avait été privée du droit de disposer d'elle-même ainsi que du droit de disposer librement de ses richesses et ressources naturelles. Bien que le Gouvernement canadien ait, par la loi sur les Indiens de 1970 et le Traité No 8 de 1899, reconnu le droit de la bande du lac Lubicon à poursuivre son mode de vie traditionnel, ses terres (10 000 kilomètres carrés environ) avaient été expropriées à des fins commerciales (prospection de pétrole et de gaz) et détruites, ce qui avait privé la bande du lac Lubicon de ses moyens de subsistance et de la jouissance de son droit à l'autodétermination. La destruction rapide de l'assise économique et du mode de vie aborigène de la bande avait déjà causé un dommage irréparable. L'auteur alléguait en outre que le Gouvernement canadien s'était délibérément servi des moyens politiques et juridiques disponibles au Canada pour empêcher et retarder les actions en justice de la bande de manière qu'avec le développement industriel de la région, s'accompagnant de la destruction du milieu écologique et de l'assise économique de la bande, celle-ci ne puisse survivre en tant que nation. L'auteur déclarait que la bande du lac Lubicon ne demandait pas au Comité une décision sur des droits territoriaux mais seulement que le Comité l'aide à tenter de convaincre le Gouvernement : a) que l'existence de la bande était gravement menacée et b) que le Canada était responsable de la situation actuelle.

29.2 Dès le début, l'Etat partie a repoussé les allégations selon lesquelles l'existence de la bande du lac Lubicon était menacée et affirmé que la poursuite de la mise en valeur de la région ne causerait pas de dommage irréparable au mode de vie traditionnel de la bande. Il estimait que la revendication, par la bande du lac Lubicon, de certaines terres situées dans la partie septentrionale de l'Alberta n'était qu'un élément d'une situation qui était extrêmement complexe du fait les

revendications concurrentes de plusieurs autres communautés autochtones de la région, que la bande disposait encore de recours effectifs pour faire valoir ses revendications tant par la voie judiciaire que par la négociation, que le Gouvernement avait fait à la bande un versement à titre gracieux de 1,5 million de dollars canadiens pour couvrir ses frais de justice et que, de toute façon, l'article premier du Pacte, ayant trait aux droits d'un peuple, ne pouvait être invoqué en vertu du Protocole facultatif, qui prévoit l'examen de prétendues violations de droits individuels mais non de droits collectifs conférés à des peuples.

29.3 Telle était la situation lorsque le Comité a décidé, en juillet 1987, que la communication était recevable "dans la mesure où elle pouvait soulever des questions au regard de l'article 27 ou d'autres articles du Pacte". Etant donné la gravité des allégations de l'auteur selon lesquelles la bande du lac Lubicon était au bord de l'extinction, le Comité a prié l'Etat partie, conformément à l'article 86 du règlement intérieur, "de prendre des mesures provisoires pour éviter qu'un préjudice irréparable ne soit causé [à l'auteur de la communication] et aux autres membres de la bande du lac Lubicon".

29.4 Faisant valoir que le mode de vie traditionnel de la bande du lac Lubicon n'avait pas été atteint de manière irréparable et n'était pas menacé de manière imminente et que tant un procès sur le fond que le processus de négociation proposé constituaient des recours effectifs au même titre que l'injonction provisoire que la bande avait cherché sans succès à obtenir des tribunaux, l'Etat partie a, en octobre 1987, prié le Comité, en vertu du paragraphe 4 de l'article 93 du règlement intérieur, de réexaminer sa décision de recevabilité dans la mesure où elle se fondait sur la règle de l'épuisement des recours internes. L'Etat partie soulignait à ce propos que les retards intervenus dans les procédures judiciaires engagées par la bande étaient dus pour une bonne part à l'inaction de la bande. Il faisait aussi valoir qu'il avait pour politique de s'efforcer de résoudre par la négociation les revendications foncières justifiées et en suspens de bandes indiennes.

29.5 Depuis octobre 1987, les parties ont présenté un certain nombre d'observations, réfutant mutuellement leurs déclarations comme étant fausses ou fallacieuses quant aux faits. L'auteur a allégué que l'Etat partie avait créé une situation qui avait causé directement ou indirectement la mort de beaucoup de membres de la bande et menaçait la vie de tous les autres membres de la communauté du lac Lubicon, que le nombre de fausses-couches et d'enfants morts-nés avait monté en flèche et que celui des anomalies à la naissance était passé de 0 à presque 100 %, tout cela en violation de l'article 6 du Pacte, que les effets dévastateurs causés à la communauté constituaient des traitements cruels, inhumains et dégradants en violation de l'article 7, que la partialité des tribunaux canadiens faisait obstacle aux efforts déployés par la bande pour protéger ses terres, sa communauté et ses moyens d'existence, que plusieurs des juges entretenaient manifestement des liens économiques et personnels avec les parties adverses, en violation du paragraphe 1 de l'article 14 et de l'article 26, que l'Etat partie avait permis la destruction des familles et des foyers des membres de la bande en violation de l'article 17 et du paragraphe 1 de l'article 23, que les membres de la bande étaient "spoliés du substrat physique qui [servait] de support à leur religion", en violation du paragraphe 1 de l'article 18, et que tous les faits susmentionnés constituaient aussi des violations des paragraphes 1 à 3 de l'article 2 du Pacte.

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29.6 L'Etat partie a rejeté catégoriquement les allégations ci-dessus comme étant non fondées et non établies et comme constituant un abus du droit de communication. Il affirme que des efforts réels et sérieux ont continué d'être faits au début de 1988 pour engager des négociations avec les représentants de la bande du lac Lubicon au sujet des revendications de la bande. Ces efforts, qui comportaient une offre provisoire de céder à la bande 25,4 milles carrés de terres réservées, sans préjudice de toute négociation ou action en justice, ont échoué. D'après l'auteur, à l'exception de 25,4 milles carrés, le Canada a donné à bail la totalité des terres traditionnelles de la bande - au mépris de la demande du Comité tendant à la prise de mesures conservatoires - en vue de leur exploitation par une usine de pâte à papier qui serait construite près de Peace River, dans l'Alberta, par la Daishowa Canada Company Ltd, et le projet de la Daishowa a mis un point final à tout espoir de la part des membres de la bande de pouvoir poursuivre certaines de leurs activités traditionnelles.

29.7 Reconnaisant l'obligation qui lui est faite, en vertu du Traité No 8, de fournir une réserve à la bande du lac Lubicon et après de nouvelles discussions qui n'ont pas abouti, le Gouvernement fédéral a, en mai 1988, engagé une action en justice contre la province de l'Alberta et la bande du lac Lubicon afin qu'il y ait une juridiction commune et que le Canada puisse ainsi s'acquitter de ses obligations à l'égard de la bande découlant du Traité No 8. Selon l'auteur, cependant, cette initiative n'a pas d'autre but que de retarder indéfiniment le règlement des revendications foncières du Lubicon et, le 6 octobre 1988 (le 30 septembre, selon l'Etat partie), la bande du lac Lubicon a proclamé sa juridiction sur son territoire et déclaré qu'elle cessait de reconnaître la compétence des tribunaux canadiens. L'auteur a en outre accusé l'Etat partie d'"intoxiquer l'opinion dans les médias et de congédier les conseillers qui préconisaient une solution favorable au peuple de Lubicon".

29.8 En novembre 1988, à la suite d'un accord conclu entre le Gouvernement provincial de l'Alberta et la bande du lac Lubicon sur la cession de 95 milles carrés de terres pour établir une réserve, le Gouvernement fédéral et la bande ont entamé des négociations sur les modalités du transfert des terres et sur des questions connexes. D'après l'Etat partie, une entente était intervenue sur la majorité des questions, y compris l'appartenance à la bande, la superficie de la réserve, les constructions destinées à la communauté et les programmes et services à fournir, mais non sur la question de la compensation en espèces, lorsque la bande s'est retirée des négociations le 24 janvier 1989. L'offre formelle du Gouvernement fédéral représentait alors environ 45 millions de dollars en prestations et programmes, en plus de la réserve de 95 milles carrés.

29.9 L'auteur, quant à lui, déclare que les informations ci-dessus de l'Etat partie n'ont pas seulement pour effet d'induire en erreur mais qu'elles sont presque entièrement fausses et que le Gouvernement ne fait aucun effort sérieux pour aboutir à un règlement. Il qualifie l'offre du Gouvernement d'opération de relations publiques qui "ne comporte pratiquement aucun engagement de la part du Gouvernement fédéral", et déclare qu'aucun accord ou consensus n'est intervenu sur aucune question. L'auteur accuse en outre l'Etat partie d'infiltrer des agents dans des communautés jouxtant le territoire traditionnel de la communauté du Lubicon pour inciter d'autres autochtones à revendiquer de leur côté des terres traditionnelles du Lubicon.

29.10 L'Etat partie rejette l'allégation selon laquelle il aurait négocié de mauvaise foi ou agi irrégulièrement au détriment des intérêts de la bande du lac Lubicon. Il reconnaît que la bande du lac Lubicon a été victime d'une injustice historique mais affirme avoir fait à la bande une offre formelle qui, si elle était acceptée, devrait lui permettre de préserver sa culture, d'être maîtresse de son mode de vie et d'être autonome sur le plan économique, offre qui constituerait ainsi une solution interne efficace. Si l'on considère que la bande compte 500 membres et que les biens et services offerts par le Gouvernement s'élèvent à 45 millions de dollars canadiens, l'offre du Gouvernement représente près de 500 000 dollars canadiens par famille de cinq personnes. Certaines demandes de la bande, comme une patinoire et une piscine, ont été rejetées. Selon l'Etat partie, le seul point important encore en litige concerne l'indemnité de 167 millions de dollars canadiens que la bande réclame au titre des pertes économiques et autres qu'elle aurait subies. Selon lui, cette demande pourrait être portée devant les tribunaux, que l'offre formelle soit acceptée ou non. L'Etat partie réaffirme que l'offre qu'il a faite à la bande reste valable.

29.11 D'autres communications des deux parties ont traité entre autres de l'influence de l'usine de pâte à papier de la Daishowa sur le mode de vie traditionnel de la bande du lac Lubicon. Alors que l'auteur déclare que l'usine aurait un impact dévastateur, l'Etat partie affirme qu'elle n'entraînerait pas de conséquences graves, faisant observer que l'usine de pâte à papier, située à environ 80 kilomètres de la limite des terres réservées à la bande, n'est pas dans le périmètre des terres prétendument ancestrales de la bande, et que les coupes annuelles, effectuées en dehors des terres proposées à la bande, toucheraient moins de 1 % de la superficie spécifiée dans l'accord d'exploitation forestière.

30. Le Comité des droits de l'homme a examiné la présente communication en tenant compte de toutes les informations écrites qui lui ont été soumises par les parties, comme le stipule l'article 5, paragraphe 1, du Protocole facultatif. A ce propos, il fait observer que le désaccord persistant des parties sur les faits de la cause a rendu particulièrement difficile l'examen au fond de leurs thèses respectives.

Demande de réexamen de la décision sur la recevabilité

31.1 Le Comité a étudié avec le plus grand soin la demande de l'Etat partie tendant à ce qu'il réexamine sa décision déclarant la communication recevable, aux fins du Protocole facultatif, "dans la mesure où elle peut soulever des questions au regard de l'article 27 ou d'autres articles du Pacte". Au vu des informations dont il dispose maintenant, le Comité note que l'Etat partie a fait valoir de façon convaincante que, si elle avait activement mené son affaire devant les tribunaux compétents, la bande du lac Lubicon aurait pu abréger des délais qui ont semblé anormalement longs. Mais la question est de savoir si la voie de la confrontation judiciaire aurait été un bon moyen de sauvegarder ou de restaurer le mode de vie traditionnel ou culturel de la bande du lac Lubicon, mode de vie dont la bande a dit qu'il était, à l'époque pertinente, sur le point de disparaître. Le Comité n'est pas persuadé que cela aurait constitué un recours efficace au sens de l'article 5, alinéa 2 b), du Protocole facultatif. En l'occurrence, le Comité confirme sa décision antérieure sur la recevabilité.

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31.2 À ce stade, le Comité tient aussi à déclarer qu'il ne peut suivre l'Etat partie lorsque celui-ci lui reproche d'avoir failli à sa tâche en ne précisant pas, au moment où il a déclaré la communication recevable, qu'elles étaient celles des allégations de l'auteur qui méritaient d'être examinées au fond. Les arguments de l'auteur étaient certes parfois confus, mais ils ont été exposés assez clairement pour que l'Etat partie et le Comité puissent répondre sur le fond.

#### Articles du Pacte qui auraient été violés

32.1 La question s'est posée de savoir si tout grief présenté au titre de l'article premier du Pacte pouvait être maintenu malgré la décision prise par le Comité concernant la recevabilité. Tous les peuples ont le droit de disposer d'eux-mêmes, de déterminer librement leur statut politique et d'assurer leur développement économique, social et culturel, comme le stipule l'article premier du Pacte, mais la question de savoir si la bande du lac Lubicon constitue un "peuple" n'est pas de celles que le Comité puisse traiter dans le cadre du Protocole facultatif concernant le Pacte. Ce Protocole offre à des particuliers le moyen de se faire entendre lorsqu'ils estiment que leurs droits individuels ont été violés. Ces droits sont énoncés dans la troisième partie du Pacte, aux articles 6 à 27. Cela dit, rien ne s'oppose à ce qu'un groupe de personnes, s'estimant victimes d'un même préjudice, présentent ensemble une communication alléguant une atteinte à leurs droits.

32.2 Bien qu'ils aient été initialement présentés comme relevant de l'article premier du Pacte, il ne fait pas de doute que bon nombre des griefs formulés soulèvent des questions qui relèvent de l'article 27. Le Comité constate qu'au nombre des droits protégés par l'article 27 figure le droit pour des personnes d'avoir, en commun avec d'autres, des activités économiques et sociales qui s'inscrivent dans la culture de leur communauté. Les allégations très générales d'atteintes particulièrement graves à d'autres articles du Pacte (les articles 6, 7, 14, par. 1, et 26), présentées après que la communication eut été déclarée recevable, n'ont pas été suffisamment étayées pour mériter un examen sérieux. De même, les allégations de violation des articles 17 et 23, paragraphe 1, sont elles aussi très générales et il n'en sera pas tenu compte si ce n'est dans la mesure où elles peuvent être considérées comme englobées dans les allégations qui relèvent essentiellement de l'article 27.

32.3 Les dernières en date des allégations, selon lesquelles l'Etat partie aurait suscité de toutes pièces une bande des Cree des forêts qui aurait des revendications concurrentes sur les terres traditionnelles de la communauté du Lubicon, sont rejetées comme constituant un abus du droit de saisir le Comité, au sens de l'article 3 du Protocole facultatif.

#### Les violations et la réparation offerte

33. Les inégalités historiques mentionnées par l'Etat partie et certains faits plus récents menacent le mode de vie et la culture de la bande du lac Lubicon et constituent une violation de l'article 27 tant qu'ils n'aurent pas été éliminés. L'Etat partie propose de remédier à la situation en offrant une réparation que le Comité juge appropriée au sens de l'article 2 du Pacte.

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Notes

1/ Communication No 203/1986, constatations finales adoptées  
le 4 novembre 1988, par. 11.3.

2/ Communication No 24/1977, constatations finales adoptées le 30 juillet 1981.

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## APPENDICE I

Opinion individuelle se rapportant aux constatations du Comité  
concernant la communication No 147/1984, H. Ominavak et la  
Bande du lac Lubicon c. CanadaPrésentée par M. Nisuke Ando comme l'y autorise le paragraphe 3  
de l'article 94 du règlement intérieur du Comité

Je ne suis pas opposé à l'adoption des constatations établies par le Comité, car elles peuvent mettre en garde contre une exploitation des richesses naturelles qui risquerait de causer sur la planète d'irréparables dommages dans l'environnement - lequel doit impérativement être préservé pour les générations futures. Mais je ne suis pas certain que la situation qui fait l'objet de la communication examinée doive être considérée comme une violation des dispositions de l'article 27 du Pacte.

Cet article 27 dispose que "Dans les Etats où il existe des minorités ethniques, religieuses ou linguistiques, les personnes appartenant à ces minorités ne peuvent être privées du droit d'avoir, en commun avec les autres membres de leur groupe, leur propre vie culturelle, de professer et de pratiquer leur propre religion, ou d'employer leur propre langue." De toute évidence, le droit de professer et de pratiquer leur propre religion ou d'employer leur propre langue n'est pas refusé aux membres de la Bande du lac Lubicon. La question qui se pose est donc de déterminer si le Gouvernement de la province de l'Alberta, lorsqu'il a à une date récente exproprié les terres de la Bande pour servir des intérêts commerciaux (par exemple en vue de concession de prospection du pétrole et du gaz), a porté atteinte au droit qui est reconnu à ces personnes "d'avoir leur propre vie culturelle".

Il peut arriver qu'une culture soit étroitement associée à un mode d'existence particulier et il n'est pas impossible en l'occurrence que le mode de vie traditionnel de la communauté considérée ici, notamment ses activités de chasse et de pêche, soit compromis par la prospection industrielle de richesses naturelles. Mais il me paraît toutefois que le droit d'avoir sa vie culturelle propre ne devrait pas être interprété comme impliquant que le mode de vie traditionnel de la Bande doit être préservé tel quel à tout prix. L'histoire de l'humanité est là pour rappeler que les progrès techniques ont modifié à divers égards les façons de vivre pratiquées jusque-là et ont par conséquent eu des incidences sur les cultures qu'elles nourrissaient. On pourrait aller jusqu'à dire qu'un groupe qui, au sein d'une société, refuse absolument de changer son mode de vie traditionnel risque de compromettre par là le développement économique de cette société tout entière. C'est pourquoi je formule une réserve à l'égard de l'assertion qui pose catégoriquement que les faits intervenus depuis quelque temps menacent la Bande du lac Lubicon dans son existence et constituent une violation de l'article 27.

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APPENDICE II

Opinion individuelle se rapportant aux constatations du Comité  
concernant la communication No 167/1984, B. Ominayak et la  
Bande du lac Lubicon c. Canada

Présentée par M. Bertil Wennergren comme l'y autorise le paragraphe 3  
de l'article 94 du règlement intérieur du Comité

Sous sa forme actuelle, la communication concerne essentiellement le droit des auteurs de disposer librement de leurs richesses et ressources naturelles et de ne pas être privés de leurs propres moyens de subsistance, tels que la chasse et la pêche. Dans sa décision du 22 juillet 1987, le Comité des droits de l'homme a décidé que la communication était recevable dans la mesure où elle aurait pu soulever des questions relevant de l'article 27 ou d'autres articles du Pacte. Toutefois, en ce qui concerne les dispositions autres que l'article 27, les allégations des auteurs sont restées si générales que le Comité n'a pas pu en tenir compte si ce n'est dans la mesure où elles peuvent être considérées comme englobées dans les allégations qui relèvent essentiellement de l'article 27. C'est là-dessus que se fonde mon opinion individuelle.

Depuis que le Comité a adopté sa décision sur la recevabilité, des négociations ont été engagées entre le Gouvernement fédéral, la province d'Alberta et les auteurs en vue de régler l'affaire. Comme aucun progrès n'a été réalisé dans la voie d'un règlement, le Gouvernement fédéral a engagé, le 17 mai 1988, une action en justice contre la province de l'Alberta et la bande du lac Lubicon afin que le Canada puisse s'acquitter de ses obligations conventionnelles à l'égard des auteurs en vertu du Traité 8. Dans l'acte introductif d'instance, la Cour du Banc de la Reine de l'Alberta est priée a) de déclarer que la bande du lac Lubicon a droit à une réserve et b) de déterminer la superficie de cette réserve.

Le 9 juin 1988, la bande du lac Lubicon a présenté les conclusions de la défense et a déposé une demande reconventionnelle. L'Etat partie a fait observer à cet égard que l'affaire à l'origine du différend interne et de la communication adressée au Comité des droits de l'homme concerne la superficie du territoire qui doit constituer la réserve et les questions qui en découlent. Il n'est pas absolument certain que toutes les questions qui peuvent relever de l'article 27 du Pacte soient des questions qui doivent être examinées par la Cour du Banc de la Reine de l'Alberta dans l'affaire dont elle est encore saisie en ce moment. Mais il est évident, en revanche, que les questions relevant de l'article 27 du Pacte sont inextricablement liées à celles de la superficie du territoire qui doit constituer la réserve et aux questions qui en découlent.

La règle générale du droit international qui veut que les recours internes soient épuisés avant qu'une plainte soit soumise à une instance internationale d'enquête ou de règlement a essentiellement pour objet de donner à l'Etat défendeur la possibilité de réparer lui-même, dans le cadre de son propre système juridique interne, le préjudice qu'a pu subir l'auteur de la plainte. Cela signifie, selon

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moi, que dans un cas comme le cas présent, une instance internationale ne peut pas examiner une question pendante devant un tribunal de l'Etat défendeur. A mon avis, il n'est pas conforme au droit international qu'une instance internationale examine des questions qui sont pendantes devant un tribunal national. J'estime qu'une instance internationale d'enquête ou de règlement doit s'abstenir d'examiner toute question pendante devant un tribunal national jusqu'à ce que le tribunal national se soit prononcé sur cette question. Comme ce n'est pas le cas ici, je juge la communication irrecevable au stade actuel.

Bertil Wennergren



**International Covenant  
on Civil and  
Political Rights**

Distr.  
RESTRICTED\*

CCPR/C/38/D/167/1984  
26 March 1990

ORIGINAL: ENGLISH

HUMAN RIGHTS COMMITTEE  
Thirty-eighth session

DECISIONS

Communication No. 167/1984

Submitted by: Bernard Omasyak, Chief of the Lubicon Lake Band  
(represented by counsel)

Alleged victims: The Lubicon Lake Band

State party concerned: Canada

Date of communication: 14 February 1984

Documentation references: Prior decisions - CCPR/C/WG/23/D/167/1984 (rule 91  
decision, 9 November 1984)  
- CCPR/C/27/D/167/1984 (interim  
decision, 10 April 1986)  
- CCPR/C/30/D/167/1984 (decision on  
admissibility, dated 22 July 1987)  
- CCPR/C/36/D/167/1984 (further interim  
decision, dated 14 July 1989)

Date of present decision: 26 March 1990

On 26 March 1990, the Human Rights Committee adopted its views under article 5, paragraph 4 of the Optional Protocol, concerning communication No. 167/1984. The text of the views is annexed to the present document.

\* Made public by decision of the Human Rights Committee.

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**VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4,  
OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL  
AND POLITICAL RIGHTS - THIRTY-EIGHTH SESSION**

concerning

Communication No. 167/1984

- Submitted by: Chief Bernard Ominayak and the Lubicon Lake Band (represented by counsel)
- Alleged victim: Lubicon Lake Band
- State party concerned: Canada
- Date of communication: 14 February 1984 (date of initial letter)
- Date of decision on admissibility: 22 July 1987

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 1990.

Having concluded its consideration of communication No. 167/1984, submitted to the Committee by Chief B. Ominayak and the Lubicon Lake Band under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol \*\*/

1. The author of the communication (initial letter dated 14 February 1984 and subsequent correspondence) is Chief Bernard Ominayak (hereinafter referred to as the author) of the Lubicon Lake Band, Canada. He is represented by counsel.
- 2.1 The author alleges violations by the Government of Canada of the Lubicon Lake Band's right of self-determination and by virtue of that right to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence. These violations allegedly contravene Canada's obligations under article 1, paragraphs 1 to 3, of the International Covenant on Civil and Political Rights.

\*\*/ Individual opinions submitted by Mr. Nisuke Ando and Mr. Bertil Wennargren, respectively, are appended.

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2.2 Chief Ominayak is the leader and representative of the Lubicon Lake Band, a Cree Indian band living within the borders of Canada in the Province of Alberta. They are subject to the jurisdiction of the Federal Government of Canada, allegedly in accordance with a fiduciary relationship assumed by the Canadian Government with respect to Indian peoples and their lands located within Canada's national borders. The Lubicon Lake Band is a self-identified, relatively autonomous, socio-cultural and economic group. Its members have continuously inhabited, hunted, trapped and fished in a large area encompassing approximately 10,000 square kilometres in northern Alberta since time immemorial. Since their territory is relatively inaccessible, they have, until recently, had little contact with non-Indian society. Band members speak Cree as their primary language. Many do not speak, read or write English. The Band continues to maintain its traditional culture, religion, political structure and subsistence economy.

2.3 It is claimed that the Canadian Government, through the Indian Act of 1970 and Treaty 8 of 21 June 1899 (concerning aboriginal land rights in northern Alberta), recognized the right of the original inhabitants of that area to continue their traditional way of life. Despite these laws and agreements, the Canadian Government has allowed the provincial government of Alberta to expropriate the territory of the Lubicon Lake Band for the benefit of private corporate interests (e.g., leases for oil and gas exploration). In so doing, Canada is accused of violating the Band's right to determine freely its political status and to pursue its economic, social and cultural development, as guaranteed by article 1, paragraph 1, of the Covenant. Furthermore, energy exploration in the Band's territory allegedly entails a violation of article 1, paragraph 2, which grants all peoples the right to dispose of their natural wealth and resources. In destroying the environment and undermining the Band's economic base, the Band is allegedly being deprived of its means to subsist and of the enjoyment of the right of self-determination guaranteed in article 1.

3.1 The author states that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

3.2 With respect to the exhaustion of domestic remedies, it is stated that the Lubicon Lake Band has been pursuing its claims through domestic political and legal avenues. It is alleged that the domestic political and legal process in Canada is being used by government officials and energy corporation representatives to thwart and delay the Band's actions until, ultimately, the Band becomes incapable of pursuing them, because industrial development at the current rate in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people for many more years.

3.3 On 27 October 1975, the Band's representatives filed with the Registrar of the Alberta (Provincial) Land Registration District a request for a caveat, which would give notice to all parties dealing with the caveated land of their assertion of aboriginal title, a procedure foreseen in the Provincial Land Title Act. The Supreme Court of Alberta received arguments on behalf of the Provincial Government, contesting the caveat, and on behalf of the Lubicon Lake Band. On 7 September 1976, the provincial Attorney General filed an application for a postponement, pending resolution of a similar case; the application was granted.

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On 25 March 1977, however, the Attorney General introduced in the provincial legislature an amendment to the Land Title Act precluding the filing of caveats; the amendment was passed and made retroactive to 13 January 1975, thus predating the filing of the caveat involving the Lubicon Lake Band. Consequently, the Supreme Court hearings were dismissed as moot.

3.4 On 25 April 1980, the members of the Band filed an action in the Federal Court of Canada, requesting a declaratory judgement concerning their rights to their land, its use, and the benefits of its natural resources. The claim was dismissed on jurisdictional grounds against the provincial government and all energy corporations except one (Petro-Canada). The claim with the federal Government and Petro-Canada as defendants was allowed to stand.

3.5 On 16 February 1982, an action was filed in the Court of Queen's Bench of Alberta requesting 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, the author states, was to prevent the Alberta government and the oil companies (the "defendants") from further destroying the traditional hunting and trapping territory of the Lubicon Lake people. This would have permitted the Band members to continue to hunt and trap for their livelihood and subsistence as a part of their aboriginal way of life. The provincial court did not render its decision for almost two years, during which time oil and gas development continued, along with rapid destruction of the Band's economic base. On 17 November 1983, the request for an interim injunction was denied and the Band, although financially destitute, was subsequently held liable for all court costs and attorneys' fees associated with the action.

3.6 The decision of the Court of Queen's Bench was appealed to the Court of Appeal of Alberta; it was dismissed on 11 January 1985. 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 presented a serious question of law to be decided at trial. None the less, the Court of Appeal found that the Lubicon Lake Band would suffer no irreparable harm if resource development continued fully and that the balance of convenience, therefore, favoured denial of the injunction.

3.7 The author states that the defendants attempted to convince the Court that the Lubicon Lake Band has 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 members of the Lubicon Lake Band 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.

3.8 The author further states that the legal basis for the Court of Appeal's decision was its own definition of irreparable injury. This test was: injury that is of such a nature that no fair and reasonable redress may be had in a court

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of law and that to refuse the injunction would be a denial of justice. The author submits that the Lubicon Lake Band clearly met this test by demonstrating, with uncontested evidence, 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.

3.9 On 18 February 1985, the Band presented arguments to a panel of three judges of the Supreme Court of Canada, requesting leave to appeal from the judgement of the Alberta Court of Appeal. On 14 March 1985, the Supreme Court of Canada refused leave to appeal. Generally, the author states, 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. He states that the issues presented by the Lubicon Lake Band involved such questions as the interpretation of the constitutional 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 régime 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. The author submits that at least the first four questions have not yet been adjudicated by the Supreme Court of Canada and that they undeniably fall within the criteria for granting leave to appeal.

4. By decision of 16 October 1984, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication. The main points reflected in the information and observations received from the State party are set out in paragraphs 5.1 to 5.7 and 6.1 to 6.4 below.

Exhaustion of domestic remedies

5.1 In its submission dated 31 May 1985, the State party contends 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. The State party recalls that the Lubicon Lake Band, suing in its own legal right, and Chief Bernard Ominayak, suing in his personal capacity, and with other Band councillors in a representative capacity, have initiated three different legal procedures and points out that 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, were said to be still pending.

5.2 With regard to the Federal Court action referred to in the communication, the State party recalls that the Band and its legal advisers, in April 1980, sought to sue the Province of Alberta and private corporations in proceedings in the Federal

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Court of Canada. It is submitted that in the circumstances of this case, neither the province nor private entities could have been sued as defendants in the Federal Court of Canada. Rather than reconstitute the proceedings in the proper forum, the State party submits, the Band contested interlocutory proceedings brought by the 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 of Canada was dismissed by the Federal Court of Appeal in May 1981.

5.3 Following the interlocutory proceedings relating to the jurisdiction of the Federal Court, a new action was instituted on 21 February 1982 against the province and certain corporate defendants in the Court of Queen's Bench of Alberta. As indicated in the communication, 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) 3 W.R.R. 188, which set out the criteria that must be present for a court to grant an interim injunction. Pursuant to that case, an applicant for an interim injunction must establish:

- (a) That there exists a serious issue to be tried;
- (b) That irreparable harm will be suffered prior to trial if no injunction is granted;
- (c) That the balance of convenience between the parties favours relief to the applicant.

The State party points out that 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.

5.4 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 of 11 January 1985. The Band's application for leave to appeal the dismissal of the interim injunction to the Supreme Court of Canada was refused on 14 March 1985. Almost two months later, on 13 May 1985, the State party adds, the Supreme Court of Canada denied another request by the Band that the Court bend its own rules to rehear the application. Thus, the State party states, the Court upheld its well-established rule prohibiting the rehearing of applications for leave to appeal.

5.5 The State party submits that, 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 submits that 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.

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Additional remedies

5.6 The State party submits that 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, paragraph 3 (b), of the Covenant, it states, recognizes that in addition to judicial remedies a State party to the Covenant can also provide administrative and other remedies. 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 the 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 of the dispute.

5.7 The Band's claim to certain lands in northern Alberta, the State party submits, is part of a 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 a separate land claim with the Department of Indian Affairs asserting aboriginal title to lands that 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 that 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, to review the entire situation and to formulate recommendations. The State party submits that consideration of the Lubicon Lake Band's claim in isolation from the competing claims of the other native communities would jeopardize the domestic remedy of negotiated settlement selected by the latter.

Right of self-determination

6.1 The Government of Canada submits that the communication, as it pertains to the right of self-determination, is inadmissible for two reasons. First, 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. It therefore submits that the communication is 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, the State party argues, 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.

6.2 As to the argument 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

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assert under the Protocol the right of self-determination, the Government of Canada points out 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. 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.

6.3 The Government of Canada submits that while self-determination as contained in article 1 of the Covenant is not an individual right, it provides the necessary contextual background for the exercise of individual human rights. This view, it contends, is supported by the following phrase from the Committee's general comment 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". This general comment, the State party adds, recognizes 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 on Civil and Political Rights are, in the submission of Canada, different in nature and kind from the rights in part III, the former being 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, the State party argues, it cannot be invoked by individuals under the Optional Protocol.

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

7. In a detailed reply, dated 8 July 1985, to the State party's submission, the author summarized his arguments as follows. The Government of Canada offers three principal allegations in its response. It alleges, first, that the Lubicon Lake Band has not exhausted 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. Finally, the Government of Canada makes allegations concerning the identity and status of the communicant. 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.

8.1 By interim decision of 10 April 1986, the Committee, recalling that the State party had informed it that the Minister of Indian and Northern Affairs had

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appointed a special envoy and given him the task to review the situation, requested the State party to furnish the Committee with the special envoy's report and with any information as to recommendations as well as measures which the State party had taken or intended to take in that connection.

8.2 In the same decision the Committee requested the author to inform it of any developments in the legal actions pending in the Canadian courts.

9.1 In his reply, dated 30 June 1986, to the Committee's interim decision, the author claims that there has been no substantive progress in any of the pending court proceedings. He reiterates his argument that:

"The Band's request for an interim injunction to halt the oil development, which has destroyed the subsistence livelihood of its people, was denied and the Supreme Court of Canada refused to grant leave to appeal the denial ... The development and the destruction, therefore, continue unabated. The Band's attorney is continuing to pursue the claims through the courts despite the fact that the Band is unable to provide financial support for the effort and that there is no possible hope of resolution for the next several years. Therefore, the Band has no basis for altering its previous conclusion that, for all practical purposes, its domestic judicial remedies have been exhausted."

9.2 The Band also points out that the Federal Government's special envoy, Mr. E. Davie Fulton, was relieved of his responsibilities following the submission of his "discussion paper".

"In the discussion paper ... Mr. Fulton reached much the same conclusion as the Band itself, that the Canadian Government must bear the blame for the situation at Lubicon Lake and that the resolution of the problem is up to the Federal Government. His report also suggested a land settlement based on the Band's current population and recognized the importance of providing the Band with wildlife management authority throughout its hunting and trapping territory. The land settlement proposed by Mr. Fulton, which would result in a reserve significantly larger than the 25 square mile reserve the Band was promised in 1940, is consistent with the position of the Band with regard to this issue ... Mr. Fulton also recommended that Alberta compensate the Band for damage caused by the unrestricted oil and gas development for which it has issued leases within the Band's territory. In addition to relieving Mr. Fulton of his responsibility in the matter, the Federal Government, to date, has refused to make his discussion paper public."

10.1 In its reply to the Committee's interim decision, dated 23 June 1986, the State party forwarded the text of Mr. Fulton's report and noted that it had appointed Mr. Roger Tassé to act as negotiator. Furthermore, it informed the Committee that on 8 January 1986 the Canadian Government had made an *ex gratia* payment of \$1.5 million to the Band to cover legal and other related costs.

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10.2 In a further submission of 20 January 1987, the State party argues that following the rejection of the Band's application for an interim injunction:

"The Band should then have taken steps with all due speed to seek its permanent injunction before seeking international recourse. The Band alleges in its submission ... that the delay in the litigation will cause it irreparable harm. Its action for a permanent injunction would, if successful, permanently prevent that harm."

11.1 In submissions dated 23 and 25 February 1987, the author discussed, inter alia, matters of substance, such as the Fulton discussion paper, and argued that "Canada has abandoned key recommendations contained in the Fulton discussion paper", and that "Canada is attempting retroactively to subject the Band to a law which this Committee has held to be in violation of article 27 of the International Covenant on Civil and Political Rights and which Canada amended in accordance with the findings of this Committee".

11.2 With regard to the pending litigation proceedings, the Band contends that a permanent injunction would not constitute an effective remedy because it would come too late, explaining that:

"The recognition of aboriginal rights or even treaty rights by a final determination of the courts will not undo the irreparable damage to the society of the Lubicon Lake Band, will not bring back the animals, will not restore the environment, will not restore the Band's traditional economy, will not replace the destruction of their traditional way of life and will not repair the damages to the spiritual and cultural ties to the land. 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."

12. In a further submission, dated 12 June 1987, the author states that:

"The Lubicon Lake Band is not requesting a territorial rights decision. Rather, the Band requests only that the Human Rights Committee assist it in attempting to convince the Government of Canada that:

"(a) The Band's existence is seriously threatened by the oil and gas development that has been allowed to proceed unchecked on their traditional hunting grounds and in complete disregard for the human community inhabiting the area;

"(b) Canada is responsible for the current state of affairs and for co-operating in their resolution in accordance with article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights."

13.1 Before considering a communication on the merits, the Committee must ascertain whether it fulfils all conditions relating to its admissibility under the Optional Protocol.

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13.2 With regard to the requirement, in article 5, paragraph 2 (b), of the Optional Protocol, that authors must exhaust domestic remedies before submitting a communication to the Human Rights Committee, the author of the present communication had invoked the qualification that this requirement should be waived "where the application of the remedies is unreasonably prolonged". The Committee noted that the author had argued that the only effective remedy in the circumstances of the case was to seek an interim injunction, because "without the preservation of the status quo, a final judgement on the merits, even if favourable to the Band, would be rendered ineffectual", in so far as "any final judgement recognizing aboriginal rights, or alternatively treaty rights, [could] never restore the way of life, livelihood and means of subsistence of the Band". Referring to its established jurisprudence that "exhaustion of domestic remedies can be required only to the extent that these remedies are effective and available", the Committee found that, in the circumstances of the case, there were no effective remedies still available to the Lubicon Lake Band.

13.3 With regard to the State party's contention that the author's communication pertaining to self-determination should be declared inadmissible because "the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right", the Committee reaffirmed that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee observed that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article 1 of the Covenant, which deals with rights conferred upon peoples, as such.

13.4 The Committee noted, however, that the facts as submitted might raise issues under other articles of the Covenant, including article 27. Thus, in so far as the author and other members of the Lubicon Lake Band were affected by the events which the author has described, these issues should be examined on the merits, in order to determine whether they reveal violations of article 27 or other articles of the Covenant.

14. On 22 July 1987, therefore, the Human Rights Committee decided that the communication was admissible in so far as it might raise issues under article 27 or other articles of the Covenant. The State party was requested, under rule 86 of the rules of procedure, to take interim measures of protection to avoid irreparable damage to Chief Ominayak and other members of the Lubicon Lake Band.

15. In its submission under article 4, paragraph 2, dated 7 October 1987, the State party invokes rule 93, paragraph 4, of the Committee's provisional rules of procedure and requests the Committee to review its decision on admissibility, submitting that effective domestic remedies have not been exhausted by the Band. It observes that the Committee's decision appears to be based on the assumption that an interim injunction would be the only effective remedy to address the alleged breach of the Lubicon Lake Band's rights. This assumption, in its opinion, does not withstand close scrutiny. The State party submits that, based on the

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evidence of the Alberta Court of Queen's Bench and the Court of Appeal - the two courts which had had to deal with the Band's request for interim relief - as well as the socio-economic conditions of the Band, its way of life, livelihood and means of subsistence have not been irreparably damaged, nor are they under imminent threat. Accordingly, it is submitted that an interim injunction is not the only effective remedy available to the Band, and that a trial on the merits and the negotiation process proposed by the Federal Government constitute both effective and viable alternatives. The State party reaffirms its position that it has a right, pursuant to article 5, paragraph 2 (b), of the Optional Protocol, to insist that domestic redress be exhausted before the Committee considers the matter. It claims that the terms "domestic remedies", in accordance with relevant principles of international law, must be understood as applying to all established local procedures of redress. As long as there has not been a final judicial determination of the Band's rights under Canadian law, there is no basis in fact or under international law for concluding that domestic redress is ineffective, nor for declaring the communication admissible under the Optional Protocol. In support of its claims, the State party provides a detailed review of the proceedings before the Alberta Court of Queen's Bench and explains its longstanding policy to seek the resolution of valid, outstanding land claims by Indian Bands through negotiation.

16.1 Commenting on the State party's submission, the author, in a letter dated 12 January 1988, maintains that his and the Lubicon Lake Band's allegations are well founded. According to Chief Ominayak, the State party bases its request for a review of the decision on admissibility on a mere restatement of the facts and is seeking to have the Committee reverse its decision under the guise of substantiation of its previous submissions, without adducing any new grounds. Recalling the Committee's statement that the communication is admissible in so far as it raises issues under article 27 "or other articles of the Covenant", the author spells out which articles of the Covenant he considers to have been violated. First, he claims that Canada has violated article 2, paragraphs 1 to 3, of the Covenant: paragraph 1, because the State party has treated the Lubicon Lake Band without taking into consideration elements of a social, economic and property nature inherent in the Band's indigenous community structure; paragraph 2, because it is said to continue to refuse to solve some issues complained of by the Band for which there remain means of redress; and paragraph 3, because it is said to have failed to provide the Band with an effective remedy with regard to its rights under the Covenant.

16.2 The author further alleges that the State party, through actions affecting the Band's livelihood, has created a situation which "led, indirectly if not directly, to the deaths of 21 persons and [is] threatening the lives of virtually every other member of the Lubicon community. Moreover, the ability of the community to [survive] is in serious doubt as the number of miscarriages and stillbirths has skyrocketed and the number of abnormal births ... has gone from near zero to near 100 per cent". This, it is submitted, constitutes a violation of article 6 of the Covenant. Furthermore, it is claimed that the appropriation of the Band's traditional lands, the destruction of its way of life and livelihood and the devastation wrought to the community constitute cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant for which the State party must be held accountable.

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16.3 The author raises further questions about the State party's compliance with articles 14, paragraph 1, and 26, of the Covenant. He recalls that the domestic court proceedings instituted by the Lubicon Lake Band, founded on aboriginal rights and title to land, challenge certain of the State's asserted powers and jurisdiction, which he contends are "inherently susceptible to precisely the types of abuses that articles 14, paragraph 1, and 26 are intended to guard against". In this context, he claims that "the bias of the Canadian courts has presented a major obstacle to the Band's attempt to protect its land, community and livelihood, and that the courts' biases arises from distinctions based on race, political, social and economic status". He further claims that the economic and social biases the Band has been confronted with in the Canadian courts, especially in the provincial court system in Alberta, have been greatly magnified by the "fact that several of the judges rendering the decisions of these courts have had clear economic and personal ties to the parties opposing the Band in the actions".

16.4 In addition to the above, it is submitted that in violation of articles 17 and 23, paragraph 1, of the Covenant, the State party has permitted the members of the Lubicon Lake Band to be subjected to conditions that are leading to the destruction of the families and the homes of its members. The author explains that in an indigenous community, the entire family system is predicated upon the spiritual and cultural ties to the land and the exercise of traditional activities. Once these have been destroyed, as in the case of the Band, the essential family component of the society is irremediably damaged. Similarly, it is alleged that the State party has violated article 18, paragraph 1, of the Covenant since, as a consequence of the destruction of their land, the Band members have been "robbed of the physical realm to which their religion - their spiritual belief system - attaches".

16.5 With respect to the requirement of exhaustion of domestic remedies, the author rejects the State party's assertion that a trial on the merits would offer the Band an effective recourse against the federal Government and redress for the loss of its economy and its way of life. First, this assertion rests upon the assumption that past human rights violations can be rectified through compensatory payments; secondly, it is obvious that the Band's economy and way of life have suffered irreparable harm. Furthermore, it is submitted that a trial on the merits is no longer available against the federal Government of Canada since, in October 1986, the Supreme Court of Canada held that aboriginal land rights within provincial boundaries involve provincial land rights and must therefore be adjudicated before the provincial courts. It was for that reason that, on 30 March 1987, the Lubicon Lake Band applied to the Alberta Court of Queen's Bench for leave to amend its statement of claim before that court so as to be able to add the federal Government as a defendant. On 22 October 1987, the Court of Queen's Bench denied the application. Therefore, despite the fact that the Canadian Constitution vests exclusive jurisdiction for all matters concerning Indians and Indian lands in Canada with the federal Government, it is submitted that the Band cannot avail itself of any recourse against the federal Government on issues pertaining to these very questions.

17.1 In a submission dated 3 March 1988, the State party submits that genuine and serious efforts continue to be made with a view to finding an acceptable solution to the issues raised by the author and the Band. In particular, it explains that:

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"On 3 February 1988, the Minister of Indian Affairs and Northern Development delivered to the Attorney General of Alberta a formal request for reserve land for the Lubicon Lake Band. In this request, he advised Alberta that a rejection of the request would require Canada to commence a legal action, pursuant to the Constitution Act, 1930, to resolve the dispute as to the quantum of land to which the Lubicon Lake Band is entitled. In any event, the Minister of Indian Affairs and Northern Development asked Alberta to consider, as an interim measure, the immediate transfer to the Band of 25.4 square miles of land ... without prejudice to any legal action.

"By letter dated 10 February 1988, the federal negotiator advised counsel for the Band of the above developments and, as well, sought to negotiate all aspects of the claim not dependent on Alberta's response to the formal request ... The communicant, by letter dated 29 February 1988, rejected this offer, but indicated that he would be prepared to consider an interim transfer of 25.4 square miles without prejudice to negotiations or any court actions. As a consequence of the above developments, negotiators for the federal and provincial Governments met on 1 and 2 March 1988 and concluded an interim agreement for the transfer of 25.4 square miles as reserve land for the Band, including mines and minerals. This agreement is without prejudice to the positions of all parties involved, including the Band ..."

17.2 With respect to the effectiveness of available domestic remedies, the State party takes issue with the author's submission detailed in paragraph 16.5 above, which it claims seriously misrepresents the legal situation as it relates to the Band and the federal and provincial Governments. It reiterates that the Band has instituted two legal actions, both of which remain pending: one in the Federal Court of Canada against the federal Government; the other in the Alberta Court of Queen's Bench against the province and certain private corporations. To the extent that the author's claim for land is based on aboriginal title, as opposed to treaty entitlement, it is established case law that a court action must be brought against the province and not the federal Government.

17.3 The State party adds that in the action brought before the Alberta Court of Queen's Bench:

"The communicant sought leave to add the federal Government as a party to the legal proceedings in the Alberta Court of Queen's Bench. The Court there held that, based on existing case law, a provincial court is without jurisdiction to hear a claim for relief against the federal Government; rather, this is a matter properly brought before the Federal Court of Canada. The plaintiff has in fact done this and the action is, as already indicated, currently pending. Therefore, recourse against the Government of Canada is still available to the Band, as it has always been, in the Federal Court of Canada. Moreover, the communicant has appealed the decision of the Court of Queen's Bench to the Alberta Court of Appeal".

17.4 Finally, the State party categorically rejects most of the author's allegations detailed in paragraphs 16.2 and 16.3 above as unfounded and unsubstantiated; it submits that these allegations constitute an abuse of process

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that should result in the dismissal of the communication pursuant to article 3 of the Optional Protocol.

18.1 In a further submission dated 28 March 1988, the author comments on the State party's overview of recent developments in the case (see para. 17.1) and adds the following remarks: (a) the Lubicon Lake Band was not a party to the negotiation of the settlement offer; (b) the settlement offer rests on a "highly prejudicial" view of the Band's rights under Canadian law and an equally prejudicial determination of Band membership; (c) the federal Government would negotiate non-land issues such as housing with fewer than half of the Band members; (d) Canada has leased all but 25.4 square miles of the Band's traditional lands for development, in conjunction with a pulp mill to be constructed by the Daishowa Canada Company Ltd. near Peace River, Alberta; (e) the Daishowa project frustrates any hopes of the continuation of some traditional activity by Band members; and (f) the Parliamentary Standing Committee on Aboriginal Affairs, the oversight committee of the Canadian Parliament with respect to such matters, does not support the approach to negotiated settlement being taken by the Minister of Indian Affairs and Northern Development.

18.2 The author reaffirms that the essential part of the court actions initiated by the Band relates to aboriginal rights claims and that, with the decision of the Alberta Court of Queen's Bench of 22 October 1987 and in the light of recent Supreme Court decisions referred to by the State party, the Band continues to be denied redress against the federal Government.

18.3 The author further rejects the State party's contention that the claims made in his submission of 12 January 1988 are unsubstantiated and unfounded and constitute an abuse of the right of submission; he reaffirms his readiness to furnish detailed information on the "21 unnatural deaths resulting directly or indirectly from the destruction of the traditional Lubicon economy and way of life". Finally, he points out that the State party continues to disregard the Committee's request for interim measures of protection pursuant to rule 86 of its rules of procedure, as evidenced by Canadian backing of the Daishowa paper mill project. This means that far from adopting interim measures to avoid irreparable harm to the Band, Canada has endorsed a project that would contribute to the further degradation of the Band's traditional lands.

19.1 In another submission dated 17 June 1988, the State party points to further developments in the case and re-emphasizes that effective remedies continue to be open to the Lubicon Lake Band. It explains that, since 11 March 1988, the date of the Band's refusal of the Government's interim offer to transfer to it 25.4 square miles of reserve land, discussions:

"have taken place between the federal Government, the Province of Alberta and the communicant. However, virtually no progress was made towards settlement. As a consequence, on 17 May 1988, the federal Government initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band in order to enable Canada to meet its lawful obligations to the Band under Treaty 9. The Statement of Claim, commencing the legal action, asks the Court of Queen's Bench of Alberta for a declaration that the Lubicon Lake Band is entitled to a reserve and a determination of the size of the reserve. ... On 9 June 1988 the

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Lubicon Lake Band filed a Statement of Defence and Counterclaim. On 10 June 1988, all parties to the dispute appeared before Chief Justice Morre of the Alberta Court of Queen's Bench and agreed that best efforts should be made to expedite this case with a preliminary trial date to be set on 16 January 1989."

19.2 The State party accepts its obligation to provide the Lubicon Lake Band with a reserve pursuant to Treaty 8. It argues that the issue that forms the basis of the domestic dispute, as well as the communication under consideration, concerns the amount of land to be set aside as a reserve and related issues. As such, the State party asserts that the communication does not properly fall within any of the provisions of the Covenant and cannot therefore form the basis of a violation.

20.1 In a submission dated 5 July 1988, the author furnishes further information and comments on the State party's submission of 17 June 1988. He identifies "many problems" inherent in the court action initiated by the federal Government against the provincial government in the Alberta Court of Queen's Bench. Among these are: (a) the purported fact that it ignores the Band's aboriginal land claim; (b) the fact that it seeks a declaratory judgement with respect to Band membership "apparently based on the unique and highly controversial approach to determination of Band membership that has been discussed in previous submissions"; and (c) the fact that much of the substance of the issues addressed are already before the courts in the Band's pending actions. The author notes that since "the action was filed in the lowest court in Canada, and will entail subpoena of an argument over the extremely lengthy and complex Lubicon genealogical study, as well as appeals from any decision rendered, there is no basis for believing that the action will do anything but delay indefinitely [the] resolution of the Lubicon land issues". The author believes that the Government's action is intended to have precisely this effect.

20.2 By letter dated 28 October 1988, the author informs the Committee that on 6 October 1988, the Lubicon Lake Band asserted jurisdiction over its territory. He explains that this action was the result of the federal Government's failure to contribute to a favourable solution of the Band's problems. He adds that the State party has continuously delayed action on the issue, accusing it of "practicing deceit in the media and dismissing advisors who recommend any resolution favourable to the Lubicon people. At the same time the Band has watched the Province of Alberta continue to grant leases for oil and gas development and now for timber development on the Lubicons' traditional lands ...".

20.3 The author further observes that the action of the Lubicon Lake Band has resulted in:

"a positive response from the Alberta provincial government. Alberta Premier Don Getty negotiated an agreement with Chief Ominayak whereby Alberta will offer to sell to the Federal Government 79 square miles of land with surface and subsurface rights, to be designated as a reserve for the benefit of the Lubicon Lake Band. The province has agreed to sell an additional 16 square miles of land to the federal Government with surface rights only, and to make subsurface development on such land subject to Band approval.

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Thus the total area agreed to by the province is 95 square miles, the amount to which the Band is entitled, based on its present membership, under Canadian federal Indian law. ... The federal Government has stated that it is willing to consider the transfer of 79 square miles of land for the benefit of the Lubicon people. However, it has refused to accept the remaining 16 square miles, recommending that such land be transferred to the Band to be held in free title. The effect of this would be to subject the land in question to taxation and alienation, while reducing the level of federal obligation to the Lubicon people ..."

21.1 In a further submission dated 2 February 1989, the State party observes that in November 1988, following an agreement between the provincial government of Alberta and the Lubicon Lake Band to set aside 95 square miles of land for a reserve, the federal Government initiated negotiations with the Band on the modalities of the land transfer and related issues. During two months of negotiations, consensus was reached on the majority of issues, including Band membership, size of the reserve, community construction and delivery of programmes and services. No agreement could, however, be found on the issue of cash compensation and on 24 January 1989 the Band withdrew from the negotiations when the federal Government presented its formal offer.

21.2 After reviewing the principal features of its formal offer (transfer to the Band of 95 square miles of reserve land; the acceptance of the Band's membership calculation; the setting aside of \$C 34 million for community development projects; the granting of \$C 2.5 million per year of federal support programmes; the proposal of a special development plan to assist the Band in establishing a viable economy on its new reserve; and the establishment of a \$C 500,000 trust fund to assist Band elders wishing to pursue their traditional way of life), the State party observes that the Government's formal overall offer amounts to approximately \$C 45 million in benefits and programmes, in addition to a 95 square mile reserve. The Band has claimed additional compensation of between \$C 114 million and \$C 275 million for alleged lost revenues. The State party has denied the Band's entitlement to such sums but has advised it that it is prepared to proceed with every aspect of its offer without prejudice to the Band's right to sue the federal Government for additional compensation.

21.3 The State party concludes that its most recent offer meets two tests of fairness, namely: that it is consistent with other recent settlements with native groups, and that it addresses the legitimate social and economic objectives of the Band. It adds that the community negotiation process must be considered as a practical vehicle and opportunity for Indian communities to increase their local autonomy and decision-making responsibilities. The federal policy provides for negotiations on a wide range of issues, such as government institutions, membership, accountability, financial arrangements, education, health services and social development. Based on the above considerations, the State party requests the Committee to declare the communication inadmissible on the grounds of failure to exhaust all available domestic remedies.

22.1 In a further submission dated 22 March 1989, the author takes issue with the State party's submission of 2 February 1989, characterizing it as not only misleading but virtually entirely untrue. He alleges that recent negotiations

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between the Lubicon Lake Band and the federal Government did not, on the Government's side, "in any way represent a serious attempt at settlement of the Lubicon issues". Rather, he submits, the Government's "formal offer" was an exercise in public relations, which committed the Federal Government to virtually nothing. It is submitted that the offer, if accepted, would have stripped the community's members of any legal means of redressing their situation.

22.2 In substantiation of these allegations, the author argues that the Government's "formal offer" contains no more than a commitment to provide housing and a school. On the other hand, it lacks "any commitment to provide the facilities and equipment necessary for the Lubicon people to manage their own affairs, such as facilities for essential vocational training, support for commercial and economic development, or any basis from which the Band might achieve financial independence". It is further submitted that contrary to the State party's statement that an agreement had been reached on the majority of issues for which the Band seeks a viable solution, including membership, reserve size and community construction, no agreement or consensus had been reached on any of these issues. Furthermore, the author argues that while the State party has claimed that its offer would amount to approximately \$C 45 million in benefits and programmes, it has failed to indicate that the majority of these funds remain uncommitted and that without adequate means of legal redress the Lubicon Lake Band would be incapable of seeking to obtain any future commitments from the Government.

23.1 By submission of 30 May 1989, the author recalls that the Band has been pursuing its domestic claims through the Canadian courts for over 14 years, and that the nature of the claims and the judicial process involved is bound to draw out these proceedings for another 10 years. He submits that the State party does not dispute that court actions and negotiations undertaken to ensure the Band's livelihood have produced no results, and that court proceedings addressing the issues of land title and compensation would take years in resolution, if resolution ever occurred. It is pointed out that following the Band's refusal to endorse a settlement offer, which would force the Band to relinquish all rights to legal action involving a controversy with the State party in exchange for promises of future discussions between Canada and the Band, Canada terminated the negotiations. The author adds that: "Rather than continuing to seek a course of compromise and settlement, Canada has sent agents into non-native communities of northern Alberta, in the area immediately surrounding the traditional Lubicon territory." Working through a single individual who is said to retain some ties with the Band but who has not lived in the community for 40 years, these agents are said to try to induce other native individuals to strike their own private deals with the federal Government. Most of the individuals identified by the agents do not appear to be affiliated with any recognized aboriginal society.

23.2 In substantiation of earlier allegations, the author explains that the Band's loss of its economic base and the breakdown of its social institutions, including the transition from a way of life marked by trapping and hunting to a sedentary existence, has led to a marked deterioration in the health of the Band members:

"... the diet of the people has undergone dramatic changes with the loss of their game, their reliance on less nutritious processed foods, and the spectre of alcoholism, previously unheard of in this community and which is now

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overwhelming it. ... As a result of these drastic changes in the community's physical existence, the basic health and resistance to infection of community members has deteriorated dramatically. The lack of running water and sanitary facilities in the community, needed to replace the traditional systems of water and sanitary management, ... is leading to the development of diseases associated with poverty and poor sanitary and health conditions. This situation is evidenced by the astonishing increase in the number of abnormal births and by the outbreak of tuberculosis, affecting approximately one third of the community."

24.1 In a submission dated 20 June 1989, the State party concedes "that the Lubicon Lake Band has suffered a historical inequity and that they are entitled to a reserve and related entitlements". It maintains, however, that it has made offers to the Band which, if accepted, would enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency, and that its offer would provide an effective remedy to the violations of the Covenant alleged by the Band. However, a remedy of this nature cannot be imposed on the Band. The State party recalls that negotiations between the Lubicon Lake Band and senior government officials took place from November 1988 to January 1989; during the autumn of 1988, Chief Ominayak also met with the Prime Minister of Canada. It is submitted that the State party met virtually every demand of the author, either in full or to such an extent that equal treatment with other indigenous groups in Canada was approximated or exceeded. Thus, 95 square miles of land, mineral rights over 79 square miles, community facilities for each family living on the reserve, control over membership and an economic self-sufficiency package were offered in full to the Band. On the basis of a total of 500 Band members and a government package worth \$C 45 million (non-inclusive of mineral and land rights), this offer amounted to \$C 90,000 per person or almost \$C 500,000 for each family of five. A number of the Band's demands, such as a request for an indoor ice arena or a swimming pool, were refused.

24.2 According to the State party, the major remaining point of contention between the federal Government and the Band is a claim by the Band for \$C 167 million in compensation for economic and other losses allegedly suffered. In an endeavour to permit the resolution of the matters agreed on between the parties, the federal Government put forth a proposal that would enable the Band to accept the State party's offer in its entirety, while continuing to pursue their general claim for compensation in the Canadian courts. The State party rejects the contention that "virtually all items of any significance" in its offer "were left to future discussions", and contends that most of the Band's claims for land, mineral rights, community facilities, control over membership and an economic self-sufficiency package have been agreed to by the Government. Finally, the State party rejects the allegation that it negotiated in bad faith.

24.3 On procedural grounds, the State party indicates that, since the Committee's decision on admissibility, no clarifications have been put forward by the Committee to enable the State party to address specific allegations of violations of the Covenant. It therefore maintains that the proceedings have not progressed from the admissibility stage. It further submits that by acting within its jurisdiction and procedure, the Committee should (a) issue a ruling pursuant to rule 93,

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paragraph 4, indicating the outcome of its reconsideration of admissibility; (b) if finding the communication admissible, stipulate the articles and the evidence on which the finding is based; and (c) provide the federal Government with a six-month period during which to file its observations on the merits.

25. By interlocutory decision of 14 July 1989, the Human Rights Committee invited the State party to submit to the Committee any further explanations or statements relating to the substance of the author's allegations, in addition to its earlier submissions, not later than by 1 September 1989. The State party was again requested, pursuant to rule 86 of the rules of procedure and pending the Committee's final decision, to take measures to avoid damage to the author and the members of the Lubicon Lake Band.

26.1 In its reply to the interlocutory decision, dated 31 August 1989, the State party asserts that it is being denied due process, since the principles of natural justice require that a party be aware of the specific charge and evidence on which the accusations of the author of the communication are based. It claims that since it was never informed of the articles of the Covenant and the evidence in respect of which the communication was declared admissible, the principles of procedural fairness have not been respected, and that the federal Government remains prejudiced in its ability to respond to the Band's claim.

26.2 In respect of the alleged violations of articles 14, paragraph 1, and 26, the State party rejects as "totally unfounded" the claim that it failed to provide the Band with an independent and impartial tribunal for the resolution of its claims: the long tradition of impartiality and integrity of Canadian courts includes numerous cases won by aboriginal litigants. It is submitted that the Band has failed to adduce any evidence that would indicate that the judiciary acted any differently in proceedings concerning the Lubicon Lake Band. Furthermore, the State party claims that the responsibility for major delays in the resolution of the Band's court actions lies largely with the Band itself. Not only did the Band fail to take the necessary steps to move any of the actions it initiated forward and refuse to co-operate with the federal Government in the action it had initiated in an effort to resolve the matter, but, in addition, on 30 September 1988, the Band declared that it refused to recognize the jurisdiction of the Canadian courts, thus undermining any attempt to obtain a resolution through the judicial process.

26.3 The State party provides a detailed outline of the chronology of the judicial proceedings in the Band's case. Three court actions in respect of the Band remain outstanding. The first of these was initiated by the Band in the Federal Court of Canada against the federal Government. This action has not moved forward since 1981 although, according to the State party, it was the Band's responsibility to take the next step in this suit. The second action was initiated by the Band in the Alberta Court of Queen's Bench against the province and some private corporations. After the Band was denied an interim injunction in 1985, it did not take substantive steps in the proceedings and abandoned its appeal against the Court's refusal to add the federal Government as a party. The third action was initiated by the federal Government in May 1988 in an attempt to overcome jurisdictional wrangles, to bring both the provincial and federal Governments and the Band before the same courts, and to finally solve matters. The Band chose not

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to participate in this action, despite the efforts of the Chief Justice of the Court of Queen's Bench of Alberta to expedite matters - this action remains in abeyance. For the State party, each of the above court actions provides a vehicle by which the Band could resolve its claims.

26.4 In addition to judicial proceedings, the State party maintains, the federal Government has sought to settle matters with the Lubicon Lake Band by way of negotiation. Thus, the offers put forward during these negotiations (outlined in para. 24.1 above) met virtually all of the author's claim in full or to a large extent. The State party adds that a new round of negotiations has started and that "extensive efforts are being made in this regard". Discussions between the Band and the Alberta provincial government resumed on 23 August 1989, and further discussions with the federal Government were scheduled to start on 7 September 1989. The State party reiterates that its offer to the Band remains valid.

26.5 In respect of the determination of Band membership, the State party rejects as "completely incorrect" the Band's claim that "Canada has attempted to subject Lubicon Lake Band members to a retroactive application of the Canadian Indian Act as it stood prior to its amendment following the decision in Sandra Lovelace v. Canada". On the contrary, the State party submits, the Band submitted, in 1985, a membership code pursuant to the Indian Act (as amended following the Committee's decision in the Lovelace case), which was accepted by Canada and gave the Band total control over its membership. As a result, the federal Government's offer is based on the approximately 500 individuals considered by the Band leadership to be members of the Lubicon Lake community.

26.6 In respect of the alleged violations of articles 17 and 23, paragraph 1, 18 and 27, the State party rejects as inaccurate and misleading the Band's claim that "Canada is participating in a project by which virtually all traditional Lubicon lands have been leased for timber development". It points out that the Daishowa pulp mill, which is under construction north of Peace River, Alberta, is neither within the Band's claimed "traditional" lands nor within the area agreed to by the Band and the provincial government for a reserve. It is stated that the new pulp mill is located approximately 80 kilometres away from the land set aside for the Band. The State party continues:

"As regards the area available to the pulp mill to supply its operations, the forest management agreement between the province of Alberta and the pulp mill specifically excludes the land proposed for the Lubicon Lake Band. Moreover, in the interests of sound forest management practices, the area cut annually outside of the proposed Lubicon reserve will involve less than 1 per cent of the area specified in the forest management agreement."

26.7 Finally, the State party draws attention to recent developments in the Cadotte Lake/Bufalo Lake community, within which the majority of the Lubicon Lake Band members reside. In December 1988, the federal Government was informed of the existence of a new group within the community, which was seeking to solve the rights of its members under Treaty 8 independent of the Lubicon Lake Band. This group, composed of about 350 individuals, requested from the Government recognition of its status as the Woodland Cree Band. According to the State party, the group

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consists of Lubicon Lake Band members who formally expressed their intention of joining the new Band, former Lubicon Lake Band members whose names were removed by the Lubicon Lake Band in January 1989 from the list of Band members, and other native individuals living within the community. The federal Government agreed to the creation of the Woodland Cree Band. The State party adds that it recognizes the same legal obligations in respect of the Woodland Cree Band as it does in respect of the Lubicon Lake Band members.

26.8 In a further submission dated 28 September 1989, the State party refers to the tripartite negotiations between the federal Government, the provincial government and the Lubicon Lake Band, scheduled to take place at the end of August/early September 1989; it claims that although the Band had undertaken to provide a comprehensive counterproposal to the federal Government's outstanding offer and to provide a list of the persons it represented in the negotiations, it was informed, on 7 September 1989, that a counterproposal had not been prepared by the Band and that no list of the individuals purported to be represented by the Band would be forthcoming. The Band allegedly stated that it refused to negotiate in the presence of Mr. Ken Colby, a member of Canada's negotiating team, because of his activities as a government media spokesman. Thus, owing to the Band's refusal to continue a meaningful discussion of its claim, negotiations were not resumed.

27.1 In his comments of 2 October 1989 on the State party's reply to the Committee's interim decision, the author contends that the State party's claim of prejudice in conducting the case before the Human Rights Committee is unfounded, as all the factual and legal bases of the Band's claims have been thoroughly argued. As to whether domestic remedies continue to be available to the Band, it is pointed out that no domestic remedy exists which could restore the Lubicon Lake Band's traditional economy or way of life, which "has been destroyed as a direct result of both the negligence of the Canadian Government and its deliberate actions". The author submits that from the legal point of view, the situation of the Band is consistent with the Committee's decision in the case of Muñoz v. Peru, 1/ in which it was held that the concept of a fair hearing within the meaning of article 14, paragraph 1, of the Covenant necessarily entails that justice be rendered without undue delay. In that case, the Committee had considered a delay of seven years in the domestic proceedings to be unreasonably prolonged. In the case of the Band, the author states, domestic proceedings were initiated in 1975. Furthermore, although the Band petitioned the federal Government for a reserve for the first time in 1933, the matter remains unsettled. According to the Band, it was forced to bring 14 years of litigation to an end, primarily because of two decisions that effectively deny the Band an opportunity to maintain aboriginal rights claim against the federal Government. Thus, in 1986, the Supreme Court of Canada denied federal court jurisdiction in aboriginal rights cases arising within provincial boundaries in the Joe case. In the light of that decision, the Band requested the Alberta courts, in 1987, to include the federal Government as a necessary party in the Band's aboriginal rights claim; this request was opposed by the federal Government. In May 1988, the federal Government instituted proceedings, which, in the author's opinion, were intended to persuade the Alberta Court of Queen's Bench that the Band merely had treaty-based rights to 40 square miles of land. It is submitted that a favourable decision would, for the Government, virtually clear the title to the Daishowa timber leases, encompassing nearly all of the traditional

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Lubicon territory, while not rendering "moot issues related to [the] destruction of the Band's economic base". The author submits that the Chief Justice of the Court of Queen's Bench recognized that aboriginal rights had to be determined before any decision on the issue of treaty rights, and that if the State party had wanted the courts to truly settle the Lubicon land issue, rather than using them so as to forestall any efforts to solve the matter, it would have referred the issue directly to the Supreme Court of Canada.

27.2 As to the State party's reference to a negotiated settlement, the author submits that the offer is neither equitable nor does it address the needs of the Lubicon community, since it would leave virtually all items of any significance to future discussions, decisions by Canada, or applications by the Band; and that the Band would be required to abandon all rights to present any future domestic and international claims against the State party, including its communication to the Human Rights Committee. The author further submits that the agreement of October 1988 between the Band and the Province of Alberta does not in the least solve the Band's aboriginal land claims, and that the State party's characterization of the agreement has been "deceptive". In this context, the author argues that, contrary to its earlier representations, the State party has not offered to implement the October 1988 agreement and that if it were willing to honour its provisions, several issues including the question of just compensation would have to be settled.

27.3 In substantiation of his earlier submissions concerning alleged violations of articles 14 and 26, the author claims that the State party has not only failed to provide the Band equal protection vis-à-vis non-Indian groups, but that it also attempted to deny it equal protection vis-à-vis other Indian bands. Thus, with respect to the issue of Band membership, the author alleges, the effect of the formula proposed by Canada in 1986 for determining Band membership would deny aboriginal rights to more than half of the Lubicon people, thereby treating the Band members in an unequal and discriminatory way in comparison with the treatment of all other native people. It is submitted that as late as December 1988, the State party sought to apply to the Band criteria that were those of the legislation prior to the Human Rights Committee's views in the case of Lovelace v. Canada, 2/ which legislation was found to be contrary to article 27 of the Covenant.

27.4 With respect to the alleged violations of articles 17, 18, 23 and 27, the author reiterates that the State party has sought to distort the presentation of recent events and engaged in a misleading discussion of the Daishowa timber project, so as to divert the Committee's attention from "Canada's knowing and wilful destruction of Lubicon society". He recalls that only seven months after the Committee's request for interim protection under rule 86, virtually all of the traditional Lubicon land was leased for commercial purposes in connection with the Daishowa timber project. The relevant forest management agreement to supply the new pulp mill with trees, allegedly completely covers the traditional Lubicon hunting and trapping grounds, which cover 10,000 square kilometres, with the exception of 65 square kilometres set aside but never formally established as a reserve. It is submitted by the author that Canada has acted in violation of the Committee's request for interim protection when it sold the timber resources of the 10,000 square kilometres, allegedly traditionally used by the Band and never ceded by it, to a Japanese company. Moreover, Canada is alleged to portray wrongly the

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impact of the Daishowa project as minimal; the author points out that current production plans would call for the cutting of 4 million trees annually, and that plans to double the envisaged annual production of 340,000 metric tons of pulp in three years have recently been announced. This economic activity, if proceeding unabated, would, in the author's opinion, continue to destroy the traditional lifeground of the Lubicon community. He submits that the fact that the 95 square miles set aside under the October 1988 agreement are relatively intact would be irrelevant, since the game on which the Band members have traditionally depended for their livelihood has already been driven out of the entire 10,000 square kilometre area.

27.5 Finally, the author submits that the State party's creation of the "Woodland Cree Band", through which it is allegedly attempting to "fabricate" a competing claim to traditional Lubicon lands, places the State party in further violations of articles 1, 26 and 27 of the Covenant. In this context, the author claims that the Woodland Cree Band is:

"a group of disparate individuals drawn together by Canada from a dozen different communities scattered across Alberta and British Columbia, who have no history as an organized aboriginal society and no relation as a group to the traditional territory of the Lubicon Lake Band [and that it] is Canada's most recent effort to undermine the traditional Lubicon society and to subvert Lubicon land rights."

The author adds that the federal Government has supported the Woodland Cree Band both financially and legally, recognizing it "with unprecedented dispatch", thereby bypassing more than 70 other groups, including six different homogenous Cree communities in northern Alberta that had been awaiting recognition as bands for over 50 years. Some of the alleged members of the "Woodland Cree" band are said to come from these very communities. The author refers to section 17 of the Indian Act, which gives the Canadian Indian Affairs Minister the power to constitute bands and to determine that "such portion of the reserve land and funds of the existing Band as the Minister determines" may be earmarked for the benefit of the new band. It is submitted by the author that the powers conferred under section 17 of the Indian Act are "extraordinary and unconstitutional" and that they have been invoked "in order to create [the] 'Woodland Cree Band' and to dispossess the Lubicon Lake Band of its traditional territory and culture". Furthermore, while the State party claims that the Woodland Cree Band represents some 350 individuals, the author alleges that the new Band has steadfastly refused to release the names of its members, so that its claims might be verified. He states that the federal Government has recognized that the Woodland Cree Band members comprise only 110 individuals.

27.6 The author concludes that the State party has been unable to refute his allegations of violations of articles 2, 6, paragraph 1, 7, 14, paragraph 1, 17, 18, paragraph 1, 23, paragraph 1, 26 and 27, as set out in his submissions of 12 January 1988 and 30 May 1989, and requests the Committee to find against the State party in respect of these articles. In respect of an alleged violation of article 1, he points out that while he has, as the representative of the Band, signed all the submissions to the Committee, he merely acts in his capacity as a duly elected representative of the Band and not on his own behalf. In this

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context, he notes that while article 2 of the Optional Protocol provides for the submission of claims to the Committee by individuals, article 1 of the Covenant guarantees "all peoples ... the right of self-determination". He adds that "if the Committee determines that an individual submitting a claim on behalf of a group, in compliance with the provisions of article 2 of the Optional Protocol, may not state a case on behalf of that group under article 1 of the Covenant, the Committee effectively has determined that the rights enumerated in article 1 of the Covenant are not enforceable". The author further adds that it "clearly could not be the intent of the Committee to reach such a result" and that "therefore, the Band respectfully submits that as a people, represented by their duly elected leader, Chief Bernard Ominayak, the Lubicon Lake Band has been the victim of violations by the federal Government of Canada of the Band's rights as enumerated in article 1 of the Covenant on Civil and Political Rights".

28.1 In a final submission dated 8 November 1989, the State party recalls that in any assessment of the judicial proceedings in the case of the Lubicon Lake Band, the State party's constitutional division of powers between the federal and provincial governments and the respective jurisdiction of the courts has to be borne in mind. Where provincially owned lands are claimed, as in the case of the Lubicons, the Supreme Court of Canada has held that claims must be filed in the provincial courts against provincial governments. The Supreme Court's ruling clearly defines, the State party submits, the proper judicial forum for the Band's claim to aboriginal land rights. The State party emphasizes that the failure of the Band's representatives to initiate proceedings in the competent courts does not imply that Canadian courts are either unable or unwilling to guarantee a fair hearing in the case.

28.2 Regarding the distinction between aboriginal rights and treaty rights, the State party explains that under Canadian constitutional law, aboriginal rights may be superseded by treaty rights. Whenever this occurs, Indian bands may claim benefits under the superseding treaties. The State party acknowledges that the Lubicon Lake Band has a valid claim to benefits under Treaty 8, which was entered into with the Cree and other Indians in the Province of Alberta in 1899. Rights under Treaty 8 formed the basis of the offers made by the Canadian and Albertan governments to the Band. The land offered by the provincial government under the October 1988 agreement is related to these Treaty provisions. On the other hand, the 10,000 square kilometre area referred to by the Band in its submissions relate to its aboriginal claims, which have not been recognized by the federal Government. The Band's complaint about oil exploration and exploitation and impending timber development, refers to activities on this wider territory of 10,000 square kilometres - not on lands that were identified in proposed settlements between the Band and the federal and provincial government.

28.3 The State party refutes the Band's claim that its trapping and hunting lifestyle has been irretrievably destroyed and points out that in areas covered by timber leases the forest, generally, remains intact and sustains an animal population sufficient to satisfy those members of the Lubicon Lake Band who wish to engage in traditional activities. It adds that disturbances of the forest ecosystems usually result in an increase of the population of larger mammals, as they increase food availability in open areas.

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28.4 Lastly, the State party reaffirms the voluntary nature of the establishment of the Woodland Cree Band. It points out that a minority of those wishing to join the Woodland Cree Band were at one point in time full members of the Lubicon Lake Band. Some of them, the State party points out, have since left the Band voluntarily, while about 30 of the members were expelled recently by decision of the Lubicon Lake Band. It is submitted that members of the Woodland Cree Band petitioned the federal Government, much in the same way as members of the Lubicon Lake Band did prior to the Band's recognition in the 1930s. The new Band was recognized because, in the State party's view, some of its members have land entitlements pursuant to Treaty 8 which they wish to assert. The State party adds that it recognized the Woodland Cree Band, at the express request of those who sought recognition, so that their desire to form a community could be realized, and that the Woodland Cree Band has not sought any land portions also claimed by the Lubicons.

#### Summary of the submissions

29.1 At the outset, the author's claim, although set against a complex background, concerned basically the alleged denial of the right of self-determination and the right of the members of the Lubicon Lake Band to dispose freely of their natural wealth and resources. It was claimed that, although the Government of Canada, through the Indian Act of 1970 and Treaty 8 of 1899, had recognized the right of the Lubicon Lake Band to continue its traditional way of life, its land (approximately 10,000 square kilometres) had been expropriated for commercial interest (oil and gas exploration) and destroyed, thus depriving the Lubicon Lake Band of its means of subsistence and enjoyment of the right of self-determination. It was claimed that the rapid destruction of the Band's economic base and aboriginal way of life had already caused irreparable injury. It was further claimed that the Government of Canada had deliberately used the domestic political and legal processes to thwart and delay all the Band's efforts to seek redress, so that the industrial development in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people. The author has stated that the Lubicon Lake Band is not seeking from the Committee a territorial rights decision, but only that the Committee assist it in attempting to convince the Government of Canada: (a) that the Band's existence is seriously threatened; and (b) that Canada is responsible for the current state of affairs.

29.2 From the outset, the State party has denied the allegations that the existence of the Lubicon Lake Band has been threatened and has maintained that continued resource development would not cause irreparable injury to the traditional way of life of the Band. It submitted that the Band's claim to certain lands in northern Alberta was part of a complex situation that involved a number of competing claims from several other native communities in the area, that effective redress in respect of the Band's claims was still available, both through the courts and through negotiations, that the Government had made an *ex gratia* payment to the Band of \$C 1.5 million to cover legal costs and that, at any rate, article 1 of the Covenant, concerning the rights of people, could not be invoked under the Optional Protocol, which provides for the consideration of alleged violations of individual rights, but not collective rights conferred upon peoples.

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29.3 This was the state of affairs when the Committee decided in July 1987 that the communication was admissible "in so far as it may raise issues under article 27 or other articles of the Covenant". In view of the seriousness of the author's allegations that the Lubicon Lake Band was at the verge of extinction, the Committee requested the State party, under rule 86 of the rules of procedure 'to take interim measures of protection to avoid irreparable damage to [the author of the communication] and other members of the Lubicon Lake Band".

29.4 Insisting that no irreparable damage to the traditional way of life of the Lubicon Lake Band had occurred and that there was no imminent threat of such harm, and further that both a trial on the merits of the Band's claims and the negotiation process constitute effective and viable alternatives to the interim relief which the Band had unsuccessfully sought in the courts, the State party, in October 1987, requested the Committee, under rule 93, paragraph 4, of the rules of procedure, to review its decision on admissibility, in so far as it concerns the requirement of exhaustion of domestic remedies. The State party stressed in this connection that delays in the judicial proceedings initiated by the Band were largely attributable to the Band's own inaction. The State party further explained its longstanding policy to seek the resolutions of valid, outstanding land claims by Indian bands through negotiations.

29.5 Since October 1987, the parties have made a number of submissions, refuting each others statements as factually misleading or wrong. The author has accused the State party of creating a situation that has directly or indirectly led to the death of many Band members and is threatening the lives of all other members of the Lubicon community, that miscarriages and stillbirths have skyrocketed and abnormal births have risen from zero to near 100 per cent, all in violation of article 6 of the Covenant; that the devastation wrought on the community constitutes cruel, inhuman and degrading treatment in violation of article 7; that the bias of the Canadian courts has frustrated the Band's efforts to protect its land, community and livelihood, and that several of the judges have had clear economic and personal ties to the parties opposing the Band in the court actions, all in violation of articles 14, paragraph 1, and 26; that the State party has permitted the destruction of the families and homes of the Band members in violation of articles 17 and 23, paragraph 1; that the Band members have been "robbed of the physical realm to which their religion attaches" in violation of article 18, paragraph 1; and that all of the above also constitutes violations of article 2, paragraphs 1 to 3, of the Covenant.

29.6 The State party has categorically rejected the above allegations as unfounded and unsubstantiated and as constituting an abuse of the right of submission. It submits that serious and genuine efforts continued in early 1988 to engage representatives of the Lubicon Lake Band in negotiations in respect of the Band's claims. These efforts, which included an interim offer to set aside 25.4 square miles as reserve land for the Band, without prejudice to negotiations or any court actions, failed. According to the author, all but the 25.4 square miles of the Band's traditional lands had been leased out, in defiance of the Committee's request for interim measures of protection, in conjunction with a pulp mill to be constructed by the Daishowa Canada Company Ltd. near Peace River, Alberta, and that the Daishowa project frustrated any hopes of the continuation of some traditional activity by Band members.

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29.7 Accepting its obligation to provide the Lubicon Lake Band with reserve land under Treaty 8, and after further unsuccessful discussions, the Federal Government, in May 1988, initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band, in an effort to provide a common jurisdiction and thus to enable it to meet its lawful obligations to the Band under Treaty 8. In the author's opinion, however, this initiative was designated for the sole purpose of delaying indefinitely the resolution of the Lubicon land issues and, on 6 October 1988 (30 September, according to the State party), the Lubicon Lake Band asserted jurisdiction over its territory and declared that it had ceased to recognize the jurisdiction of the Canadian courts. The author further accused the State party of "practicing deceit in the media and dismissing advisors who recommend any resolution favourable to the Lubicon people".

29.8 Following an agreement between the provincial government of Alberta and the Lubicon Lake Band in November 1988 to set aside 95 square miles of land for a reserve, negotiations started between the federal Government and the Band on the modalities of the land transfer and related issues. According to the State party, consensus had been reached on the majority of issues, including Band membership, size of the reserve, community construction and delivery of programmes and services, but not on cash compensation, when the Band withdrew from the negotiations on 24 January 1989. The formal offer presented at that time by the federal Government amounted to approximately \$C 45 million in benefits and programmes, in addition to the 95 square mile reserve.

29.9 The author, on the other hand, states that the above information from the State party is not only misleading but virtually entirely untrue and that there had been no serious attempt by the Government to reach a settlement. He describes the Government's offer as an exercise in public relations, "which committed the Federal Government to virtually nothing", and states that no agreement or consensus had been reached on any issue. The author further accused the State party of sending agents into communities surrounding the traditional Lubicon territory to induce other natives to make competing claims for traditional Lubicon land.

29.10 The State party rejects the allegation that it negotiated in bad faith or engaged in improper behaviour to the detriment of the interests of the Lubicon Lake Band. It concedes that the Lubicon Lake Band has suffered a historical inequity, but maintains that its formal offer would, if accepted, enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency and, thus, constitute an effective remedy. On the basis of a total of 500 Band members, the package worth \$C 45 million would amount to almost \$C 500,000 for each family of five. It states that a number of the Band's demands, including an indoor ice arena or a swimming pool, had been refused. The major remaining point of contention, the State party submits, is a request for \$C 157 million in compensation for economic and other losses allegedly suffered. That claim, it submits, could be pursued in the courts, irrespective of the acceptance of the formal offer. It reiterates that its offer to the Band stands.

29.11 Further submissions from both parties have, *inter alia*, dealt with the impact of the Daishowa pulp mill on the traditional way of life of the Lubicon Lake Band. While the author states that the impact would be devastating, the State party

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maintains that it would have no serious adverse consequences, pointing out that the pulp mill, located about 80 kilometres away from the land set aside for the reserve, is not within the Band's claimed traditional territory and that the area to be cut annually, outside the proposed reserve, involves less than 1 per cent of the area specified in the forest management agreement.

30. The Human Rights Committee has considered the present communication in the light of the information made available by the parties, as provided for in articles 5, paragraph 1, of the Optional Protocol. In so doing, the Committee observes that the persistent disagreement between the parties as to what constitutes the factual setting for the dispute at issue has made the consideration of the claims on the merits most difficult.

Request for a review of the decision on admissibility

31.1 The Committee has seriously considered the State party's request that it review its decision declaring the communication admissible under the Optional Protocol "in so far as it may raise issues under article 27 or other articles of the Covenant". In the light of the information now before it, the Committee notes that the State party has argued convincingly that, by actively pursuing matters before the appropriate courts, delays, which appeared to be unreasonably prolonged, could have been reduced by the Lubicon Lake Band. At issue, however, is the question of whether the road of litigation would have represented an effective method of saving or restoring the traditional or cultural livelihood of the Lubicon Lake Band, which, at the material time, was allegedly at the brink of collapse. The Committee is not persuaded that that would have constituted an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. In the circumstances, the Committee upholds its earlier decision on admissibility.

31.2 At this stage, the Committee must also state that it does not agree with the State party's contention that it was remiss in not spelling out, at the time of declaring the communication admissible, which of the author's allegations deserved consideration on the merits. Although somewhat confusing at times, the author's claims have been set out sufficiently clearly as to permit both the State party and the Committee, in turn, to address the issues on the merits.

Articles of the Covenant alleged to have been violated

32.1 The question has arisen of whether any claim under article 1 of the Covenant remains, the Committee's decision on admissibility notwithstanding. While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a "people" is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. There is, however, no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.

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32.2 Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27. The Committee recognizes that the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. Sweeping allegations concerning extremely serious breaches of other articles of the Covenant (6, 7, 14, para. 1, and 26), made after the communication was declared admissible, have not been substantiated to the extent that they would deserve serious consideration. The allegations concerning breaches of articles 17 and 23, paragraph 1, are similarly of a sweeping nature and will not be taken into account except in so far as they may be considered subsumed under the allegations which, generally, raise issues under article 27.

32.3 The most recent allegations that the State party has conspired to create an artificial band, the Woodland Cree Band, said to have competing claims to traditional Lubicon land, are dismissed as an abuse of the right of submission within the meaning of article 3 of the Optional Protocol.

Violations and the remedy offered

33. Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant.

Notes

1/ Communication No. 203/1986, final views adopted on 4 November 1988, para. 11.3.

2/ Communication No. 24/1977, final views adopted on 30 July 1981.

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Individual opinion: submitted by Mr. Nisuke Ando pursuant to rule 94, paragraph 1, of the Committee's rules of procedure, concerning the Committee's views on communication No. 167/1984, B. Omineca and the Lubicon Lake Band v. Canada

I do not oppose the adoption of the Human Rights Committee's views, as they may serve as a warning against the exploitation of natural resources which might cause irreparable damage to the environment of the earth that must be preserved for future generations. However, I am not certain if the situation at issue in the present communication should be viewed as constituting a violation of the provisions of article 27 of the Covenant.

Article 27 stipulates: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". Obviously, persons belonging to the Lubicon Lake Band are not denied the right to profess and practice their own religion or to use their own language. At issue in the present communication is therefore, whether the recent expropriation by the Government of the Province of Alberta of the Band's land for commercial interest (e.g. leases for oil and gas exploration) constitutes a violation of those persons' right "to enjoy their own culture".

It is not impossible that a certain culture is closely linked to a particular way of life and that industrial exploration of natural resources may affect the Band's traditional way of life, including hunting and fishing. In my opinion, however, the right to enjoy one's own culture should not be understood to imply that the Band's traditional way of life must be preserved intact at all costs. Past history of mankind bears out that technical development has brought about various changes to existing ways of life and thus affected a culture sustained thereon. Indeed, outright refusal by a group in a given society to change its traditional way of life may hamper the economic development of the society as a whole. For this reason I would like to express my reservation to the categorical statement that recent developments have threatened the life of the Lubicon Lake Band and constitute a violation of article 27.

Nisuke Ando

Individual opinion: submitted by Mr. Bertil Wennergren pursuant to  
rule 94, paragraph 3, of the Committee's rules of procedure,  
concerning the Committee's views on communication No. 167/1984,  
E. Ominayak and the Lubicon Lake Band v. Canada.

The communication in its present form essentially concerns the authors' rights to freely dispose of their natural wealth and resources, and to retain their own means of subsistence, such as hunting and fishing. In its decision of 22 July 1987, the Human Rights Committee decided that the communication was admissible in so far as it could have raised issues under article 27 or other articles of the Covenant. With respect to provisions other than article 27 the authors' allegations have remained, however, of such a sweeping nature that the Committee has not been able to take them into account except in so far as they maybe subsumed under the claims which, generally, raise issues under article 27. That is the basis of my individual opinion.

Since the Committee adopted its decision on admissibility, discussions seeking a resolution of the matter have taken place between the Federal Government, the Province of Alberta and the authors. As no progress was made towards a settlement, the Federal Government initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band on 17 May 1988, in order to enable Canada to meet its legal obligations vis-à-vis the authors under Treaty 8. The Statement of Claim, initiating the legal action, seeks from the Court of Queen's Bench of Alberta (a) a declaration that the Lubicon Lake Band is entitled to a reserve and (b) a determination of the size of that reserve.

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On 9 June 1988, the Lubicon Lake Band filed a Statement of Defence and Counterclaim. In this connection, the State party has submitted that the issue forming the basis of the domestic dispute as well as the basis of the communication before the Human Rights Committee concerns the extent of the territory to be set aside as a reserve, and related issues. It is not altogether clear that all issues which may be raised under article 27 of the Covenant are issues to be considered by the Court of Queen's Bench of Alberta in the case still pending before it. At the same time, it does appear that issues under article 27 of the Covenant are inextricably linked with the extent of the territory to be set aside as a reserve, and questions related to those issues.

The rationale behind the general rule of international law that domestic remedies should be exhausted before a claim is submitted to an instance of international investigation or settlement is primarily to give a respondent State an opportunity to redress, by its own means within the framework of its domestic legal system, the wrongs alleged to have been suffered by the individual. In my opinion, this rationale implies that, in a case such as the present one, an international instance shall not examine a matter pending before a court of the respondent State. To my mind, it is not compatible with international law that an international instance consider issues which, concurrently, are pending before a national court. An instance of international investigation or settlement must, in my opinion, refrain from considering any issue pending before a national court until such time as the matter has been adjudicated upon by the national courts. As that is not the case here, I find the communication inadmissible at this point in time.

Bertil Wennergren



JLO/J. HOLMES/996-5407

TO/A • MINA

FROM/DE • JLO

REFERENCE •  
RÉFÉRENCE •

SUBJECT • UN Decision on the Lubicon Lake Band  
SUJET •

Security/Sécurité <b>PROTECTED</b>
Accession/Référence <b>643859</b>
File/Dossier <b>45-CDA-13-1-3</b>
<b>- LUBICON LAKE BAND</b>
Date April 26, 1990
Number/Numéro JLO-0634

ENCLOSURES  
ANNEXES

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The purpose of this memorandum is to obtain your views on a recommendation which has been made by the Department of Indian and Northern Affairs (DIAND). The latter has suggested that the SSEA should make an announcement in the House of Commons on the decision of the United Nations Human Rights Committee (HRC) regarding a complaint by the Lubicon Lake Band of Alberta.

BACKGROUND

2. Under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), individuals in Canada can complain of human rights abuses to the HRC, provided that domestic remedies have been exhausted. A complaint by Chief Ominayak of the Lubicon has been before the HRC for a number of years. The Lubicon contended that the federal government's failure to provide the Band with a reserve and Alberta's granting permission to oil and lumber interests to operate in the disputed area resulted in violations of their human rights as set out in the ICCPR. In its response to the HRC, Canada argued that the complaint should be dismissed because domestic remedies had not been exhausted. Several court actions on the Lubicon case are still in progress. In addition, the federal government argued that it was prepared to negotiate in good faith with the Lubicon to arrive at a satisfactory solution to what we recognize as an historical wrong. Negotiations had occurred on several occasions and a formal offer from the government remains on the table, but no settlement has yet been reached.

3. At its recently concluded session, the HRC rendered its decision on the Lubicon case. We have received an advance copy of the decision and expect to be notified formally in the near future. The HRC has found that Canada has violated the human rights of Band members, based on Article 27 of the ICCPR which deals with minority rights.

The HRC also concluded that the domestic remedies available to the Band through the Canadian courts were not an effective remedy to resolve the situation. However, the Committee also states that Canada "proposes to rectify the situation by a remedy that the Committee deems appropriate". (It is unclear from the decision whether the HRC believes that the "appropriate remedy" is the Canadian offer to the Lubicon or simply the process of negotiations, i.e. government efforts to find a negotiated solution. We believe that it is unlikely that the HRC intended to endorse the specific offer by Canada since that would seemingly prejudice the outcome of further negotiations with the Lubicon.)

4. The Lubicon case has received extensive coverage from the media in Canada, much of it of a sympathetic nature. Some media coverage highlighted the fact that the case was being considered by an international human rights body.

#### DIAND RECOMMENDATION

5. Officials at DIAND believe that, given the media interest in this particular case, the federal government should make a public announcement concerning the HRC decision. They consider that the SSEA is the appropriate minister to make such an announcement given his international responsibilities and the fact that he is a senior minister from Alberta, where the Lubicon are seeking a reserve. Officials from the Department of Justice and the Federal-Provincial Relations Office concur with the DIAND recommendation. While the proposed announcement could take the form of a ministerial statement in the House, the preferred option is a response to a query during Question Period (perhaps from the M.P. in whose constituency the Lubicon reside), since a statement would give the opposition parties rights of reply. Following the announcement, DIAND proposes that its minister write to Chief Ominayak suggesting that negotiations resume. This letter would be made public, perhaps by being tabled in Parliament.

#### CONSIDERATIONS

6. There are no significant foreign policy considerations regarding the DIAND proposal. The issue is primarily a domestic one. In its eventual press release reporting on decisions taken at the HRC's recent session, the UN will include a reference to the Lubicon case. (This press release will be issued only after the various interested parties have received formal notification by the HRC of its decisions.) Therefore, some media interest is likely. The concerned domestic departments agree that any Canadian announcement should only take place following receipt of formal notification of the HRC decision but prior

to such decision being made public.

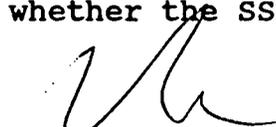
7. Now that the international complaint has been addressed, the government will want to ensure that the focus is on domestic efforts to resolve the situation. The principal reason for making an announcement would be to ensure that the results of the decision, and in particular the HRC's comment on the appropriateness of the remedy, are accurately reflected in the media. This initiative is deemed to be important to counteract anticipated Lubicon emphasis on the violation of their rights. As well, DIAND wants to use the announcement as a means to revive talks with the Lubicon (now that the international complaint has been dealt with) in order to achieve a settlement. On the negative side, any such announcement (other than in response to media inquiries generated at the time the HRC publicly releases its decision) could be viewed as gloating on the part of the government at the expense of a small, impoverished band of natives. Moreover, the announcement would have to include an acknowledgement that Canada did violate the human rights of Band members (this is something that Canada has implicitly accepted in the past), a fact which reduces the public relations value of the message.

#### RECOMMENDATION

8. DIAND would like to have a reaction to its recommendation as soon as possible in anticipation of receiving formal notification in the coming week and of the need for a government announcement immediately thereafter.

9. We do not believe that this issue lends itself to a government initiative, given that Canada is responsible for an historical inequity which has resulted in the Band being deprived of a reserve for over 40 years. If there are domestic advantages to a government announcement (a fact of which we are not convinced), we would recommend that the Minister of DIAND take the lead. However, both the SSEA and the Minister of Indian and Northern Affairs must be adequately prepared to respond to opposition questions or media inquiries. (We are currently preparing briefing materials with other departments for use in such replies and will forward these shortly.)

10. Since DIAND insists on there being such an announcement, we would be grateful for your reaction as soon as possible on the question of whether the SSEA should make it.

  
Robert J. Rochon  
Director  
Legal Operations Division

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REMARKS/REMARQUES:

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International Covenant  
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2 April 1990

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HUMAN RIGHTS COMMITTEE

Thirty-eighth session

SUMMARY RECORD OF THE 965th MEETING

Held at Headquarters, New York,  
on Wednesday, 28 March 1990, at 10 a.m.

Chairman: Mr. LALLAH

CONTENTS

Consideration of reports submitted by States parties under article 40 of the  
Covenant (continued)

Third periodic report of the Federal Republic of Germany (continued)

This record is subject to correction.

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HUMAN RIGHTS COMMITTEE

Thirty-eighth session

SUMMARY RECORD OF THE 967th MEETING

Held at Headquarters, New York,  
on Thursday, 29 March 1990, at 10 a.m.

Chairman: Mr. LALLAH

later: Mr. COORAY

CONTENTS

Consideration of reports submitted by States parties under article 40 of the  
Covenant (continued)

Second periodic report of the Dominican Republic

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2 April 1990

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HUMAN RIGHTS COMMITTEE

Thirty-eighth session

SUMMARY RECORD OF THE 966th MEETING (CLOSED)

Held at Headquarters, New York,  
on Wednesday, 28 March 1990, at 4.30 p.m.

Chairman: Mr. LALLAH

CONTENTS

Consideration of communications under the Optional Protocol to the Covenant  
(continued)

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

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The meeting was called to order at 4.45 p.m.

CONSIDERATION OF COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL TO THE COVENANT  
(continued)

Communication No. 205/1986 (CCPR/C/WG/38/DR/205/1986)

1. Mrs. HIGGINS, speaking as Chairman/Rapporteur of the Working Group on Communications, said that the authors were three leaders of an Indian tribal society who had alleged a violation of article 1 of the Covenant.
2. The authors stated that, from time immemorial, they had been a free and independent nation and had concluded treaties with the French and British colonial authorities, which guaranteed their separate identity and their hunting, fishing and trading rights. They claimed that their territory had never been part of Europe's American colonies but had always been a distinct commonwealth under the British Crown, and that no right to self-determination had been extinguished as a result of dealings between Canada and the Crown. Therefore, their land must be considered a Non-Self-Governing Territory within the meaning of the Charter of the United Nations. The authors believed that, by virtue of General Assembly resolution 1514 (XV), they had the right to self-determination, which could be exercised in various forms, including association or federation with an existing State.
3. They claimed that, in its Constitution Act 1982, Canada had "recognized and affirmed" the "existing aboriginal and treaty rights of the aboriginal peoples of Canada" and that the specification of such "existing" rights must be negotiated with the indigenous representatives "invited" for that purpose by the Prime Minister of Canada. While such meetings had been held, the authors stated that their request to participate had been denied on the grounds that other "Indians" could negotiate their future political status, and that they had found that arrangement inconsistent with their right to self-determination. The authors stated that no domestic remedies could be pursued, since participation in the negotiation of indigenous peoples' political status was entrusted to the discretion of the Prime Minister, and that Canadian law afforded no means of challenging his decision other than by appealing to him personally; that, they stated, had been done, but unsuccessfully.
4. The Committee had transmitted the communication under rule 91 of the rules of procedure to the State party concerned. On 9 February 1987, the State party had objected to the admissibility of the communication on the grounds that: first, self-determination could not be invoked in circumstances which would prejudice the national unity and territorial integrity of a sovereign State, and the communication should therefore be declared inadmissible ratione materiae under article 3 of the Optional Protocol; secondly, the tribal society did not constitute a "people" within the meaning of article 1 of the Covenant because it was a scattered group; thirdly, the right to self-determination was a collective right and was not available to an individual; fourthly, international law and Canadian domestic law did not recognize Indian treaties as international documents; fifthly,

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(Mrs. Higgins)

the constitutional conference did not deal with the right to self-determination, and the communication was incompatible ratione materiae with the provisions of the Covenant in that regard; and, sixthly, the authors of the communication had not exhausted all the domestic remedies available to them. The State party claimed that, when the Supreme Court of Ontario had rejected an application by the Prairie Treaty Nations Alliance for a mandatory order that they be invited to the constitutional conference, the authors chose not to appeal that judgement, although they could have done so.

5. Commenting on the State party's submission, the authors had contended that their allegations with respect to the violation of article 1 were well founded, and had further asserted that the State party had violated article 25 of the Covenant, and had requested interim measures. The authors asserted that their tribal society was proposing an alternative form of federalism and asserting its right to self-determination in a manner consistent with the national unity of Canada. With regard to the State party's claim that the tribal society did not constitute a "people" within the meaning of article 1 of the Covenant, the authors asserted that the State party had referred to Indians as peoples in certain United Nations bodies. The authors further reiterated their view that the right to self-determination had an individual dimension and that it was an individual right exercised through collective means.

6. The authors rejected the Canadian Government's assertion that the constitutional conference and the proposed constitutional accord with Canada's "aboriginal peoples" did not affect their tribal society's rights under article 1 of the Covenant, and expressed the view that the Canadian constitutional accord process violated article 25 of the Covenant in so far as it was non-representative and deprived a particular racial, ethnic or national class of persons of the right to participate meaningfully in decisions directly affecting them. Finally, the authors asserted that they had complied with the requirements of article 5, paragraph 2 (b), of the Optional Protocol, and pointed out that that provision did not require the exhaustion of every possible remedy, only a reasonable effort to pursue remedies which were effective and available.

7. In a further submission dated 18 May 1987, the authors informed the Committee that the final constitutional conference between the Government of Canada and selected indigenous organizations had met on 26 and 27 March 1987 but had not reached any agreement. As there was no constitutional authority to convene any further conferences, the authors claimed that there was greater need than ever to declare that no legislation affecting the political status of their tribal society within Canada should be adopted without prior negotiations with that society.

8. By an interim decision of 20 July 1987, the Working Group had requested the State party to provide the text of the judgement of the Supreme Court of Ontario in the action brought against it by the Prairie Treaty Nations Alliance. In a submission dated 10 August 1987, the authors stated, with respect to the issue whether a Canadian court could have directed the Prime Minister to invite representatives of their people to participate in the constitutional conferences, that decisions entrusted to a minister by Parliament could be reviewed by the

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(Mrs. Higgins)

courts only to the extent that, in exercising his discretion, the minister disregarded explicit parliamentary instructions; however, the reasonableness or fairness of his decisions were not subject to review.

9. In a submission dated 7 October 1987, the State party claimed that, with respect to the authors' claim that the constitutional accord process violated article 25 of the Covenant, no evidence or explanations had been put forward to support that allegation and that, accordingly, the communication should be declared inadmissible as being an abuse of the right of submission. Further, the State party argued that the authors could not be considered "victims" within the meaning of article 1 of the Optional Protocol and that what they were seeking amounted to a declaration on the possible implications and administration of future, but currently non-existent, legal provisions.

10. With respect to the exhaustion of domestic remedies, the State party submitted that the timing of the constitutional conferences in 1984 and 1987 had been known since the adoption of the Constitutional Amendment Proclamation in March 1983, and affirmed that the obligation to take appropriate legal proceedings in the domestic courts implied a responsibility to seek domestic remedies in a timely way. Finally, the State party disputed the authors' argument that decisions of Cabinet ministers were only subject to review in exceptional circumstances.

11. In a submission dated 14 February 1988, the authors referred to a written offer made by the Minister for Indian Affairs and Northern Affairs on 10 August 1987 to discuss the authors' status in a non-constitutional framework. In a submission dated 10 February 1989, the authors' counsel recalled that the Supreme Court of Canada, in 1985, had ruled favourably on the validity of the 1752 Treaty of Halifax and that, in the light of that decision, the authors had proclaimed general hunting and fishing regulations for their tribal society. Despite the Supreme Court ruling, members of their community had been arrested and prosecuted for hunting and fishing contrary to federal and provincial regulations.

12. In a submission dated 26 July 1989, the State party denied that the charges against one of the members of the tribe who had been arrested and tried related to a violation of hunting or fishing laws.

13. In paragraph 14.1 of the proposed decision on admissibility (CCPR/C/WG/38/DR/205/1986), the Committee stated that, before considering any claims contained in a communication, it would, in accordance with rule 87 of its rules of procedure, decide whether or not it was admissible under the Optional Protocol. In paragraph 14.2, the Committee observed that, while article 1 of the Covenant recognized and protected a people's right to self-determination and its right to dispose of its natural resources, that provision could be invoked neither by individuals nor by peoples under the Optional Protocol, and it referred to earlier case law on the matter.

14. In paragraph 15.1, the Committee stated that the Optional Protocol did not preclude a group of individuals who claimed to be similarly affected from collectively submitting a communication about alleged breaches of their rights as

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(Mrs. Higgins)

set out in part III of the Covenant and that the authors had asserted that the fact that their tribal group had been excluded from participating in the constitutional conferences also revealed a breach of article 25 of the Covenant.

15. There were two alternatives for the remainder of the paragraph. Alternative 1 stated that the authors' assertion had not been substantiated and therefore did not give rise to a claim within the meaning of article 2 of the Optional Protocol. In alternative 2, the Committee observed that the question as to whether constitutional conferences constituted "the conduct of public affairs" within the meaning of article 25 (a) of the Covenant was an issue which should be examined on the merits.

16. In paragraph 15.2, the Committee stated that the authors' most recent allegations of violations of article 9 of the Covenant were far removed from the issue and could not be considered as giving rise to a claim within the meaning of article 2 of the Optional Protocol.

17. There were two alternative versions of paragraph 15.3; in the first, the Committee decided that the communication was inadmissible, and, in the second, it decided that the communication was admissible in so far as it might raise issues under article 25 (a) of the Covenant.

18. The CHAIRMAN, speaking in his personal capacity, said that he had always assumed that article 25 (a) referred to representation in institutions, either directly or through freely chosen representatives; he saw no possibility that the "conduct of public affairs" could be interpreted as including arrangements for local or provincial government. He therefore considered that the claim of a violation of article 25 (a) was not substantiated, although he would be interested in knowing what the travaux préparatoires said.

19. He did not fully understand the authors' claims of a violation of article 9 of the Covenant, and wondered what issue could possibly fall under that article on the basis of the authors' allegations, assuming that they were accepted.

20. Mrs. HIGGINS, referring to paragraphs 11.2 and 11.3, said that fishermen of the tribal society caught harvesting fish in waters adjacent to Indian reserve lands had been found guilty and their appeals were pending. While the Federal Government had not challenged the validity of the treaty which had been invoked by members of the tribal group, it argued that the treaty did not apply to Cape Breton Island. The authors had claimed that the prosecutions constituted an abuse of legal process in violation of article 9. None of the members of the Working Group had felt that that claim carried any weight and it had therefore been rejected.

21. The CHAIRMAN said that any issue raised under article 1 of the Covenant should be dealt with under article 27.

22. Mrs. HIGGINS said that the key issue had been the Constitutional Act. The Federal Government had organized a large conference in order to render specific the recognized aboriginal claims. Because there were about 350 separate bands, the

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(Mrs. Higgins)

Government had decided that participation in the conference should be limited to representative groupings, and it had not invited the tribal group represented by the authors. The authors had claimed that the Government's refusal to allow them to participate in the conference violated either their right to self-determination or their right under article 25 (a) of the Covenant.

23. The CHAIRMAN said that there would still be no question of a violation under article 25 (a). The constitutional conference did not involve bilateral negotiations between two separate sovereign entities. It was an internal agreement and fell under the jurisdiction of Canadian courts of law.

24. Mr. DIMITRIJEVIĆ said that, although he could accept either alternative version of paragraph 15.3, he would prefer alternative 2, since the Committee could not simply dismiss the claim under article 25 (a) simply by stating that it had not been substantiated. He agreed with the Chairman that the constitutional conference was not a constitutional assembly. Under Canadian law, it was within the discretionary power of the Prime Minister to select the most representative groups.

25. In his opinion, article 25 (a) was not applicable; the Committee should provide a better explanation of why it considered that the communication might raise issues under article 25 (a). If the Committee agreed on alternative 2, it could decide to invite the State party to present its views on article 25 (a), and then the Committee could proceed to a decision on the merits.

26. Mr. MAVROMMATIS said that he did not believe that non-participation in an internal arrangement was or could be a violation of article 25 (a), and there was no need for explanations. The Committee should straightforwardly present its view of the matter.

27. In paragraph 15.1, the Committee's reference to a group of individuals "collectively submitting" a communication might be interpreted as a sanctioning of some sort of actio popularis. Although the word "collectively" was technically correct, the Committee should not give the impression that the claim involved a whole band or a whole people.

28. Mr. WAKO, agreeing that the issues were not to be confused with those in the Lake Lubicon case, said that, like Mr. Dimitrijević, he would opt for admissibility under article 25. The constitutional conferences, even if advisory, had been meant to decide the rights of the indigenous peoples of Canada and thus were important; and the indigenous peoples had the right to have some say in the matter either by direct participation or through elected representatives.

29. He read out passages from the travaux préparatoires for article 25 (a) showing that at the time States had been divided as to whether it should be interpreted widely or strictly; and observed that the Working Group had similarly fallen into two camps. He advocated declaring the communication admissible under article 25 (a), so that both parties could be heard on the merits.

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30. Mr. POCAR observed that the case was more difficult than had appeared at first sight. Although it had one issue in common with the Lake Lubicon case, it was not at all similar and the Committee's decision in the latter would be of no assistance. The travaux préparatoires also shed very little light on the article 25 issues. Since he himself had not yet read the communication carefully as to the facts, he was not in a position to give an opinion on the applicability of article 25 (a). Therefore, if he had to opt now for one of the two alternatives in the conclusion to paragraph 15.1 of the proposed decision, he would support alternative 2 in fairness to the victims, since it left the matter open. Nevertheless, he had reservations about the wisdom of invoking article 25 (a), since it might raise an issue where none existed and give unfounded expectations to the authors. Personally, he would like more time to study the matter, but would not oppose an emerging consensus.

31. Mr. COORAY concurred with Mr. Pocar as to the need for more time and the position he would take if pressed to decide now.

32. Mr. EL-SHAFEI said that the time had come for a decision. The authors had made their position very clear and he sympathized with their argumentation regarding the points raised by the State party. The only possible topic of discussion at a constitutional conference between the Government of Canada and organizations of indigenous peoples would be the relationship between the two, and it must touch on the constitutional position of those peoples vis-à-vis the federal system as a whole. To his mind, the communication was admissible and, in fact, the Committee should say only that, without pre-judging its future position by referring solely to article 25 (a).

33. Mr. WENNERGREN pointed out that the State party itself described the constitutional conference as a "domestic political process" (para. 9.1 of the proposed decision) - in other words, an ad hoc formation intended to make possible an exchange of views within the framework of domestic politics. That was close to the "conduct of public affairs" in article 25 (a), and it therefore looked like an issue that might be raised under that article.

34. Mrs. HIGGINS said that the Committee could either take no decision at the moment or find the communication admissible, which would give it more time for further thinking on the matter. Either way, she believed that certain amendments to the text of document CCPR/C/WG/38/DR/205/1986 were in order. In paragraph 15.1, taking Mr. Mavrommatis' objection into account, the words "collectively submitting" should be replaced by the words "together submitting". Alternative 1 for the continuation of paragraph 15.1 should be reworded entirely so that it read: "However, the constitutional conference concerns not the conduct of public affairs but the rendering specific of aboriginal rights and, therefore, no issue arises under article 25."

35. Alternative 2, which would make the case admissible, should include not only a reference to the applicability of article 25 (a) to the constitutional conferences but also a reference to the reasonableness of the Government in excluding the Indian tribal society. Thus, after the phrase "within the meaning of

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(Mrs. Higgins)

article 25 (a) of the Covenant", the clause "and, if so, whether the exclusion of the ... Band violated article 25 of the Covenant" should be inserted.

36. Mr. WENNERGREN observed that since the Indian tribal society was referred to in the first sentence of paragraph 15.1 as a "group of individuals", the reference to it in the amendment to alternative 2 as the "... Band" should at least be put in quotation marks.

37. He noted further that the State party had contested the authors' position on the exhaustion of domestic remedies (para. 9.3 of the proposed decision), maintaining that they could have asked for review of the Prime Minister's discretionary decision or instituted timely proceedings, years earlier, to secure a seat at the constitutional conference. That too should be mentioned in alternative 2.

38. Mr. NDIAYE said that assessing the powers of the constitutional conference as such would be a minor matter but that the question of participation in that particular constitutional conference was extremely important. It should be recalled that often, in other settings, colonial councils had provided the framework within which indigenous peoples had obtained rights and prerogatives, and the same might have happened in the case under consideration. He needed more time to give careful study to the scope of article 25. At any rate, it was not a proper assessment of the situation to say that since only consultative powers were at issue, they were unimportant and did not constitute the conduct of public affairs.

39. Mrs. HIGGINS said that under no circumstances should there be any overtone of the issues not being important. Article 25 of the Covenant was not couched in terms of importance or otherwise, and indeed many issues were crucial but did not fall within the scope of that article.

40. For her, the issue was narrow. Either it concerned how public affairs were conducted, or it concerned the rendering specific of aboriginal rights (rights like fishing and hunting that were very important). However, she could see both sides.

41. Mr. MAVROMMATIS, reiterating that the case had dragged on far too long, especially when all members of the Committee knew what the end result would be, said that he did not think, given his views, that it would be proper for him to take part in any decision on the merits.

42. In any case, the Committee should not lose sight of the original allegations, which concerned property rights, and the nature of the constitutional conference, the latter being an advisory meeting that could never, in his view, come under article 25. He noted further that article 25 was intended to protect individuals. The rights of bands and indigenous peoples were covered by other articles.

43. He did not think that the Committee should raise false hopes. Nor, more importantly, should it create the impression that its members were seeking to become legislators through judicial decisions that gave wide interpretations.

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44. The CHAIRMAN, speaking in his personal capacity, asked what remedy the Committee could ever ask the State party to give, if the constitutional conferences were over.

45. Mr. MÖLLER (Representative of the Secretary-General) said that since the conferences had ended inconclusively, the issue could be considered moot. The authors had, indeed, wanted a decision in the past, at the relevant time.

46. Mr. DIMITRIJEVIĆ asked Mrs. Higgins to come back to the Committee with more polished versions of the two alternatives in paragraph 15.1, including also the point just made by Mr. Mavrommatis that article 25 of the Covenant governed individual rights and not the rights of the whole group, as in article 1.

47. Mrs. HIGGINS agreed to do so and said that she would also include in alternative 2 the point regarding local remedies brought up by Mr. Wennergren.

The meeting rose at 6 p.m.

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**International Covenant  
on Civil and  
Political Rights**

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CCPR/C/38/D/167/1984  
28 March 1990

**ORIGINAL: ENGLISH**

**HUMAN RIGHTS COMMITTEE**  
Thirty-eighth session

**DECISIONS**

Communication No. 167/1984

Submitted by: Bernard Ominayak, Chief of the Lubicon Lake Band  
(represented by counsel)

Alleged victims: The Lubicon Lake Band

State party concerned: Canada

Date of communication: 14 February 1984

Documentation references: Prior decisions - CCPR/C/WG/23/D/167/1984 (rule 91  
decision, 9 November 1984)  
- CCPR/C/27/D/167/1984 (interim  
decision, 10 April 1986)  
- CCPR/C/30/D/167/1984 (decision on  
admissibility, dated 22 July 1987)  
- CCPR/C/36/D/167/1984 (further interim  
decision, dated 14 July 1989)

Date of present decision: 26 March 1990

On 26 March 1990, the Human Rights Committee adopted its views under article 5, paragraph 4 of the Optional Protocol, concerning communication No. 167/1984. The text of the views is annexed to the present document.

\* Made public by decision of the Human Rights Committee.

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VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4,  
OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL  
AND POLITICAL RIGHTS - THIRTY-EIGHTH SESSION

concerning

Communication No. 167/1984

Submitted by: Chief Bernard Ominayak and the Lubicon Lake Band (represented by counsel)

Alleged victim: Lubicon Lake Band

State party concerned: Canada

Date of communication: 14 February 1984 (date of initial letter)

Date of decision on admissibility: 22 July 1987

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 1990,

Having concluded its consideration of communication No. 167/1984, submitted to the Committee by Chief B. Ominayak and the Lubicon Lake Band under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol \*\*/

1. The author of the communication (initial letter dated 14 February 1984 and subsequent correspondence) is Chief Bernard Ominayak (hereinafter referred to as the author) of the Lubicon Lake Band, Canada. He is represented by counsel.

2.1 The author alleges violations by the Government of Canada of the Lubicon Lake Band's right of self-determination and by virtue of that right to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence. These violations allegedly contravene Canada's obligations under article 1, paragraphs 1 to 3, of the International Covenant on Civil and Political Rights.

\*\*/ Individual opinions submitted by Mr. Nisuke Ando and Mr. Bertil Wennergren, respectively, are appended.

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2.2 Chief Ominayak is the leader and representative of the Lubicon Lake Band, a Cree Indian band living within the borders of Canada in the Province of Alberta. They are subject to the jurisdiction of the Federal Government of Canada, allegedly in accordance with a fiduciary relationship assumed by the Canadian Government with respect to Indian peoples and their lands located within Canada's national borders. The Lubicon Lake Band is a self-identified, relatively autonomous, socio-cultural and economic group. Its members have continuously inhabited, hunted, trapped and fished in a large area encompassing approximately 10,000 square kilometres in northern Alberta since time immemorial. Since their territory is relatively inaccessible, they have, until recently, had little contact with non-Indian society. Band members speak Cree as their primary language. Many do not speak, read or write English. The Band continues to maintain its traditional culture, religion, political structure and subsistence economy.

2.3 It is claimed that the Canadian Government, through the Indian Act of 1970 and Treaty 8 of 21 June 1899 (concerning aboriginal land rights in northern Alberta), recognized the right of the original inhabitants of that area to continue their traditional way of life. Despite these laws and agreements, the Canadian Government has allowed the provincial government of Alberta to expropriate the territory of the Lubicon Lake Band for the benefit of private corporate interests (e.g., leases for oil and gas exploration). In so doing, Canada is accused of violating the Band's right to determine freely its political status and to pursue its economic, social and cultural development, as guaranteed by article 1, paragraph 1, of the Covenant. Furthermore, energy exploration in the Band's territory allegedly entails a violation of article 1, paragraph 2, which grants all peoples the right to dispose of their natural wealth and resources. In destroying the environment and undermining the Band's economic base, the Band is allegedly being deprived of its means to subsist and of the enjoyment of the right of self-determination guaranteed in article 1.

3.1 The author states that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

3.2 With respect to the exhaustion of domestic remedies, it is stated that the Lubicon Lake Band has been pursuing its claims through domestic political and legal avenues. It is alleged that the domestic political and legal process in Canada is being used by government officials and energy corporation representatives to thwart and delay the Band's actions until, ultimately, the Band becomes incapable of pursuing them, because industrial development at the current rate in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people for many more years.

3.3 On 27 October 1975, the Band's representatives filed with the Registrar of the Alberta (Provincial) Land Registration District a request for a caveat, which would give notice to all parties dealing with the caveated land of their assertion of aboriginal title, a procedure foreseen in the Provincial Land Title Act. The Supreme Court of Alberta received arguments on behalf of the Provincial Government, contesting the caveat, and on behalf of the Lubicon Lake Band. On 7 September 1976, the provincial Attorney General filed an application for a postponement, pending resolution of a similar case; the application was granted.

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On 25 March 1977, however, the Attorney General introduced in the provincial legislature an amendment to the Land Title Act precluding the filing of caveats; the amendment was passed and made retroactive to 13 January 1975, thus predating the filing of the caveat involving the Lubicon Lake Band. Consequently, the Supreme Court hearings were dismissed as moot.

3.4 On 25 April 1980, the members of the Band filed an action in the Federal Court of Canada, requesting a declaratory judgement concerning their rights to their land, its use, and the benefits of its natural resources. The claim was dismissed on jurisdictional grounds against the provincial government and all energy corporations except one (Petro-Canada). The claim with the federal Government and Petro-Canada as defendants was allowed to stand.

3.5 On 16 February 1982, an action was filed in the Court of Queen's Bench of Alberta requesting 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, the author states, was to prevent the Alberta government and the oil companies (the "defendants") from further destroying the traditional hunting and trapping territory of the Lubicon Lake people. This would have permitted the Band members to continue to hunt and trap for their livelihood and subsistence as a part of their aboriginal way of life. The provincial court did not render its decision for almost two years, during which time oil and gas development continued, along with rapid destruction of the Band's economic base. On 17 November 1983, the request for an interim injunction was denied and the Band, although financially destitute, was subsequently held liable for all court costs and attorneys' fees associated with the action.

3.6 The decision of the Court of Queen's Bench was appealed to the Court of Appeal of Alberta; it was dismissed on 11 January 1985. 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 presented a serious question of law to be decided at trial. None the less, the Court of Appeal found that the Lubicon Lake Band would suffer no irreparable harm if resource development continued fully and that the balance of convenience, therefore, favoured denial of the injunction.

3.7 The author states that the defendants attempted to convince the Court that the Lubicon Lake Band has 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 members of the Lubicon Lake Band 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.

3.8 The author further states that the legal basis for the Court of Appeal's decision was its own definition of irreparable injury. This test was: injury that is of such a nature that no fair and reasonable redress may be had in a court

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of law and that to refuse the injunction would be a denial of justice. The author submits that the Lubicon Lake Band clearly met this test by demonstrating, with uncontested evidence, 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.

3.9 On 18 February 1985, the Band presented arguments to a panel of three judges of the Supreme Court of Canada, requesting leave to appeal from the judgement of the Alberta Court of Appeal. On 14 March 1985, the Supreme Court of Canada refused leave to appeal. Generally, the author states, 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. He states that the issues presented by the Lubicon Lake Band involved such questions as the interpretation of the constitutional 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 régime 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. The author submits that at least the first four questions have not yet been adjudicated by the Supreme Court of Canada and that they undeniably fall within the criteria for granting leave to appeal.

4. By decision of 16 October 1984, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication. The main points reflected in the information and observations received from the State party are set out in paragraphs 5.1 to 5.7 and 6.1 to 6.4 below.

#### Exhaustion of domestic remedies

5.1 In its submission dated 31 May 1985, the State party contends 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. The State party recalls that the Lubicon Lake Band, suing in its own legal right, and Chief Bernard Ominayak, suing in his personal capacity, and with other Band councillors in a representative capacity, have initiated three different legal procedures and points out that 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, were said to be still pending.

5.2 With regard to the Federal Court action referred to in the communication, the State party recalls that the Band and its legal advisers, in April 1980, sought to sue the Province of Alberta and private corporations in proceedings in the Federal

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Court of Canada. It is submitted that in the circumstances of this case, neither the province nor private entities could have been sued as defendants in the Federal Court of Canada. Rather than reconstitute the proceedings in the proper forum, the State party submits, the Band contested interlocutory proceedings brought by the 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 of Canada was dismissed by the Federal Court of Appeal in May 1981.

5.3 Following the interlocutory proceedings relating to the jurisdiction of the Federal Court, a new action was instituted on 21 February 1982 against the province and certain corporate defendants in the Court of Queen's Bench of Alberta. As indicated in the communication, 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 that case, an applicant for an interim injunction must establish:

- (a) That there exists a serious issue to be tried;
- (b) That irreparable harm will be suffered prior to trial if no injunction is granted;
- (c) That the balance of convenience between the parties favours relief to the applicant.

The State party points out that 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.

5.4 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 of 11 January 1985. The Band's application for leave to appeal the dismissal of the interim injunction to the Supreme Court of Canada was refused on 14 March 1985. Almost two months later, on 13 May 1985, the State party adds, the Supreme Court of Canada denied another request by the Band that the Court bend its own rules to rehear the application. Thus, the State party states, the Court upheld its well-established rule prohibiting the rehearing of applications for leave to appeal.

5.5 The State party submits that, 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 submits that 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.

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16.3 The author raises further questions about the State party's compliance with articles 14, paragraph 1, and 26, of the Covenant. He recalls that the domestic court proceedings instituted by the Lubicon Lake Band, founded on aboriginal rights and title to land, challenge certain of the State's asserted powers and jurisdiction, which he contends are "inherently susceptible to precisely the types of abuses that articles 14, paragraph 1, and 26 are intended to guard against". In this context, he claims that "the bias of the Canadian courts has presented a major obstacle to the Band's attempt to protect its land, community and livelihood, and that the courts' biases arises from distinctions based on race, political, social and economic status". He further claims that the economic and social biases the Band has been confronted with in the Canadian courts, especially in the provincial court system in Alberta, have been greatly magnified by the "fact that several of the judges rendering the decisions of these courts have had clear economic and personal ties to the parties opposing the Band in the actions".

16.4 In addition to the above, it is submitted that in violation of articles 17 and 23, paragraph 1, of the Covenant, the State party has permitted the members of the Lubicon Lake Band to be subjected to conditions that are leading to the destruction of the families and the homes of its members. The author explains that in an indigenous community, the entire family system is predicated upon the spiritual and cultural ties to the land and the exercise of traditional activities. Once these have been destroyed, as in the case of the Band, the essential family component of the society is irremediably damaged. Similarly, it is alleged that the State party has violated article 18, paragraph 1, of the Covenant since, as a consequence of the destruction of their land, the Band members have been "robbed of the physical realm to which their religion - their spiritual belief system - attaches".

16.5 With respect to the requirement of exhaustion of domestic remedies, the author rejects the State party's assertion that a trial on the merits would offer the Band an effective recourse against the federal Government and redress for the loss of its economy and its way of life. First, this assertion rests upon the assumption that past human rights violations can be rectified through compensatory payments; secondly, it is obvious that the Band's economy and way of life have suffered irreparable harm. Furthermore, it is submitted that a trial on the merits is no longer available against the federal Government of Canada since, in October 1986, the Supreme Court of Canada held that aboriginal land rights within provincial boundaries involve provincial land rights and must therefore be adjudicated before the provincial courts. It was for that reason that, on 30 March 1987, the Lubicon Lake Band applied to the Alberta Court of Queen's Bench for leave to amend its statement of claim before that court so as to be able to add the federal Government as a defendant. On 22 October 1987, the Court of Queen's Bench denied the application. Therefore, despite the fact that the Canadian Constitution vests exclusive jurisdiction for all matters concerning Indians and Indian lands in Canada with the federal Government, it is submitted that the Band cannot avail itself of any recourse against the federal Government on issues pertaining to these very questions.

17.1 In a submission dated 3 March 1988, the State party submits that genuine and serious efforts continue to be made with a view to finding an acceptable solution to the issues raised by the author and the Band. In particular, it explains that:

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"On 3 February 1988, the Minister of Indian Affairs and Northern Development delivered to the Attorney General of Alberta a formal request for reserve land for the Lubicon Lake Band. In this request, he advised Alberta that a rejection of the request would require Canada to commence a legal action, pursuant to the Constitution Act, 1930, to resolve the dispute as to the quantum of land to which the Lubicon Lake Band is entitled. In any event, the Minister of Indian Affairs and Northern Development asked Alberta to consider, as an interim measure, the immediate transfer to the Band of 25.4 square miles of land ... without prejudice to any legal action.

"By letter dated 10 February 1988, the federal negotiator advised counsel for the Band of the above developments and, as well, sought to negotiate all aspects of the claim not dependent on Alberta's response to the formal request ... The communicant, by letter dated 29 February 1988, rejected this offer, but indicated that he would be prepared to consider an interim transfer of 25.4 square miles without prejudice to negotiations or any court actions. As a consequence of the above developments, negotiators for the federal and provincial Governments met on 1 and 2 March 1988 and concluded an interim agreement for the transfer of 25.4 square miles as reserve land for the Band, including mines and minerals. This agreement is without prejudice to the positions of all parties involved, including the Band ..."

17.2 With respect to the effectiveness of available domestic remedies, the State party takes issue with the author's submission detailed in paragraph 16.5 above, which it claims seriously misrepresents the legal situation as it relates to the Band and the federal and provincial Governments. It reiterates that the Band has instituted two legal actions, both of which remain pending: one in the Federal Court of Canada against the federal Government; the other in the Alberta Court of Queen's Bench against the province and certain private corporations. To the extent that the author's claim for land is based on aboriginal title, as opposed to treaty entitlement, it is established case law that a court action must be brought against the province and not the federal Government.

17.3 The State party adds that in the action brought before the Alberta Court of Queen's Bench:

"The communicant sought leave to add the federal Government as a party to the legal proceedings in the Alberta Court of Queen's Bench. The Court there held that, based on existing case law, a provincial court is without jurisdiction to hear a claim for relief against the federal Government; rather, this is a matter properly brought before the Federal Court of Canada. The plaintiff has in fact done this and the action is, as already indicated, currently pending. Therefore, recourse against the Government of Canada is still available to the Band, as it has always been, in the Federal Court of Canada. Moreover, the communicant has appealed the decision of the Court of Queen's Bench to the Alberta Court of Appeal".

17.4 Finally, the State party categorically rejects most of the author's allegations detailed in paragraphs 16.2 and 16.3 above as unfounded and unsubstantiated; it submits that these allegations constitute an abuse of process

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that should result in the dismissal of the communication pursuant to article 3 of the Optional Protocol.

18.1 In a further submission dated 28 March 1988, the author comments on the State party's overview of recent developments in the case (see para. 17.1) and adds the following remarks: (a) the Lubicon Lake Band was not a party to the negotiation of the settlement offer; (b) the settlement offer rests on a "highly prejudicial" view of the Band's rights under Canadian law and an equally prejudicial determination of Band membership; (c) the federal Government would negotiate non-land issues such as housing with fewer than half of the Band members; (d) Canada has leased all but 25.4 square miles of the Band's traditional lands for development, in conjunction with a pulp mill to be constructed by the Daishowa Canada Company Ltd. near Peace River, Alberta; (e) the Daishowa project frustrates any hopes of the continuation of some traditional activity by Band members; and (f) the Parliamentary Standing Committee on Aboriginal Affairs, the oversight committee of the Canadian Parliament with respect to such matters, does not support the approach to negotiated settlement being taken by the Minister of Indian Affairs and Northern Development.

18.2 The author reaffirms that the essential part of the court actions initiated by the Band relates to aboriginal rights claims and that, with the decision of the Alberta Court of Queen's Bench of 22 October 1987 and in the light of recent Supreme Court decisions referred to by the State party, the Band continues to be denied redress against the federal Government.

18.3 The author further rejects the State party's contention that the claims made in his submission of 12 January 1988 are unsubstantiated and unfounded and constitute an abuse of the right of submission; he reaffirms his readiness to furnish detailed information on the "21 unnatural deaths resulting directly or indirectly from the destruction of the traditional Lubicon economy and way of life". Finally, he points out that the State party continues to disregard the Committee's request for interim measures of protection pursuant to rule 86 of its rules of procedure, as evidenced by Canadian backing of the Daishowa paper mill project. This means that far from adopting interim measures to avoid irreparable harm to the Band, Canada has endorsed a project that would contribute to the further degradation of the Band's traditional lands.

19.1 In another submission dated 17 June 1988, the State party points to further developments in the case and re-emphasizes that effective remedies continue to be open to the Lubicon Lake Band. It explains that, since 11 March 1988, the date of the Band's refusal of the Government's interim offer to transfer to it 25.4 square miles of reserve land, discussions:

"have taken place between the federal Government, the Province of Alberta and the communicant. However, virtually no progress was made towards settlement. As a consequence, on 17 May 1988, the federal Government initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band in order to enable Canada to meet its lawful obligations to the Band under Treaty 8. The Statement of Claim, commencing the legal action, asks the Court of Queen's Bench of Alberta for a declaration that the Lubicon Lake Band is entitled to a reserve and a determination of the size of the reserve. ... On 9 June 1988 the

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Lubicon Lake Band filed a Statement of Defence and Counterclaim. On 10 June 1988, all parties to the dispute appeared before Chief Justice Moore of the Alberta Court of Queen's Bench and agreed that best efforts should be made to expedite this case with a preliminary trial date to be set on 16 January 1989."

19.2 The State party accepts its obligation to provide the Lubicon Lake Band with a reserve pursuant to Treaty 8. It argues that the issue that forms the basis of the domestic dispute, as well as the communication under consideration, concerns the amount of land to be set aside as a reserve and related issues. As such, the State party asserts that the communication does not properly fall within any of the provisions of the Covenant and cannot therefore form the basis of a violation.

20.1 In a submission dated 5 July 1988, the author furnishes further information and comments on the State party's submission of 17 June 1988. He identifies "many problems" inherent in the court action initiated by the federal Government against the provincial government in the Alberta Court of Queen's Bench. Among these are: (a) the purported fact that it ignores the Band's aboriginal land claim; (b) the fact that it seeks a declaratory judgement with respect to Band membership "apparently based on the unique and highly controversial approach to determination of Band membership that has been discussed in previous submissions"; and (c) the fact that much of the substance of the issues addressed are already before the courts in the Band's pending actions. The author notes that since "the action was filed in the lowest court in Canada, and will entail subpoena of an argument over the extremely lengthy and complex Lubicon genealogical study, as well as appeals from any decision rendered, there is no basis for believing that the action will do anything but delay indefinitely [the] resolution of the Lubicon land issues". The author believes that the Government's action is intended to have precisely this effect.

20.2 By letter dated 28 October 1988, the author informs the Committee that on 6 October 1988, the Lubicon Lake Band asserted jurisdiction over its territory. He explains that this action was the result of the federal Government's failure to contribute to a favourable solution of the Band's problems. He adds that the State party has continuously delayed action on the issue, accusing it of "practicing deceit in the media and dismissing advisors who recommend any resolution favourable to the Lubicon people. At the same time the Band has watched the Province of Alberta continue to grant leases for oil and gas development and now for timber development on the Lubicons' traditional lands ...".

20.3 The author further observes that the action of the Lubicon Lake Band has resulted in:

"a positive response from the Alberta provincial government. Alberta Premier Don Getty negotiated an agreement with Chief Ominayak whereby Alberta will offer to sell to the Federal Government 79 square miles of land with surface and subsurface rights, to be designated as a reserve for the benefit of the Lubicon Lake Band. The province has agreed to sell an additional 16 square miles of land to the federal Government with surface rights only, and to make subsurface development on such land subject to Band approval.

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Thus the total area agreed to by the province is 95 square miles, the amount to which the Band is entitled, based on its present membership, under Canadian federal Indian law. ... The federal Government has stated that it is willing to consider the transfer of 79 square miles of land for the benefit of the Lubicon people. However, it has refused to accept the remaining 16 square miles, recommending that such land be transferred to the Band to be held in free title. The effect of this would be to subject the land in question to taxation and alienation, while reducing the level of federal obligation to the Lubicon people ..."

21.1 In a further submission dated 2 February 1989, the State party observes that in November 1988, following an agreement between the provincial government of Alberta and the Lubicon Lake Band to set aside 95 square miles of land for a reserve, the federal Government initiated negotiations with the Band on the modalities of the land transfer and related issues. During two months of negotiations, consensus was reached on the majority of issues, including Band membership, size of the reserve, community construction and delivery of programmes and services. No agreement could, however, be found on the issue of cash compensation and on 24 January 1989 the Band withdrew from the negotiations when the federal Government presented its formal offer.

21.2 After reviewing the principal features of its formal offer (transfer to the Band of 95 square miles of reserve land; the acceptance of the Band's membership calculation; the setting aside of \$C 34 million for community development projects; the granting of \$C 2.5 million per year of federal support programmes; the proposal of a special development plan to assist the Band in establishing a viable economy on its new reserve; and the establishment of a \$C 500,000 trust fund to assist Band elders wishing to pursue their traditional way of life), the State party observes that the Government's formal overall offer amounts to approximately \$C 45 million in benefits and programmes, in addition to a 95 square mile reserve. The Band has claimed additional compensation of between \$C 114 million and \$C 275 million for alleged lost revenues. The State party has denied the Band's entitlement to such sums but has advised it that it is prepared to proceed with every aspect of its offer without prejudice to the Band's right to sue the federal Government for additional compensation.

21.3 The State party concludes that its most recent offer meets two tests of fairness, namely: that it is consistent with other recent settlements with native groups, and that it addresses the legitimate social and economic objectives of the Band. It adds that the community negotiation process must be considered as a practical vehicle and opportunity for Indian communities to increase their local autonomy and decision-making responsibilities. The federal policy provides for negotiations on a wide range of issues, such as government institutions, membership, accountability, financial arrangements, education, health services and social development. Based on the above considerations, the State party requests the Committee to declare the communication inadmissible on the grounds of failure to exhaust all available domestic remedies.

22.1 In a further submission dated 22 March 1989, the author takes issue with the State party's submission of 2 February 1989, characterizing it as not only misleading but virtually entirely untrue. He alleges that recent negotiations

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Additional remedies

5.6 The State party submits that 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, paragraph 3 (b), of the Covenant, it states, recognizes that in addition to judicial remedies a State party to the Covenant can also provide administrative and other remedies. 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 the 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 of the dispute.

5.7 The Band's claim to certain lands in northern Alberta, the State party submits, is part of a 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 a separate land claim with the Department of Indian Affairs asserting aboriginal title to lands that 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 that 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, to review the entire situation and to formulate recommendations. The State party submits that consideration of the Lubicon Lake Band's claim in isolation from the competing claims of the other native communities would jeopardize the domestic remedy of negotiated settlement selected by the latter.

Right of self-determination

6.1 The Government of Canada submits that the communication, as it pertains to the right of self-determination, is inadmissible for two reasons. First, 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. It therefore submits that the communication is 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, the State party argues, 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.

6.2 As to the argument 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

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assert under the Protocol the right of self-determination, the Government of Canada points out 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. 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.

6.3 The Government of Canada submits that while self-determination as contained in article 1 of the Covenant is not an individual right, it provides the necessary contextual background for the exercise of individual human rights. This view, it contends, is supported by the following phrase from the Committee's general comment 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". This general comment, the State party adds, recognizes 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 on Civil and Political Rights are, in the submission of Canada, different in nature and kind from the rights in part III, the former being 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, the State party argues, it cannot be invoked by individuals under the Optional Protocol.

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

7. In a detailed reply, dated 8 July 1985, to the State party's submission, the author summarized his arguments as follows. The Government of Canada offers three principal allegations in its response. It alleges, first, that the Lubicon Lake Band has not exhausted 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. Finally, the Government of Canada makes allegations concerning the identity and status of the communicant. 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.

8.1 By interim decision of 10 April 1986, the Committee, recalling that the State party had informed it that the Minister of Indian and Northern Affairs had

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appointed a special envoy and given him the task to review the situation, requested the State party to furnish the Committee with the special envoy's report and with any information as to recommendations as well as measures which the State party had taken or intended to take in that connection.

8.2 In the same decision the Committee requested the author to inform it of any developments in the legal actions pending in the Canadian courts.

9.1 In his reply, dated 30 June 1986, to the Committee's interim decision, the author claims that there has been no substantive progress in any of the pending court proceedings. He reiterates his argument that:

"The Band's request for an interim injunction to halt the oil development, which has destroyed the subsistence livelihood of its people, was denied and the Supreme Court of Canada refused to grant leave to appeal the denial ... The development and the destruction, therefore, continue unabated. The Band's attorney is continuing to pursue the claims through the courts despite the fact that the Band is unable to provide financial support for the effort and that there is no possible hope of resolution for the next several years. Therefore, the Band has no basis for altering its previous conclusion that, for all practical purposes, its domestic judicial remedies have been exhausted."

9.2 The Band also points out that the Federal Government's special envoy, Mr. E. Davie Fulton, was relieved of his responsibilities following the submission of his "discussion paper".

"In the discussion paper ... Mr. Fulton reached much the same conclusion as the Band itself, that the Canadian Government must bear the blame for the situation at Lubicon Lake and that the resolution of the problem is up to the Federal Government. His report also suggested a land settlement based on the Band's current population and recognized the importance of providing the Band with wildlife management authority throughout its hunting and trapping territory. The land settlement proposed by Mr. Fulton, which would result in a reserve significantly larger than the 25 square mile reserve the Band was promised in 1940, is consistent with the position of the Band with regard to this issue ... Mr. Fulton also recommended that Alberta compensate the Band for damage caused by the unrestricted oil and gas development for which it has issued leases within the Band's territory. In addition to relieving Mr. Fulton of his responsibility in the matter, the Federal Government, to date, has refused to make his discussion paper public."

10.1 In its reply to the Committee's interim decision, dated 23 June 1986, the State party forwarded the text of Mr. Fulton's report and noted that it had appointed Mr. Roger Tassé to act as negotiator. Furthermore, it informed the Committee that on 8 January 1986 the Canadian Government had made an ex gratia payment of \$1.5 million to the Band to cover legal and other related costs.

10.2 In a further submission of 20 January 1987, the State party argues that following the rejection of the Band's application for an interim injunction:

"The Band should then have taken steps with all due speed to seek its permanent injunction before seeking international recourse. The Band alleges in its submission ... that the delay in the litigation will cause it irreparable harm. Its action for a permanent injunction would, if successful, permanently prevent that harm."

11.1 In submissions dated 23 and 25 February 1987, the author discussed, inter alia, matters of substance, such as the Fulton discussion paper, and argued that "Canada has abandoned key recommendations contained in the Fulton discussion paper", and that "Canada is attempting retroactively to subject the Band to a law which this Committee has held to be in violation of article 27 of the International Covenant on Civil and Political Rights and which Canada amended in accordance with the findings of this Committee".

11.2 With regard to the pending litigation proceedings, the Band contends that a permanent injunction would not constitute an effective remedy because it would come too late, explaining that:

"The recognition of aboriginal rights or even treaty rights by a final determination of the courts will not undo the irreparable damage to the society of the Lubicon Lake Band, will not bring back the animals, will not restore the environment, will not restore the Band's traditional economy, will not replace the destruction of their traditional way of life and will not repair the damages to the spiritual and cultural ties to the land. 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."

12. In a further submission, dated 12 June 1987, the author states that:

"The Lubicon Lake Band is not requesting a territorial rights decision. Rather, the Band requests only that the Human Rights Committee assist it in attempting to convince the Government of Canada that:

"(a) The Band's existence is seriously threatened by the oil and gas development that has been allowed to proceed unchecked on their traditional hunting grounds and in complete disregard for the human community inhabiting the area;

"(b) Canada is responsible for the current state of affairs and for co-operating in their resolution in accordance with article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights."

13.1 Before considering a communication on the merits, the Committee must ascertain whether it fulfils all conditions relating to its admissibility under the Optional Protocol.

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13.2 With regard to the requirement, in article 5, paragraph 2 (b), of the Optional Protocol, that authors must exhaust domestic remedies before submitting a communication to the Human Rights Committee, the author of the present communication had invoked the qualification that this requirement should be waived "where the application of the remedies is unreasonably prolonged". The Committee noted that the author had argued that the only effective remedy in the circumstances of the case was to seek an interim injunction, because "without the preservation of the status quo, a final judgement on the merits, even if favourable to the Band, would be rendered ineffectual", in so far as "any final judgement recognising aboriginal rights, or alternatively treaty rights, [could] never restore the way of life, livelihood and means of subsistence of the Band". Referring to its established jurisprudence that "exhaustion of domestic remedies can be required only to the extent that these remedies are effective and available", the Committee found that, in the circumstances of the case, there were no effective remedies still available to the Lubicon Lake Band.

13.3 With regard to the State party's contention that the author's communication pertaining to self-determination should be declared inadmissible because "the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right", the Committee reaffirmed that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee observed that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article 1 of the Covenant, which deals with rights conferred upon peoples, as such.

13.4 The Committee noted, however, that the facts as submitted might raise issues under other articles of the Covenant, including article 27. Thus, in so far as the author and other members of the Lubicon Lake Band were affected by the events which the author has described, these issues should be examined on the merits, in order to determine whether they reveal violations of article 27 or other articles of the Covenant.

14. On 22 July 1987, therefore, the Human Rights Committee decided that the communication was admissible in so far as it might raise issues under article 27 or other articles of the Covenant. The State party was requested, under rule 86 of the rules of procedure, to take interim measures of protection to avoid irreparable damage to Chief Ominayak and other members of the Lubicon Lake Band.

15. In its submission under article 4, paragraph 2, dated 7 October 1987, the State party invokes rule 93, paragraph 4, of the Committee's provisional rules of procedure and requests the Committee to review its decision on admissibility, submitting that effective domestic remedies have not been exhausted by the Band. It observes that the Committee's decision appears to be based on the assumption that an interim injunction would be the only effective remedy to address the alleged breach of the Lubicon Lake Band's rights. This assumption, in its opinion, does not withstand close scrutiny. The State party submits that, based on the

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evidence of the Alberta Court of Queen's Bench and the Court of Appeal - the two courts which had had to deal with the Band's request for interim relief - as well as the socio-economic conditions of the Band, its way of life, livelihood and means of subsistence have not been irreparably damaged, nor are they under imminent threat. Accordingly, it is submitted that an interim injunction is not the only effective remedy available to the Band, and that a trial on the merits and the negotiation process proposed by the Federal Government constitute both effective and viable alternatives. The State party reaffirms its position that it has a right, pursuant to article 5, paragraph 2 (b), of the Optional Protocol, to insist that domestic redress be exhausted before the Committee considers the matter. It claims that the terms "domestic remedies", in accordance with relevant principles of international law, must be understood as applying to all established local procedures of redress. As long as there has not been a final judicial determination of the Band's rights under Canadian law, there is no basis in fact or under international law for concluding that domestic redress is ineffective, nor for declaring the communication admissible under the Optional Protocol. In support of its claims, the State party provides a detailed review of the proceedings before the Alberta Court of Queen's Bench and explains its longstanding policy to seek the resolution of valid, outstanding land claims by Indian Bands through negotiation.

16.1 Commenting on the State party's submission, the author, in a letter dated 12 January 1988, maintains that his and the Lubicon Lake Band's allegations are well founded. According to Chief Ominayak, the State party bases its request for a review of the decision on admissibility on a mere restatement of the facts and is seeking to have the Committee reverse its decision under the guise of substantiation of its previous submissions, without adducing any new grounds. Recalling the Committee's statement that the communication is admissible in so far as it raises issues under article 27 "or other articles of the Covenant", the author spells out which articles of the Covenant he considers to have been violated. First, he claims that Canada has violated article 2, paragraphs 1 to 3, of the Covenant: paragraph 1, because the State party has treated the Lubicon Lake Band without taking into consideration elements of a social, economic and property nature inherent in the Band's indigenous community structure; paragraph 2, because it is said to continue to refuse to solve some issues complained of by the Band for which there remain means of redress; and paragraph 3, because it is said to have failed to provide the Band with an effective remedy with regard to its rights under the Covenant.

16.2 The author further alleges that the State party, through actions affecting the Band's livelihood, has created a situation which "led, indirectly if not directly, to the deaths of 21 persons and [is] threatening the lives of virtually every other member of the Lubicon community. Moreover, the ability of the community to [survive] is in serious doubt as the number of miscarriages and stillbirths has skyrocketed and the number of abnormal births ... has gone from near zero to near 100 per cent". This, it is submitted, constitutes a violation of article 6 of the Covenant. Furthermore, it is claimed that the appropriation of the Band's traditional lands, the destruction of its way of life and livelihood and the devastation wrought to the community constitute cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant for which the State party must be held accountable.

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between the Lubicon Lake Band and the federal Government did not, on the Government's side, "in any way represent a serious attempt at settlement of the Lubicon issues". Rather, he submits, the Government's "formal offer" was an exercise in public relations, which committed the Federal Government to virtually nothing. It is submitted that the offer, if accepted, would have stripped the community's members of any legal means of redressing their situation.

22.2 In substantiation of these allegations, the author argues that the Government's "formal offer" contains no more than a commitment to provide housing and a school. On the other hand, it lacks "any commitment to provide the facilities and equipment necessary for the Lubicon people to manage their own affairs, such as facilities for essential vocational training, support for commercial and economic development, or any basis from which the Band might achieve financial independence". It is further submitted that contrary to the State party's statement that an agreement had been reached on the majority of issues for which the Band seeks a viable solution, including membership, reserve size and community construction, no agreement or consensus had been reached on any of these issues. Furthermore, the author argues that while the State party has claimed that its offer would amount to approximately \$C 45 million in benefits and programmes, it has failed to indicate that the majority of these funds remain uncommitted and that without adequate means of legal redress the Lubicon Lake Band would be incapable of seeking to obtain any future commitments from the Government.

23.1 By submission of 30 May 1989, the author recalls that the Band has been pursuing its domestic claims through the Canadian courts for over 14 years, and that the nature of the claims and the judicial process involved is bound to draw out these proceedings for another 10 years. He submits that the State party does not dispute that court actions and negotiations undertaken to ensure the Band's livelihood have produced no results, and that court proceedings addressing the issues of land title and compensation would take years in resolution, if resolution ever occurred. It is pointed out that following the Band's refusal to endorse a settlement offer, which would force the Band to relinquish all rights to legal action involving a controversy with the State party in exchange for promises of future discussions between Canada and the Band, Canada terminated the negotiations. The author adds that: "Rather than continuing to seek a course of compromise and settlement, Canada has sent agents into non-native communities of northern Alberta, in the area immediately surrounding the traditional Lubicon territory." Working through a single individual who is said to retain some ties with the Band but who has not lived in the community for 40 years, these agents are said to try to induce other native individuals to strike their own private deals with the federal Government. Most of the individuals identified by the agents do not appear to be affiliated with any recognized aboriginal society.

23.2 In substantiation of earlier allegations, the author explains that the Band's loss of its economic base and the breakdown of its social institutions, including the transition from a way of life marked by trapping and hunting to a sedentary existence, has led to a marked deterioration in the health of the Band members:

"... the diet of the people has undergone dramatic changes with the loss of their game, their reliance on less nutritious processed foods, and the spectre of alcoholism, previously unheard of in this community and which is now

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overwhelming it. ... As a result of these drastic changes in the community's physical existence, the basic health and resistance to infection of community members has deteriorated dramatically. The lack of running water and sanitary facilities in the community, needed to replace the traditional systems of water and sanitary management, ... is leading to the development of diseases associated with poverty and poor sanitary and health conditions. This situation is evidenced by the astonishing increase in the number of abnormal births and by the outbreak of tuberculosis, affecting approximately one third of the community."

24.1 In a submission dated 20 June 1989, the State party concedes "that the Lubicon Lake Band has suffered a historical inequity and that they are entitled to a reserve and related entitlements". It maintains, however, that it has made offers to the Band which, if accepted, would enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency, and that its offer would provide an effective remedy to the violations of the Covenant alleged by the Band. However, a remedy of this nature cannot be imposed on the Band. The State party recalls that negotiations between the Lubicon Lake Band and senior government officials took place from November 1988 to January 1989; during the autumn of 1988, Chief Ominayak also met with the Prime Minister of Canada. It is submitted that the State party met virtually every demand of the author, either in full or to such an extent that equal treatment with other indigenous groups in Canada was approximated or exceeded. Thus, 95 square miles of land, mineral rights over 79 square miles, community facilities for each family living on the reserve, control over membership and an economic self-sufficiency package were offered in full to the Band. On the basis of a total of 500 Band members and a government package worth \$C 45 million (non-inclusive of mineral and land rights), this offer amounted to \$C 90,000 per person or almost \$C 500,000 for each family of five. A number of the Band's demands, such as a request for an indoor ice arena or a swimming pool, were refused.

24.2 According to the State party, the major remaining point of contention between the federal Government and the Band is a claim by the Band for \$C 167 million in compensation for economic and other losses allegedly suffered. In an endeavour to permit the resolution of the matters agreed on between the parties, the federal Government put forth a proposal that would enable the Band to accept the State party's offer in its entirety, while continuing to pursue their general claim for compensation in the Canadian courts. The State party rejects the contention that "virtually all items of any significance" in its offer "were left to future discussions", and contends that most of the Band's claims for land, mineral rights, community facilities, control over membership and an economic self-sufficiency package have been agreed to by the Government. Finally, the State party rejects the allegation that it negotiated in bad faith.

24.3 On procedural grounds, the State party indicates that, since the Committee's decision on admissibility, no clarifications have been put forward by the Committee to enable the State party to address specific allegations of violations of the Covenant. It therefore maintains that the proceedings have not progressed from the admissibility stage. It further submits that by acting within its jurisdiction and procedure, the Committee should (a) issue a ruling pursuant to rule 93,

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paragraph 4, indicating the outcome of its reconsideration of admissibility; (b) if finding the communication admissible, stipulate the articles and the evidence on which the finding is based; and (c) provide the federal Government with a six-month period during which to file its observations on the merits.

25. By interlocutory decision of 14 July 1989, the Human Rights Committee invited the State party to submit to the Committee any further explanations or statements relating to the substance of the author's allegations, in addition to its earlier submissions, not later than by 1 September 1989. The State party was again requested, pursuant to rule 86 of the rules of procedure and pending the Committee's final decision, to take measures to avoid damage to the author and the members of the Lubicon Lake Band.

26.1 In its reply to the interlocutory decision, dated 31 August 1989, the State party asserts that it is being denied due process, since the principles of natural justice require that a party be aware of the specific charge and evidence on which the accusations of the author of the communication are based. It claims that since it was never informed of the articles of the Covenant and the evidence in respect of which the communication was declared admissible, the principles of procedural fairness have not been respected, and that the federal Government remains prejudiced in its ability to respond to the Band's claim.

26.2 In respect of the alleged violations of articles 14, paragraph 1, and 26, the State party rejects as "totally unfounded" the claim that it failed to provide the Band with an independent and impartial tribunal for the resolution of its claims; the long tradition of impartiality and integrity of Canadian courts includes numerous cases won by aboriginal litigants. It is submitted that the Band has failed to adduce any evidence that would indicate that the judiciary acted any differently in proceedings concerning the Lubicon Lake Band. Furthermore, the State party claims that the responsibility for major delays in the resolution of the Band's court actions lies largely with the Band itself. Not only did the Band fail to take the necessary steps to move any of the actions it initiated forward and refuse to co-operate with the federal Government in the action it had initiated in an effort to resolve the matter, but, in addition, on 30 September 1988, the Band declared that it refused to recognize the jurisdiction of the Canadian courts, thus undermining any attempt to obtain a resolution through the judicial process.

26.3 The State party provides a detailed outline of the chronology of the judicial proceedings in the Band's case. Three court actions in respect of the Band remain outstanding. The first of these was initiated by the Band in the Federal Court of Canada against the federal Government. This action has not moved forward since 1981 although, according to the State party, it was the Band's responsibility to take the next step in this suit. The second action was initiated by the Band in the Alberta Court of Queen's Bench against the province and some private corporations. After the Band was denied an interim injunction in 1985, it did not take substantive steps in the proceedings and abandoned its appeal against the Court's refusal to add the federal Government as a party. The third action was initiated by the federal Government in May 1988 in an attempt to overcome jurisdictional wrangles, to bring both the provincial and federal Governments and the Band before the same courts, and to finally solve matters. The Band chose not

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to participate in this action, despite the efforts of the Chief Justice of the Court of Queen's Bench of Alberta to expedite matters - this action remains in abeyance. For the State party, each of the above court actions provides a vehicle by which the Band could resolve its claims.

26.4 In addition to judicial proceedings, the State party maintains, the federal Government has sought to settle matters with the Lubicon Lake Band by way of negotiation. Thus, the offers put forward during these negotiations (outlined in para. 24.1 above) met virtually all of the author's claim in full or to a large extent. The State party adds that a new round of negotiations has started and that "extensive efforts are being made in this regard". Discussions between the Band and the Alberta provincial government resumed on 23 August 1989, and further discussions with the federal Government were scheduled to start on 7 September 1989. The State party reiterates that its offer to the Band remains valid.

26.5 In respect of the determination of Band membership, the State party rejects as "completely incorrect" the Band's claim that "Canada has attempted to subject Lubicon Lake Band members to a retroactive application of the Canadian Indian Act as it stood prior to its amendment following the decision in Sandra Lovelace v. Canada". On the contrary, the State party submits, the Band submitted, in 1985, a membership code pursuant to the Indian Act (as amended following the Committee's decision in the Lovelace case), which was accepted by Canada and gave the Band total control over its membership. As a result, the federal Government's offer is based on the approximately 500 individuals considered by the Band leadership to be members of the Lubicon Lake community.

26.6 In respect of the alleged violations of articles 17 and 23, paragraph 1, 18 and 27, the State party rejects as inaccurate and misleading the Band's claim that "Canada is participating in a project by which virtually all traditional Lubicon lands have been leased for timber development". It points out that the Daishowa pulp mill, which is under construction north of Peace River, Alberta, is neither within the Band's claimed "traditional" lands nor within the area agreed to by the Band and the provincial government for a reserve. It is stated that the new pulp mill is located approximately 80 kilometres away from the land set aside for the Band. The State party continues:

"As regards the area available to the pulp mill to supply its operations, the forest management agreement between the province of Alberta and the pulp mill specifically excludes the land proposed for the Lubicon Lake Band. Moreover, in the interests of sound forest management practices, the area cut annually outside of the proposed Lubicon reserve will involve less than 1 per cent of the area specified in the forest management agreement."

26.7 Finally, the State party draws attention to recent developments in the Cadotte Lake/Buffalo Lake community, within which the majority of the Lubicon Lake Band members reside. In December 1988, the federal Government was informed of the existence of a new group within the community, which was seeking to solve the rights of its members under Treaty 8 independent of the Lubicon Lake Band. This group, composed of about 350 individuals, requested from the Government recognition of its status as the Woodland Cree Band. According to the State party, the group

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consists of Lubicon Lake Band members who formally expressed their intention of joining the new Band, former Lubicon Lake Band members whose names were removed by the Lubicon Lake Band in January 1989 from the list of Band members, and other native individuals living within the community. The federal Government agreed to the creation of the Woodland Cree Band. The State party adds that it recognizes the same legal obligations in respect of the Woodland Cree Band as it does in respect of the Lubicon Lake Band members.

26.8 In a further submission dated 28 September 1989, the State party refers to the tripartite negotiations between the federal Government, the provincial government and the Lubicon Lake Band, scheduled to take place at the end of August/early September 1989; it claims that although the Band had undertaken to provide a comprehensive counterproposal to the federal Government's outstanding offer and to provide a list of the persons it represented in the negotiations, it was informed, on 7 September 1989, that a counterproposal had not been prepared by the Band and that no list of the individuals purported to be represented by the Band would be forthcoming. The Band allegedly stated that it refused to negotiate in the presence of Mr. Ken Colby, a member of Canada's negotiating team, because of his activities as a government media spokesman. Thus, owing to the Band's refusal to continue a meaningful discussion of its claim, negotiations were not resumed.

27.1 In his comments of 2 October 1989 on the State party's reply to the Committee's interim decision, the author contends that the State party's claim of prejudice in conducting the case before the Human Rights Committee is unfounded, as all the factual and legal bases of the Band's claims have been thoroughly argued. As to whether domestic remedies continue to be available to the Band, it is pointed out that no domestic remedy exists which could restore the Lubicon Lake Band's traditional economy or way of life, which "has been destroyed as a direct result of both the negligence of the Canadian Government and its deliberate actions". The author submits that from the legal point of view, the situation of the Band is consistent with the Committee's decision in the case of Muñoz v. Peru, 1/ in which it was held that the concept of a fair hearing within the meaning of article 14, paragraph 1, of the Covenant necessarily entails that justice be rendered without undue delay. In that case, the Committee had considered a delay of seven years in the domestic proceedings to be unreasonably prolonged. In the case of the Band, the author states, domestic proceedings were initiated in 1975. Furthermore, although the Band petitioned the federal Government for a reserve for the first time in 1933, the matter remains unsettled. According to the Band, it was forced to bring 14 years of litigation to an end, primarily because of two decisions that effectively deny the Band an opportunity to maintain aboriginal rights claim against the federal Government. Thus, in 1986, the Supreme Court of Canada denied federal court jurisdiction in aboriginal rights cases arising within provincial boundaries in the Joe case. In the light of that decision, the Band requested the Alberta courts, in 1987, to include the federal Government as a necessary party in the Band's aboriginal rights claim; this request was opposed by the federal Government. In May 1988, the federal Government instituted proceedings, which, in the author's opinion, were intended to persuade the Alberta Court of Queen's Bench that the Band merely had treaty-based rights to 40 square miles of land. It is submitted that a favourable decision would, for the Government, virtually clear the title to the Daishowa timber leases, encompassing nearly all of the traditional

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Lubicon territory, while not rendering "moot issues related to [the] destruction of the Band's economic base". The author submits that the Chief Justice of the Court of Queen's Bench recognized that aboriginal rights had to be determined before any decision on the issue of treaty rights, and that if the State party had wanted the courts to truly settle the Lubicon land issue, rather than using them so as to forestall any efforts to solve the matter, it would have referred the issue directly to the Supreme Court of Canada.

27.2 As to the State party's reference to a negotiated settlement, the author submits that the offer is neither equitable nor does it address the needs of the Lubicon community, since it would leave virtually all items of any significance to future discussions, decisions by Canada, or applications by the Band; and that the Band would be required to abandon all rights to present any future domestic and international claims against the State party, including its communication to the Human Rights Committee. The author further submits that the agreement of October 1988 between the Band and the Province of Alberta does not in the least solve the Band's aboriginal land claims, and that the State party's characterization of the agreement has been "deceptive". In this context, the author argues that, contrary to its earlier representations, the State party has not offered to implement the October 1988 agreement and that if it were willing to honour its provisions, several issues including the question of just compensation would have to be settled.

27.3 In substantiation of his earlier submissions concerning alleged violations of articles 14 and 26, the author claims that the State party has not only failed to provide the Band equal protection vis-à-vis non-Indian groups, but that it also attempted to deny it equal protection vis-à-vis other Indian bands. Thus, with respect to the issue of Band membership, the author alleges, the effect of the formula proposed by Canada in 1986 for determining Band membership would deny aboriginal rights to more than half of the Lubicon people, thereby treating the Band members in an unequal and discriminatory way in comparison with the treatment of all other native people. It is submitted that as late as December 1988, the State party sought to apply to the Band criteria that were those of the legislation prior to the Human Rights Committee's views in the case of Lovelace v. Canada, 2/ which legislation was found to be contrary to article 27 of the Covenant.

27.4 With respect to the alleged violations of articles 17, 18, 23 and 27, the author reiterates that the State party has sought to distort the presentation of recent events and engaged in a misleading discussion of the Daishowa timber project, so as to divert the Committee's attention from "Canada's knowing and wilful destruction of Lubicon society". He recalls that only seven months after the Committee's request for interim protection under rule 86, virtually all of the traditional Lubicon land was leased for commercial purposes in connection with the Daishowa timber project. The relevant forest management agreement to supply the new pulp mill with trees, allegedly completely covers the traditional Lubicon hunting and trapping grounds, which cover 10,000 square kilometres, with the exception of 65 square kilometres set aside but never formally established as a reserve. It is submitted by the author that Canada has acted in violation of the Committee's request for interim protection when it sold the timber resources of the 10,000 square kilometres, allegedly traditionally used by the Band and never ceded by it, to a Japanese company. Moreover, Canada is alleged to portray wrongly the

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impact of the Daishowa project as minimal; the author points out that current production plans would call for the cutting of 4 million trees annually, and that plans to double the envisaged annual production of 340,000 metric tons of pulp in three years have recently been announced. This economic activity, if proceeding unabated, would, in the author's opinion, continue to destroy the traditional lifeground of the Lubicon community. He submits that the fact that the 95 square miles set aside under the October 1988 agreement are relatively intact would be irrelevant, since the game on which the Band members have traditionally depended for their livelihood has already been driven out of the entire 10,000 square kilometre area.

27.5 Finally, the author submits that the State party's creation of the "Woodland Cree Band", through which it is allegedly attempting to "fabricate" a competing claim to traditional Lubicon lands, places the State party in further violations of articles 1, 26 and 27 of the Covenant. In this context, the author claims that the Woodland Cree Band is:

"a group of disparate individuals drawn together by Canada from a dozen different communities scattered across Alberta and British Columbia, who have no history as an organized aboriginal society and no relation as a group to the traditional territory of the Lubicon Lake Band [and that it] is Canada's most recent effort to undermine the traditional Lubicon society and to subvert Lubicon land rights."

The author adds that the federal Government has supported the Woodland Cree Band both financially and legally, recognizing it "with unprecedented dispatch", thereby bypassing more than 70 other groups, including six different homogenous Cree communities in northern Alberta that had been awaiting recognition as bands for over 50 years. Some of the alleged members of the "Woodland Cree" band are said to come from these very communities. The author refers to section 17 of the Indian Act, which gives the Canadian Indian Affairs Minister the power to constitute bands and to determine that "such portion of the reserve land and funds of the existing Band as the Minister determines" may be earmarked for the benefit of the new band. It is submitted by the author that the powers conferred under section 17 of the Indian Act are "extraordinary and unconstitutional" and that they have been invoked "in order to create [the] 'Woodland Cree Band' and to dispossess the Lubicon Lake Band of its traditional territory and culture". Furthermore, while the State party claims that the Woodland Cree Band represents some 350 individuals, the authors alleges that the new Band has steadfastly refused to release the names of its members, so that its claims might be verified. He states that the federal Government has recognized that the Woodland Cree Band members comprise only 110 individuals.

27.6 The author concludes that the State party has been unable to refute his allegations of violations of articles 2, 6, paragraph 1, 7, 14, paragraph 1, 17, 18, paragraph 1, 23, paragraph 1, 26 and 27, as set out in his submissions of 12 January 1988 and 30 May 1989, and requests the Committee to find against the State party in respect of these articles. In respect of an alleged violation of article 1, he points out that while he has, as the representative of the Band, signed all the submissions to the Committee, he merely acts in his capacity as a duly elected representative of the Band and not on his own behalf. In this

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context, he notes that while article 2 of the Optional Protocol provides for the submission of claims to the Committee by individuals, article 1 of the Covenant guarantees "all peoples ... the right of self-determination". He adds that "if the Committee determines that an individual submitting a claim on behalf of a group, in compliance with the provisions of article 2 of the Optional Protocol, may not state a case on behalf of that group under article 1 of the Covenant, the Committee effectively has determined that the rights enumerated in article 1 of the Covenant are not enforceable". The author further adds that it "clearly could not be the intent of the Committee to reach such a result" and that "therefore, the Band respectfully submits that as a people, represented by their duly elected leader, Chief Bernard Ominayak, the Lubicon Lake Band has been the victim of violations by the federal Government of Canada of the Band's rights as enumerated in article 1 of the Covenant on Civil and Political Rights".

28.1 In a final submission dated 8 November 1989, the State party recalls that in any assessment of the judicial proceedings in the case of the Lubicon Lake Band, the State party's constitutional division of powers between the federal and provincial governments and the respective jurisdiction of the courts has to be borne in mind. Where provincially owned lands are claimed, as in the case of the Lubicons, the Supreme Court of Canada has held that claims must be filed in the provincial courts against provincial governments. The Supreme Court's ruling clearly defines, the State party submits, the proper judicial forum for the Band's claim to aboriginal land rights. The State party emphasizes that the failure of the Band's representatives to initiate proceedings in the competent courts does not imply that Canadian courts are either unable or unwilling to guarantee a fair hearing in the case.

28.2 Regarding the distinction between aboriginal rights and treaty rights, the State party explains that under Canadian constitutional law, aboriginal rights may be superseded by treaty rights. Whenever this occurs, Indian bands may claim benefits under the superseding treaties. The State party acknowledges that the Lubicon Lake Band has a valid claim to benefits under Treaty 8, which was entered into with the Cree and other Indians in the Province of Alberta in 1899. Rights under Treaty 8 formed the basis of the offers made by the Canadian and Albertan governments to the Band. The land offered by the provincial government under the October 1988 agreement is related to these Treaty provisions. On the other hand, the 10,000 square kilometre area referred to by the Band in its submissions relate to its aboriginal claims, which have not been recognized by the federal Government. The Band's complaint about oil exploration and exploitation and impending timber development, refers to activities on this wider territory of 10,000 square kilometres - not on lands that were identified in proposed settlements between the Band and the federal and provincial government.

28.3 The State party refutes the Band's claim that its trapping and hunting lifestyle has been irretrievably destroyed and points out that in areas covered by timber leases the forest, generally, remains intact and sustains an animal population sufficient to satisfy those members of the Lubicon Lake Band who wish to engage in traditional activities. It adds that disturbances of the forest ecosystems usually result in an increase of the population of larger mammals, as they increase food availability in open areas.

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28.4 Lastly, the State party reaffirms the voluntary nature of the establishment of the Woodland Cree Band. It points out that a minority of those wishing to join the Woodland Cree Band were at one point in time full members of the Lubicon Lake Band. Some of them, the State party points out, have since left the Band voluntarily, while about 30 of the members were expelled recently by decision of the Lubicon Lake Band. It is submitted that members of the Woodland Cree Band petitioned the federal Government, much in the same way as members of the Lubicon Lake Band did prior to the Band's recognition in the 1930s. The new Band was recognized because, in the State party's view, some of its members have land entitlements pursuant to Treaty 8 which they wish to assert. The State party adds that it recognized the Woodland Cree Band, at the express request of those who sought recognition, so that their desire to form a community could be realized, and that the Woodland Cree Band has not sought any land portions also claimed by the Lubicons.

#### Summary of the submissions

29.1 At the outset, the author's claim, although set against a complex background, concerned basically the alleged denial of the right of self-determination and the right of the members of the Lubicon Lake Band to dispose freely of their natural wealth and resources. It was claimed that, although the Government of Canada, through the Indian Act of 1970 and Treaty 8 of 1899, had recognized the right of the Lubicon Lake Band to continue its traditional way of life, its land (approximately 10,000 square kilometres) had been expropriated for commercial interest (oil and gas exploration) and destroyed, thus depriving the Lubicon Lake Band of its means of subsistence and enjoyment of the right of self-determination. It was claimed that the rapid destruction of the Band's economic base and aboriginal way of life had already caused irreparable injury. It was further claimed that the Government of Canada had deliberately used the domestic political and legal processes to thwart and delay all the Band's efforts to seek redress, so that the industrial development in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people. The author has stated that the Lubicon Lake Band is not seeking from the Committee a territorial rights decision, but only that the Committee assist it in attempting to convince the Government of Canada: (a) that the Band's existence is seriously threatened; and (b) that Canada is responsible for the current state of affairs.

29.2 From the outset, the State party has denied the allegations that the existence of the Lubicon Lake Band has been threatened and has maintained that continued resource development would not cause irreparable injury to the traditional way of life of the Band. It submitted that the Band's claim to certain lands in northern Alberta was part of a complex situation that involved a number of competing claims from several other native communities in the area, that effective redress in respect of the Band's claims was still available, both through the courts and through negotiations, that the Government had made an ex gratia payment to the Band of \$C 1.5 million to cover legal costs and that, at any rate, article 1 of the Covenant, concerning the rights of people, could not be invoked under the Optional Protocol, which provides for the consideration of alleged violations of individual rights, but not collective rights conferred upon peoples.

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29.3 This was the state of affairs when the Committee decided in July 1987 that the communication was admissible "in so far as it may raise issues under article 27 or other articles of the Covenant". In view of the seriousness of the author's allegations that the Lubicon Lake Band was at the verge of extinction, the Committee requested the State party, under rule 86 of the rules of procedure "to take interim measures of protection to avoid irreparable damage to [the author of the communication] and other members of the Lubicon Lake Band".

29.4 Insisting that no irreparable damage to the traditional way of life of the Lubicon Lake Band had occurred and that there was no imminent threat of such harm, and further that both a trial on the merits of the Band's claims and the negotiation process constitute effective and viable alternatives to the interim relief which the Band had unsuccessfully sought in the courts, the State party, in October 1987, requested the Committee, under rule 93, paragraph 4, of the rules of procedure, to review its decision on admissibility, in so far as it concerns the requirement of exhaustion of domestic remedies. The State party stressed in this connection that delays in the judicial proceedings initiated by the Band were largely attributable to the Band's own inaction. The State party further explained its longstanding policy to seek the resolutions of valid, outstanding land claims by Indian bands through negotiations.

29.5 Since October 1987, the parties have made a number of submissions, refuting each others statements as factually misleading or wrong. The author has accused the State party of creating a situation that has directly or indirectly led to the death of many Band members and is threatening the lives of all other members of the Lubicon community, that miscarriages and stillbirths have skyrocketed and abnormal births have risen from zero to near 100 per cent, all in violation of article 6 of the Covenant; that the devastation wrought on the community constitutes cruel, inhuman and degrading treatment in violation of article 7; that the bias of the Canadian courts has frustrated the Band's efforts to protect its land, community and livelihood, and that several of the judges have had clear economic and personal ties to the parties opposing the Band in the court actions, all in violation of articles 14, paragraph 1, and 26; that the State party has permitted the destruction of the families and homes of the Band members in violation of articles 17 and 23, paragraph 1; that the Band members have been "robbed of the physical realm to which their religion attaches" in violation of article 18, paragraph 1; and that all of the above also constitutes violations of article 2, paragraphs 1 to 3, of the Covenant.

29.6 The State party has categorically rejected the above allegations as unfounded and unsubstantiated and as constituting an abuse of the right of submission. It submits that serious and genuine efforts continued in early 1988 to engage representatives of the Lubicon Lake Band in negotiations in respect of the Band's claims. These efforts, which included an interim offer to set aside 25.4 square miles as reserve land for the Band, without prejudice to negotiations or any court actions, failed. According to the author, all but the 25.4 square miles of the Band's traditional lands had been leased out, in defiance of the Committee's request for interim measures of protection, in conjunction with a pulp mill to be constructed by the Daishowa Canada Company Ltd. near Peace River, Alberta, and that the Daishowa project frustrated any hopes of the continuation of some traditional activity by Band members.

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29.7 Accepting its obligation to provide the Lubicon Lake Band with reserve land under Treaty 8, and after further unsuccessful discussions, the Federal Government, in May 1988, initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band, in an effort to provide a common jurisdiction and thus to enable it to meet its lawful obligations to the Band under Treaty 8. In the author's opinion, however, this initiative was designated for the sole purpose of delaying indefinitely the resolution of the Lubicon land issues and, on 6 October 1988 (30 September, according to the State party), the Lubicon Lake Band asserted jurisdiction over its territory and declared that it had ceased to recognize the jurisdiction of the Canadian courts. The author further accused the State party of "practicing deceit in the media and dismissing advisors who recommend any resolution favourable to the Lubicon people".

29.8 Following an agreement between the provincial government of Alberta and the Lubicon Lake Band in November 1988 to set aside 95 square miles of land for a reserve, negotiations started between the federal Government and the Band on the modalities of the land transfer and related issues. According to the State party, consensus had been reached on the majority of issues, including Band membership, size of the reserve, community construction and delivery of programmes and services, but not on cash compensation, when the Band withdrew from the negotiations on 24 January 1989. The formal offer presented at that time by the federal Government amounted to approximately \$C 45 million in benefits and programmes, in addition to the 95 square mile reserve.

29.9 The author, on the other hand, states that the above information from the State party is not only misleading but virtually entirely untrue and that there had been no serious attempt by the Government to reach a settlement. He describes the Government's offer as an exercise in public relations, "which committed the Federal Government to virtually nothing", and states that no agreement or consensus had been reached on any issue. The author further accused the State party of sending agents into communities surrounding the traditional Lubicon territory to induce other natives to make competing claims for traditional Lubicon land.

29.10 The State party rejects the allegation that it negotiated in bad faith or engaged in improper behaviour to the detriment of the interests of the Lubicon Lake Band. It concedes that the Lubicon Lake Band has suffered a historical inequity, but maintains that its formal offer would, if accepted, enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency and, thus, constitute an effective remedy. On the basis of a total of 500 Band members, the package worth \$C 45 million would amount to almost \$C 500,000 for each family of five. It states that a number of the Band's demands, including an indoor ice arena or a swimming pool, had been refused. The major remaining point of contention, the State party submits, is a request for \$C 167 million in compensation for economic and other losses allegedly suffered. That claim, it submits, could be pursued in the courts, irrespective of the acceptance of the formal offer. It reiterates that its offer to the Band stands.

29.11 Further submissions from both parties have, *inter alia*, dealt with the impact of the Daishowa pulp mill on the traditional way of life of the Lubicon Lake Band. While the author states that the impact would be devastating, the State party

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maintains that it would have no serious adverse consequences, pointing out that the pulp mill, located about 80 kilometres away from the land set aside for the reserve, is not within the Band's claimed traditional territory and that the area to be cut annually, outside the proposed reserve, involves less than 1 per cent of the area specified in the forest management agreement.

30. The Human Rights Committee has considered the present communication in the light of the information made available by the parties, as provided for in articles 5, paragraph 1, of the Optional Protocol. In so doing, the Committee observes that the persistent disagreement between the parties as to what constitutes the factual setting for the dispute at issue has made the consideration of the claims on the merits most difficult.

#### Request for a review of the decision on admissibility

31.1 The Committee has seriously considered the State party's request that it review its decision declaring the communication admissible under the Optional Protocol "in so far as it may raise issues under article 27 or other articles of the Covenant". In the light of the information now before it, the Committee notes that the State party has argued convincingly that, by actively pursuing matters before the appropriate courts, delays, which appeared to be unreasonably prolonged, could have been reduced by the Lubicon Lake Band. At issue, however, is the question of whether the road of litigation would have represented an effective method of saving or restoring the traditional or cultural livelihood of the Lubicon Lake Band, which, at the material time, was allegedly at the brink of collapse. The Committee is not persuaded that that would have constituted an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. In the circumstances, the Committee upholds its earlier decision on admissibility.

31.2 At this stage, the Committee must also state that it does not agree with the State party's contention that it was remiss in not spelling out, at the time of declaring the communication admissible, which of the author's allegations deserved consideration on the merits. Although somewhat confusing at times, the author's claims have been set out sufficiently clearly as to permit both the State party and the Committee, in turn, to address the issues on the merits.

#### Articles of the Covenant alleged to have been violated

32.1 The question has arisen of whether any claim under article 1 of the Covenant remains, the Committee's decision on admissibility notwithstanding. While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a "people" is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. There is, however, no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.

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32.2 Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27. The Committee recognizes that the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. Sweeping allegations concerning extremely serious breaches of other articles of the Covenant (6, 7, 14, para. 1, and 26), made after the communication was declared admissible, have not been substantiated to the extent that they would deserve serious consideration. The allegations concerning breaches of articles 17 and 23, paragraph 1, are similarly of a sweeping nature and will not be taken into account except in so far as they may be considered subsumed under the allegations which, generally, raise issues under article 27.

32.3 The most recent allegations that the State party has conspired to create an artificial band, the Woodland Cree Band, said to have competing claims to traditional Lubicon land, are dismissed as an abuse of the right of submission within the meaning of article 3 of the Optional Protocol.

#### Violations and the remedy offered

33. Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant.

#### Notes

1/ Communication No. 203/1986, final views adopted on 4 November 1988, para. 11.3.

2/ Communication No. 24/1977, final views adopted on 30 July 1981.

APPENDIX I

Individual opinion: submitted by Mr. Nisuke Ando pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's Views on communication No. 167/1984, A. Ominayak and the Lubicon Lake Band v. Canada

I do not oppose the adoption of the Human Rights Committee's views, as they may serve as a warning against the exploitation of natural resources which might cause irreparable damage to the environment of the earth that must be preserved for future generations. However, I am not certain if the situation at issue in the present communication should be viewed as constituting a violation of the provisions of article 27 of the Covenant.

Article 27 stipulates: "In those States in which ethnic, religious or linguistic minorities exists, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". Obviously, persons belonging to the Lubicon Lake Band are not denied the right to profess and practice their own religion or to use their own language. At issue in the present communication is therefore, whether the recent expropriation by the Government of the Province of Alberta of the Band's land for commercial interest (e.g. leases for oil and gas exploration) constitutes a violation of those persons' right "to enjoy their own culture".

It is not impossible that a certain culture is closely linked to a particular way of life and that industrial exploration of natural resources may affect the Band's traditional way of life, including hunting and fishing. In my opinion, however, the right to enjoy one's own culture should not be understood to imply that the Band's traditional way of life must be preserved intact at all costs. Past history of mankind bears out that technical development has brought about various changes to existing ways of life and thus affected a culture sustained thereon. Indeed, outright refusal by a group in a given society to change its traditional way of life may hamper the economic development of the society as a whole. For this reason I would like to express my reservation to the categorical statement that recent developments have threatened the life of the Lubicon Lake Band and constitute a violation of article 27.

Nisuke Ando

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APPENDIX II

Individual opinion: submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's views on communication No. 167/1984, B. Ominayak and the Lubicon Lake Band v. Canada.

The communication in its present form essentially concerns the authors' rights to freely dispose of their natural wealth and resources, and to retain their own means of subsistence, such as hunting and fishing. In its decision of 22 July 1987, the Human Rights Committee decided that the communication was admissible in so far as it could have raised issues under article 27 or other articles of the Covenant. With respect to provisions other than article 27 the authors' allegations have remained, however, of such a sweeping nature that the Committee has not been able to take them into account except in so far as they maybe subsumed under the claims which, generally, raise issues under article 27. That is the basis of my individual opinion.

Since the Committee adopted its decision on admissibility, discussions seeking a resolution of the matter have taken place between the Federal Government, the Province of Alberta and the authors. As no progress was made towards a settlement, the Federal Government initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band on 17 May 1988, in order to enable Canada to meet its legal obligations vis-à-vis the authors under Treaty 8. The Statement of Claim, initiating the legal action, seeks from the Court of Queen's Bench of Alberta (a) a declaration that the Lubicon Lake Band is entitled to a reserve and (b) a determination of the size of that reserve.

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On 9 June 1988, the Lubicon Lake Band filed a Statement of Defence and Counterclaim. In this connection, the State party has submitted that the issue forming the basis of the domestic dispute as well as the basis of the communication before the Human Rights Committee concerns the extent of the territory to be set aside as a reserve, and related issues. It is not altogether clear that all issues which may be raised under article 27 of the Covenant are issues to be considered by the Court of Queen's Bench of Alberta in the case still pending before it. At the same time, it does appear that issues under article 27 of the Covenant are inextricably linked with the extent of the territory to be set aside as a reserve, and questions related to those issues.

The rationale behind the general rule of international law that domestic remedies should be exhausted before a claim is submitted to an instance of international investigation or settlement is primarily to give a respondent State an opportunity to redress, by its own means within the framework of its domestic legal system, the wrongs alleged to have been suffered by the individual. In my opinion, this rationale implies that, in a case such as the present one, an international instance shall not examine a matter pending before a court of the respondent State. To my mind, it is not compatible with international law that an international instance consider issues which, concurrently, are pending before a national court. An instance of international investigation or settlement must, in my opinion, refrain from considering any issue pending before a national court until such time as the matter has been adjudicated upon by the national courts. As that is not the case here, I find the communication inadmissible at this point in time.

Bertil Wennergren



Indian and Northern  
Affairs Canada

Affaires indiennes  
et du Nord Canada

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April 4, 1990

Your file    Votre référence

Our file    Notre référence

Mr. Dan Livermore  
Human Rights and Social Affairs  
Department of External Affairs  
Third Floor, Tower "A"  
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OTTAWA, Ontario

ACC	DATE
653279	
FILE	ISSUE
45-CDA-13, 1-3-Lubicon	
LOC	
C7-	Lake Band

U.N. Human Rights Committee  
Decision on Lubicon and Mikmaq Complaints

Attached for your information is a revised communications plan for the HRC decision on Lubicon and Mikmaq complaints.

Please provide comments to me as soon as possible.

R.E. Cardinal  
Director General  
Communications Branch  
(819) 997-9885

SECRET

COMMUNICATIONS PLAN  
PROSPECTIVE U.N. HUMAN RIGHTS COMMITTEE FINDING

ISSUE

The United Nations International Human Rights Committee (HRC) expected decisions on Lubicon Lake and Mikmaq Tribal Society complaints.

BACKGROUND

The United Nations' International Covenant on Civil and Political Rights came into force in 1976. It defines in more detail, many of the Rights of the Universal Declaration of Human Rights. The parties to the Covenant agree that the rights recognized in the Covenant apply without discrimination to all individuals in its territory. The Covenant guarantees, among other things, the right to life, freedom of thought, conscience, and religion, the right to vote, equality before the law, and the protection of minorities.

Canada is one of 90 United Nations countries which has ratified the International Covenant on Civil and Political Rights, and one of 49 countries which has ratified its Optional Protocol. The Optional Protocol allows individuals, who have exhausted domestic remedies, to submit communications alleging violations by these state parties of any of the rights set forth in the Covenant.

Countries are expected to respond to these charges. These communications are reviewed by eighteen members of the United Nations Human Rights Committee, who sit as independent experts on human rights matters.

While these proceedings are supposed to be confidential, the HRC's rulings on admissibility and its final decisions are made public. Although countries are expected to act on decisions which are found against them, the HRC's power is more one of moral persuasion, through pronouncing on issues brought before it. The HRC has no power to force a state party to implement or enforce its recommendations.

The Human Rights Committee is expected to rule during the first week of April, on two issues:

- a complaint by the Lubicon Lake Indian Band that Canada has contravened the Band's human rights by failing to provide a settlement to its land claim, and

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- a request by the Mikmaq Tribal Society that the HRC consider a complaint that its right to self-determination was infringed when the Prime Minister did not invite it to the First Ministers' Conference on aboriginal rights in 1987.

In the case of the Lubicon complaint, the UN may decide that Canada has violated the band's human rights to varying degrees of severity, or it may rule that its human rights were not violated. In the case of the Mikmaq, the HRC may decide that the Grand Chief has a valid complaint which bears HRC investigation, or that he does not.

#### OBJECTIVE OF THE COMMUNICATIONS PLAN

- To assure Canadians that the Government is sensitive to the human rights of Indian people and is taking necessary steps to ensure that they are respected;
- To assure the international community that Canada respects the human rights of Indian people.

#### STRATEGIC CONSIDERATIONS

##### a. Current Public Opinion on Native Issues

Current public opinion research on native issues indicates two things:

- Native issues rank fairly low in terms of "top of mind" concerns among most Canadians. They rank higher in those regions of the country, especially the Western provinces, that have larger native populations.
- Public opinion is quite divided on whether or not Indian people are fairly treated by Canadian society. In terms of native justice, there is an overwhelming belief that natives are victims of discrimination.

On the other hand, the question of native land claim settlements sees greater division of public opinion. An October 1989 Angus Reid national poll showed about 55 per cent of respondents felt natives are fairly or too generously dealt with in land claim settlements, while 34 per cent felt their treatment was unfair. The highest percentage of respondents claiming settlements were "generous" or "too generous" (30%) was in Alberta, while the greatest number believing natives are unfairly treated (41%) was in Quebec.

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a. Status of the Lubicon Lake Claim

The Lubicon Lake Band has taken a number of public relations initiatives with varying degrees of success, in order to further its claim against Canada. The appeal to the UN Human Rights Committee is one of these.

Meaningful negotiations between Canada and the Lubicon Lake Band first took place from November 1988 to January 1989. The Canadian government met virtually all of the band's demands, either in full or to the extent that equal treatment with other Canadian bands was approximated or exceeded. Ninety-five square miles of land, mineral rights on 79 square miles, community facilities for each family living on the reserve (including housing, water and sewage services, electrification, roads and a school), and an economic self-sufficiency package valued at \$10.2 million were offered in full to the Band. On the basis of 100 on-reserve families (Band estimate) and a government package worth a total of \$45 million (non-inclusive of land and mineral rights), this offer amounted to the equivalent of \$450 thousand per family.

The only major point of contention remaining between the Government and the Band was a claim by the Band for approximately \$167 million in compensation for economic and other losses allegedly suffered. In an attempt to permit resolution of the matters agreed upon between the parties, the Government of Canada put forward a proposal that would, by its express terms, enable the Band to accept Canada's offer in its entirety and still pursue the claim for general compensation within the ambit of Treaty 8 which it has had in the Canadian courts since 1980.

In the following months, the Band made two inaccurate but persistent arguments: the offer, as written, did not clearly leave the right to sue, and the \$10.2 million for economic development included \$5 million in projects which require regular program approval by the department.

On September 8, 1989, Canada clarified its offer by way of letter to expressly reserve for the Band its right to sue for compensation, and to provide \$10 million in cash to the Band for economic development purposes. Thus, the two major perceived inadequacies in Canada's offer have been fully addressed.

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In August 1989, the Minister recognized a new band -- the Woodland Cree Indian Band, following petitions by some 360 individual native people in the Little Buffalo and Cadotte Lake regions, approximately 100 of whom had been claimed as members by the Lubicon Lake Band. The new band has been characterized by some media and the Lubicon leadership as a tool created by the Federal Government to undermine the current Lubicon membership. The fact is that there is significant dissatisfaction among the Lubicon membership, to the point where a number of members asked the Minister to allow them to form their own band and negotiate separately. (Those negotiations resulted in the signing of an Agreement in Principle between Canada and the Woodland Cree Band on March 26, 1990.)

In a letter dated December 6, 1989, to the Prime Minister of Canada, Chief Ominayak of the Lubicon Lake Band asked that all negotiations to date be set aside and demanded \$170 million from the governments of Canada and Alberta to settle the claim.

In the public's perception, the issue is now money and the response to the band has been largely unsympathetic. The Band now appears to be trying to move public perception toward issues of fairness related to its alleged inability to receive a fair hearing in Canada. This is supported by recent public statements of the Chief and his most recent letter of February 10, 1990 to the Prime Minister. The Band is positioning itself to take maximum advantage of a U.N. ruling in its ongoing efforts to pressure governments into a larger settlement.

The Band's strategy has been to pursue a settlement well beyond what a court likely would consider, through public relations activity. It seems certain the Band will attempt to portray a U.N. decision in its favour as a complete vindication of its position and an endorsement of its claims. It is also likely the Band will attempt to use any U.N. ruling to raise negotiations to the ministerial or prime ministerial levels.

#### Mandate of Government Negotiators On Lubicon Lake

The negotiating mandate has been defined as reaching a settlement without setting an unacceptable precedent or trampling on policy. The current offer to the Band represents the full extent of the negotiating mandate, approved by the Minister of Finance and the Cabinet. In the absence of authority to increase it - an invitation to resume negotiations must be couched in terms that do not generate an expectation that Canada is willing to consider significant improvements in its offer.

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If Canada's resolve appears wavering or its responses incoherent, the Band will draw encouragement and continue its international publicity efforts, while seeking resolution at the highest political level. The negotiating team emphasizes that the Band has acted, and likely will continue to act, in bad faith.

### Media Reaction

The Lubicon issue is of interest primarily to the Western media at present, though there has been a fair amount of national media interest from time to time. In general, the media is sympathetic to the Lubicon case -- the "politics of guilt" at work.

The Quebec media - particularly Radio Canada - are attracted to any "international" aspect and seem particularly concerned about Canada's reputation in Europe. It seems likely a U.N. ruling will attract French-language coverage in Quebec, as well as attention from the English national media.

### b. Status of the Mikmaq Complaint

The Mikmaq complaint is a step behind the Lubicon complaint, in that the HRC has yet to decide whether it is admissible.

The decision on the claim will be of some interest to the media because Grand Chief Donald Marshall, Senior, the complainant, is the father of Donald Marshall, who was recently found to have been incarcerated for 11 years for a murder he did not commit. The Grand Chief has been prominently and sympathetically portrayed in the media in recent months as the victim of a cruel and unfair white society. Nevertheless, because the complaint, if ruled admissible, will be subject to further HRC examination -- a process which is confidential, the government will quite properly decline to comment on the substance of Grand Chief Marshall's concerns.

### COMMUNICATIONS THEMES

A set of Ministerial Statements, as well as questions and answers on both cases is attached as Appendix A. These deal with the federal response in the case of each potential scenario. However, in general, the theme of the government's communications, especially with respect to the Lubicon case, which is the only one which can be substantively commented upon will be:

.../6

- 6 -

- the U.N. finding is a confirmation of Canada's stated position that we have an obligation to the Lubicons and that we ought to and indeed are doing everything we reasonably can to discharge it.
- (in case of a finding for the Lubicons) emphasize that the U.N. finding is not a blanket endorsement of the Lubicon claim nor is it a demand for a blank cheque from Canada.
- the government is being both fair and firm and firm in its dealings with the Lubicons.
- Canada has never left the table. Our offer provides the land the Lubicon wanted and sufficient funds to remedy the social and economic needs of the Lubicons. It allows the Band to continue to pursue the additional \$167 million in compensation which it feels it deserves in the courts.

(c) Spokespersons

Questions regarding international issues and the United Nations Human Rights Committee will be handled by External Affairs (Minister's Office or the Press Office).

Questions on the human right process will be referred to the Senior General Counsel, Human Rights Law Section of the Department of Justice, and the substance of domestic aboriginal matters will be dealt with by the Department of Indian Affairs and Northern Development. Specific questions on the status of the Lubicon Lake Band and the Woodland Cree Band will be referred to Assistant Negotiator Ken Colby, in Calgary. French-language questions on these claims will be referred to DIAND's Director General of Public Affairs.

See Appendix B for names and phone numbers.

COMMUNICATIONS STRATEGY ON HRC ANNOUNCEMENT

There is likely to be media interest in the UN announcement. If it goes in favour of the Lubicon complaint, the Lubicon leadership will in all likelihood call a news conference or issue a statement. Media will seek a federal reaction to such an initiative. If the announcement is made on a day when the House of Commons sits, it is likely that Ministers will be asked a question in the House. In that case, the text of the Ministers' reply will constitute the federal reaction.

.../7

- 7 -

If there is no possibility of a statement in the House, a statement will be issued jointly by the Secretary of State for External Affairs and the Minister of Indian Affairs and Northern Development along the lines of the attached Questions and Answers. Requests for interviews will be handled by the appropriate spokespersons.

#### EVALUATION

The DIAND Communications Branch will carry out media monitoring and analysis to assess the effectiveness of the communications strategy.

## STATEMENTS FOR MINISTERS

### Positive for Canada on Lubicon

- o We are pleased that the HRC agrees that Canada has not infringed Chief Ominayak's rights, under the International Covenant on Civil and Political Rights. With this decision by the HRC, the resolution of the matter clearly rests with Canada and the Chief, on behalf of the Lubicon.
- o Canada believes that its offer to the Lubicon is a fair one and, as we have said on several occasions, Canada is prepared to meet again with the Lubicon Lake Band to fine-tune the offer.
- o We cannot, however, impose what the Band will not accept but sincerely hope that the Band will decide that the offer is indeed reasonable and fair and accept it.

### Negative against Canada on Lubicon

- o Canada is disappointed that the HRC has found that Canada has infringed on Chief Ominayak's rights, under the International Covenant on Civil and Political Rights, and does not share our view that domestic remedies are available and have not been exhausted. The effect of this decision is to encourage negotiations such as we have been supporting all along.
- o We have already told the HRC that the Lubicon are entitled to a reserve and to a reasonable standard of living and access to economic opportunities, and to that end, most regular programs and services are available to the band members.
- o Canada has made a fair offer, but we cannot impose what the Band will not accept. If the Lubicon wish to fine-tune a settlement along these lines, we invite them to return to the table. If they wish to pursue their case through the courts, they are free to do so.

### Positive for Canada on Mikmaq

- o We are pleased that the HRC has found that Grand Chief Donald Marshall's complaint, under the International Covenant on Civil and Political Rights, does not warrant further HRC

consideration.

- o Our position is that it is, quite properly, the prerogative of the Prime Minister to determine suitable representatives to be invited to participate in FMCs.
- o National representatives of Canada's aboriginal peoples have been invited to, and have participated actively in, constitutional conferences convened by the Prime Minister on matters that directly affect them.

Negative against Canada on Mikmaq

- o Canada is disappointed that the HRC has found that Grand Chief Marshall's complaint is admissible and warrants further examination by the HRC. Canada certainly believes that reasonable processes and remedies are available domestically to address the Grand Chief's concerns.
- o While Canada will, of course, be responding to the HRC on the merits of the complaint, further comment would not be appropriate at this time owing to the confidential nature of the HRC process.

Both Positive for Canada

- o Canada is pleased that the HRC has found that Canada has not infringed on Chief Ominayak's rights, under the International Covenant on Civil and Political Rights and that the complaint by Grand Chief Marshall has not been accepted for further action.
- o Canada will, of course, continue to deal with the Lubicon issue. Canada has already made a fair offer to the Lubicon, which the Band has not accepted, and we cannot impose what the Band will not accept. If the Lubicon wish to fine-tune a settlement along these lines, we invite them to return to the table. If they wish to pursue their case through the courts, they are free to do so.

Both Negative against Canada

- o Canada is disappointed that the HRC has found that Canada has infringed on Chief Ominayak's rights, under the International Covenant on Civil and Political Rights, and that the complaint submitted

by Grand Chief Marshall warrants further HRC consideration.

- Canada has already made a fair offer to the Lubicon, which the Band has not accepted, and we cannot impose what the Band will not accept. If the Lubicon wish to fine-tune a settlement along these lines, we invite them to return to the table. If they wish to pursue their case through the courts, they are free to do so.
  
- Further comment at this time regarding Grand Chief Marshall's complaint is not appropriate, owing to the confidential nature of the HRC process.

**UNITED NATIONS' HUMAN RIGHTS COMMITTEE (HRC)  
LUBICON LAKE AND MIKMAQ TRIBAL SOCIETY COMPLAINTS**

**Q.**

What exactly is the nature of United Nations' involvement in the Lubicon Lake situation and in the Mikmaq Tribal Society situation?

**A.**

Chief Bernard Ominayak, on behalf of the Lubicon Lake Band, in February 1984, and Grand Chief Donald Marshall (Senior), on behalf of the Mikmaq Tribal Society, in March 1987, both chose to submit complaints to the United Nations' Human Rights Committee (HRC), alleging that Canada had infringed on their rights under the International Covenant on Civil and Political Rights. Canada has responded to these and to subsequent related complaints made by these parties, and the HRC has now announced its findings.

Background:

As of March 21, 1990, Canada was one 90 United Nations countries which has ratified the International Covenant on Civil and Political Rights, and one of 49 such countries which has ratified its Optional Protocol. The Optional Protocol allows individuals, who have exhausted domestic remedies, to submit communications alleging violations by these state parties of any of the rights set forth in the Covenant.

Countries are expected to respond to these charges. These communications are reviewed by eighteen members of the United Nations' Human Rights Committee, who sit as independent experts on human rights matters.

While these proceedings are supposed to be confidential, the HRC's rulings on admissibility and its final decisions are made public. While countries are expected to act on decisions which are found against them, the HRC's powers is more one of moral suasion, through pronouncing on issues brought before it. The HRC has no powers to force a state party to implement or enforce its recommendations.

In the past, the HRC has made one ruling against Canada - in the Lovelace case - regarding sexual discrimination in the Indian Act. This decision contributed in part to the eventual revision of the offending sections contained in that act.

Q.

Why is Canada so frequently the subject of complaints under the Optional Protocol process?

A.

One reason that it might seem that Canada is more frequently the subject of complaints under the Optional Protocol is that Canada is one of only 49 countries which have ratified the Optional Protocol. Many other countries belong to other international human rights bodies, such as the European Court and the Inter-American Court, to which Canada is not a party. For example, most of the other countries which have ratified the Covenant and the Optional Protocol are also part of the European Convention and can choose to which forum they wish to take their complaints, e.g., the European Court or the HRC, and these processes are mutually exclusive.

Further, as a democratic country, Canada attaches considerable importance to human rights issues, and provides its citizens with information about human rights initiatives and forums and also provides funding to human rights groups and to native organizations. Canada's ratification of the various United Nations instruments demonstrates its commitment to human rights and that it is willing to be judged accordingly.

**Complaint by Chief Ominayak,  
on behalf of the Lubicon Lake Band**

Q.

What is the nature of the complaint by Chief Ominayak, on behalf of the Lubicon Lake Band?

A.

Chief Ominayak, on behalf of the Lubicon, first made a submission to the HRC in February 1984, alleging that Canada was infringing on their rights under the International Covenant on Civil and Political Rights by denying them their aboriginal right to self-determination and that they had exhausted the domestic remedies available. Subsequent submissions by the Chief on related matters has made the complaint process protracted and complex.

Q.

What has been Canada's response to the allegations by Chief Ominayak?

A.

Canada has argued that domestic remedies are still available and that several avenues are open, including judicial processes and negotiations. Further, Canada has stated that it recognizes that the Lubicon Lake Band has suffered an historical inequity, and that it is entitled to a reserve and related entitlements. To that end, negotiations have been underway to reach an agreement with the Band. Unfortunately, no satisfactory mutual agreement has been reached. It should be noted that a remedy can only be offered, it cannot be imposed.

Despite the lack of agreement regarding land and compensation issues, the government has been providing a number of programs and services to the band for many years, including funding to the band for its claims research activities.

**Q.**

What is Canada's reaction to the HRC decision in favour of Canada, saying that Canada has not infringed on the rights of Chief Ominayak and that the issue is a matter for domestic resolution by Canada and Chief Ominayak, on behalf of the Lubicon Lake Band?

**A.**

We are pleased that the HRC agrees with us that Canada has not infringed the Chief's rights under the International Covenant on Civil and Political Rights and agrees with us that the Lubicon matter indeed is a subject for domestic resolution. As we have already told the HRC, we agree that the Lubicon are entitled to a settlement - one that is fair and equitable. If they accept our offer, they will receive:

- a 95 square mile reserve
- 79 square miles of oil and gas and timber rights
- \$45 million to build a community, develop economic and employment opportunities
- and they will still have the right to sue Canada, within the ambit of Treaty 8, for more.

As we have said on several occasions, Canada is prepared to meet again with the Lubicon Lake Band to fine-tune the offer. As we have also said, however, we cannot impose what the Band will not accept.

**Q.**

**What is Canada's reaction to the HRC decision finding Canada in breach of the International Covenant on Civil and Political Rights, and:**

recommending that Canada immediately resume negotiations with the Lubicon, including the issue of compensation?

finding that Canada is guilty of cultural genocide in its relations with the Lubicon?

**A.**

Canada is disappointed that the Committee has found that Canada has infringed the Chief's rights under the International Covenant on Civil and Political Rights and that it does not share our view that reasonable processes and remedies for resolving the issue are available.

The effect of this decision is to encourage negotiations such as we have been supporting all along. We believe that the HRC's decision, in fact, implicitly acknowledges Canada's position that the matter must be resolved domestically through negotiation.

We have already told the HRC that the Lubicon are entitled to a reserve and to a reasonable standard of living and access to economic opportunities, and to that end, most regular programs and services are available to the band members. In addition, domestic initiatives have been underway for some time to deal with their concerns. Further, as we have told the HRC, the members of the Lubicon Lake Band have the same civil, legal and political rights as other Canadian citizens.

Canada has made a fair offer that would provide the Band with a 95 square mile reserve, including ownership of 79 square miles of oil and gas and timber rights. As well, we have offered \$45 million to build a community and create employment.

The Band, however, has said that it wants much more. It is demanding \$2 million per family. We have offered the land, and \$45 million to build homes and develop an economy while leaving the Band the right to sue, within the ambit of Treaty 8, for more. That is as far as we can go. But we cannot impose what the Band will not accept.

If the Lubicon wish to fine-tune a settlement along these lines, we invite them to return to the table. If they wish to pursue their case through the courts, they are free to do so.

**Q.**

The decision by the United Nations' HRC makes it clear that it specifically wants Canada to meet the Lubicon demands for compensation. How does Canada respond?

**A.**

Canada believes that its offer to the Lubicon is a fair one. Including a 95 square mile reserve, ownership of 79 square miles of oil and gas and timber rights, and \$45 million to build a community and create employment, acceptance of the offer would allow them to reach their social and economic goals.

The offer is fair to other native groups because it is consistent with the principles of other recent settlements. It is also fair to the taxpayers because it meets Canada's legal and social obligations to the Band. Canada's offer remains open.

**Complaint by Grand Chief Donald Marshall (Senior),  
on behalf of the Mikmaq Tribal Society**

Q.

What is the nature of the complaint by Grand Chief Donald Marshall (Senior), on behalf of the Mikmaq Tribal Society to the United Nations' Human Rights Committee (HRC)?

A.

**USE WITH CAUTION as matters still under HRC review are considered to be confidential**

Grand Chief Donald Marshall (Senior), on behalf of the Mikmaq Tribal Society, submitted a communication in March 1987 which said that its right as a people to self-determination, under Article 1 of the Covenant on Civil and Political Rights, was infringed when the Prime Minister did not invite it to the First Ministers' Conference (FMC) on aboriginal rights, which was being held later in March 1987.

Since then, Grand Chief Marshall has submitted a series of further communications about other concerns, including treaty rights, fishing, moose hunting, and socio-economic issues.

Q.

What is Canada's reaction to the HRC's decision that Grand Chief Marshall's complaint is **not admissible**? Does this mean that the Mikmaq Tribal Society could be invited to the next FMC on aboriginal matters?

A.

We are pleased that the HRC has found that the Grand Chief's complaint, under the International Covenant on Civil and Political Rights, is **not admissible and does not warrant further HRC consideration.**

**Our position is that it is, quite properly, the prerogative of the Prime Minister to determine suitable representatives to be invited to participate in FMCs.**

With respect to future FMCs on aboriginal matters, it is expected that the four national aboriginal organizations will continue to participate and represent the interests of aboriginal Canadians, as we pursue the issue of a constitutional amendment on aboriginal self-government.

**Q.**

What is Canada's reaction to the HRC decision that Grand Chief's Marshall's complaint is admissible?

**A.**

Canada is disappointed that the HRC has found that Grand Chief's Marshall's complaint is admissible and should be the subject of further examination by the HRC.

Canada certainly believes that reasonable processes and remedies are available domestically to address the Grand Chief's concerns.

While Canada will, of course, be responding to the HRC on the merits of the complaint, further comment would not be appropriate at this time owing to the confidential nature of the HRC process.

**Q.**

What is the government's position concerning the conflict over hunting rights involving the Government of Nova Scotia and Micmac Indians?

**A.**

The current dispute arises from a September 1988 Micmac moose hunt on Cape Breton Island in which 14 persons were charged with violating provincial hunting regulations. While it is understood that the trial judge has dismissed the case, this is a matter for further government consideration and it would be inappropriate to comment further at this time.

**Both Decisions Against Canada**

**Q.**

**What is Canada's reaction to the HRC's finding that Canada has infringed on the rights of Chief Ominayak and finding Grand Chief Marshall's complaint admissible?**

**A.**

**Canada is disappointed that the HRC believes that Canada has infringed on Chief Ominayak's rights and that Grand Chief Marshall's complaint is admissible.**

**In the case of Chief Ominayak's complaint, the effect of this decision is to encourage negotiations such as we have been supporting all along. We have already told the HRC that the Lubicon are entitled to a reserve and to a reasonable standard of living and access to economic opportunities. Further, domestic initiatives have been underway for some time to deal with their concerns.**

**Canada has made a fair offer to the Lubicon and if the Lubicon wish to fine-tune a settlement along these lines, we invite them to return to the table. If they wish to pursue their case through the courts, they are free to do so.**

**In the case of Grand Chief Marshall's complaint, as it has been deemed admissible by the HRC, further comment at this time would be inappropriate given that the HRC process is a confidential one.**

**Q.**

**What is Canada's reaction to these negative determinations and the implicit criticism of its treatment of its aboriginal peoples? Does this not reinforce the findings in the recent report of the Canadian Human Rights Commission which characterized Canada's treatment of aboriginal peoples as a national tragedy?**

**A.**

**Canada's regrets that the United Nations' HRC and the Canadian Human Rights Commission appear to have ignored the significant progress made by aboriginal peoples, supported by government, over the last few decades. It certainly is acknowledged that their socio-economic situation does not match that of the majority of Canadians. Serious measures are indeed required to counter these longstanding problems and improve aboriginal peoples' situation and the government is involved in a variety of**

activities aimed specifically at this objective.

Domestically, Canada's aboriginal people -Indian, Inuit and Métis -have the same civil, legal and political rights as other citizens, as well as special constitutional recognition of their special rights which derive from their descent from the original inhabitants of this country.

Real progress has been achieved in recent years, as the result of the removal of discriminatory provisions under the Indian Act as well as in areas such as education, social services and economic development.

There are ongoing efforts aimed at strengthening the special relationship between Canada and its aboriginal people, such as through self-government community negotiations and land claims negotiations. The government is committed to continuing to work with its aboriginal groups toward further progress.

APPENDIX B

SPOKESPERSONS FOR HRC DECISION

International and UN HRC Issues

Abby Dann  
Press Attaché  
Office of the Secretary of State for External Affairs  
992-6562

External Affairs Press Office  
995-1874

Human Rights Process

Martin Low  
Senior General Counsel  
Human Rights Law Section  
Department of Justice  
957-4944

Domestic Aboriginal Issues

Ken Colby (English inquiries)  
Assistant Negotiator  
Lubicon Land Claim  
(403) 286-3411 or 234-7200

Ruth Cardinal (French inquiries)  
DG Communications  
Department of Indian Affairs and Northern Development  
997-9885

**ACTION**  
**SUITE A DONNER**

**CDN EYES ONLY**

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---HUMAN RIGHTS CTTEE:LUBICON LAKE AND MIC MAC COMMUNICATIONS

CTTEE HAS ADOPTED FINAL VIEWS ON THE COMMUNICATION BY LUBICON LAKE BAND, WITH ONE MEMBER EXPRESSING AN INDIVIDUAL OPINION. ITS VIEWS RUN TO 35 PAGES, MAKING IT THE LONGEST DOCUMENT IN CTTEES HISTORY. LENGTH OF DOCUMENT, PLUS INDIVIDUAL OPINION, WILL HAVE THE EFFECT THAT IT WILL NOT BE FINALLY RELEASED UNTIL AFTER SECRETARIAT RECEIVES THE FILES FROM THE NY MEETING IN GENEVA, PROBABLY AROUND MID-APRIL. POSSIBILITY REMAINS THAT PRESS RELEASE OR INFORMAL CONTACTS AT END OF CTTEE MEETING ON 06APR WILL RESULT IN DISCLOSURE AT THAT TIME. COPY OF THE DOCUMENT AS DRAFTED WILL BE PROVIDED TO CDA INFORMALLY, THROUGH ARRANGEMENTS TO BE MADE WITH PRMNY (TETU), NEAR CLOSE OF CTTEE MEETING.

2. DRAFT DOCUMENT CONSIDERED BY CTTEE HAS NOT BEEN SEEN, BUT GIST OF CTTEE VIEWS IS:

(A) ALLEGATIONS OF BAND RELATING TO WOODLAND CREE ARE DISCUSSED AS ABUSE OF COMMUNICATIONS PROCEDURE;

(B) HAVING REGARD TO GOVTS ACKNOWLEDGEMENT OF BANDS UNFULFILLED LAND ENTITLEMENT AND HISTORICAL INEQUITY, CTTEE FINDS BREACH OF ART 27 WHICH CONTINUES AS LONG AS RIGHTS OF BAND NOT FULFILLED, BUT

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**MAR 30 1990**  
  
**IMH**

**CDN EYES ONLY**  
**ENTRE CONS SEULEMENT**

PAGE TWO: WKGR4284 PROTECTED CDN EYES ONLY

(C) GOVTS OFFER CONSTITUTE A FULLY APPROPRIATE RESPONSE TO THE BREACH AND THEREFORE A REMEDY AS REQUIRED BY ART 2 OF THE COVENANT IS AVAILABLE TO THE BAND.

3. INDIVIDUAL OPINION HAS NOT BEEN FINALIZED AND NATURE OF THE OPINION WAS NOT DISCLOSED.

4. EFFECT OF CTTEES VIEWS IS THAT AN EFFORT HAS BEEN MADE TO VINDICATE BANDS CLAIM BUT ONLY IN RELATION TO A PROBLEM THAT HAS ALREADY BEEN PUBLICLY ACKNOWLEDGED BY THE GOVT, AND THEN TO EMPHASIZE THAT THE GOVT HAS RESPONDED IN A MANNER THAT THE CTTEE FINDS TO BE FULLY SATISFACTORY. THE OFFER WAS DESCRIBED ORALLY AS QUOTE GENEROUS UNQUOTE ALTHOUGH IT IS NOT CLEAR WHETHER THAT ADJECTIVE WILL FIGURE IN WRITTEN VIEWS. THE CTTEE DOES NOT WANT ITS PROCEDURE TO BE USED AS A BARGAINING LEVER IN A NEGOTIATION AND WILL MAKE IT CLEAR THAT ITS VIEWS FINALLY RESOLVE ANY CONCERNS UNDER THE OPTIONAL PROTOCOL OR THE COVENANT. FROM DISCUSSIONS, IT APPEAR THAT THE DECISION CASTS THE GOVT IN A FAVOURABLE LIGHT AND IS VERY POSITIVE ABOUT THE NATURE AND EXTENT OF THE SETTLEMENT OFFER WHICH MAY UNDERMINE THE BANDS COMMUNICATION STRATEGY AND IS INTENDED TO PROMOTE FURTHER NEGOTIATIONS.

5. MIC MAC DECISION IS STILL UNDER DISCUSSION. CONTACTS INDICATE AN EXPECTATION THAT THE CTTEE WILL BE ABLE TO REACH QUOTE A FINAL DISPOSITION UNQUOTE OF THE MATTER BY THE MEETINGS END. THAT SUGGESTS AN ADMISSIBILITY DECISION IN CDAS FAVOUR, BUT DYNAMICS OF CTTEE

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**ENTRE CDNS SEULEMENT**

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AFTER LUBICON DECISION LEAVE THE DISPOSITION OF THE MIC MAC  
COMMUNICATION SLIGHTLY UNCERTAIN.

6. INFORMATION ON THESE COMMUNICATIONS HAS BEEN ACQUIRED PRIMARILY  
FROM THE SECRETARIAT ON THE PERIPHERY OF DISCUSSIONS ABOUT THE  
PROPOSED WORKSHOP ON THE OPTIONAL PROTOCOL. MEMBERS OF THE CTTEE  
HAVE BEEN VERY SKITTISH ABOUT MEETING CDNS TO DISCUSS THE WORKSHOP,  
LEST THEY CONVEY AN IMPRESSION OF INAPPROPRIATE CONTACTS WHILE ON  
THE EVE OF DECIDING THESE CASES. THE NEED FOR CARE IN HANDLING THIS  
INFORMATION CANNOT BE OVEREMPHASIZED. DISCLOSURE OF GOVT CONTACT  
WITH CTTEE AT THIS STATE OR OF ADVANCE KNOWLEDGE BY GOVT OF  
OUTCOME IS LIKELY TO PREJUDICE BOTH SOURCE OF INFORMATION AND  
PEHPAPS GENERATE A BAND PROTEST THAT COULD JEOPARDIZE THE  
CTTEES DE ISION.

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Lubicon Lake Band

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Confidential  
with attachments

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**MEMORANDUM TO RUTH CARDINAL**

**RE: UNITED NATIONS' HUMAN RIGHTS COMMITTEE (HRC)**

Further to recent discussions, I am providing you some materials which relate to the anticipated decisions of the HRC on the Lubicon and the Mikmaq Tribal Society decisions.

At this time, we have to take account of a range of possible decisions on both the Lubicon and Mikmaq cases. Enclosed are items which outline reponses to a variety of decisions. These include a set of questions and answers which could be used as background for spokespeople. These reflect some comments from people at External Affairs, Justice and OACA, though we expect further comments.

Some background descriptions are provided on the HRC, the Lubicon and Mikmaq cases. Certainly the HRC and Lubicon materials could be distributed as background materials for the press. Arrangements for French translation and printing would need to be arranged.

External Affairs will be trying to get some word of the HRC decisions as soon as possible and this may be Friday, April 6, 1990. This information will probably come after the sitting of the House of Commons and so we can not expect that Ministers can make initial statements in Parliament. Details of the decisions may not come until some time later. A list is enclosed of spokespeople from concerned departments who may be able to speak on different aspects of the decisions. Clearly, they will need to be able to counter the "spins" that the Lubicon, in particular, may put on decisions. As well, by common concensus, they will need to move the issue from the international, United Nations context, to the domestic negotiations and offer with the Lubicon.

Canada

would be interested in your comments. As I will be away  
Friday, you should feel free to speak with Martha Reeve (994-  
7438).

*o/s*

Marilyn Whitaker  
Director  
Constitution

cc: Bob Coulter  
Leaman Long

**Confidential  
Draft**

**UNITED NATIONS' HUMAN RIGHTS COMMITTEE (HRC)  
EXPECTED DECISIONS ON LUBICON LAKE  
AND MIKMAQ TRIBAL SOCIETY COMPLAINTS**

It is not known for sure that the HRC will make decisions in either case, and even if it does, whether these will be immediately made public (normally, the HRC meets, with formal notification of parties made some time later). Until the actual texts of the HRC decisions are available, the federal strategy will have to contain responses for several eventualities, with possible responses ranging from **unable to comment without having seen the formal text**, to **pleased**, to **disappointed**, to **attacking the process**. If either decision is extremely unfavourable to Canada, the best recourse will probably be to reserve comment until further study of the HRC's findings can be undertaken.

**INDEX**

**STATEMENTS FOR MINISTERS/SPOKESPERSONS**

Lubicon: Positive, for Canada

Lubicon: Negative, against Canada

Mikmaq: Postive, for Canada

Mikmaq: Negative, against Canada

Both Positive, for Canada

Both Negative, against Canada

Questions regarding: international issues and United Nations' Human Rights Committee are to be handled by External Affairs (Minister's office or press office, Patricia Low-Bedard); human rights process by Justice (Martin Low); and, the substance of domestic issues, including general aboriginal matters, by DIAND (Minister's office or Roger Gagnon). Any questions requiring detailed information regarding the **Lubicon Lake Band and the Woodland Cree Band** should be referred to Ken Colby 403-286-3411 or 234-7200. Questions in French on these two issues will be handled by Ruth Cardinal, Director General, DIAND-Communications.

## STATEMENTS FOR MINISTERS

### Positive for Canada on Lubicon

- o We are pleased that the HRC agrees that Canada has not infringed Chief Ominayak's rights, under the International Covenant on Civil and Political Rights. With this decision by the HRC, the resolution of the matter clearly rests with Canada and the Chief, on behalf of the Lubicon.
- o Canada believes that its offer to the Lubicon is a fair one and, as we have said on several occasions, Canada is prepared to meet again with the Lubicon Lake Band to fine-tune the offer.
- o We cannot, however, impose what the Band will not accept but sincerely hope that the Band will decide that the offer is indeed reasonable and fair and accept it.

### Negative against Canada on Lubicon

- o Canada is disappointed that the HRC has found that Canada has infringed on Chief Ominayak's rights, under the International Covenant on Civil and Political Rights, and does not share our view that domestic remedies are available and have not been exhausted. The effect of this decision is to encourage negotiations such as we have been supporting all along.
- o We have already told the HRC that the Lubicon are entitled to a reserve and to a reasonable standard of living and access to economic opportunities, and to that end, most regular programs and services are available to the band members.
- o Canada has made a fair offer, but we cannot impose what the Band will not accept. If the Lubicon wish to fine-tune a settlement along these lines, we invite them to return to the table. If they wish to pursue their case through the courts, they are free to do so.

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- o We are pleased that the HRC has found that Grand Chief Donald Marshall's complaint, under the International Covenant on Civil and Political Rights, does not warrant further HRC

**consideration.**

- o Our position is that it is, quite properly, the prerogative of the Prime Minister to determine suitable representatives to be invited to participate in FMCs.
- o National representatives of Canada's aboriginal peoples have been invited to, and have participated actively in, constitutional conferences convened by the Prime Minister on matters that directly affect them.

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- o While Canada will, of course, be responding to the HRC on the merits of the complaint, further comment would not be appropriate at this time owing to the confidential nature of the HRC process.

**Both Positive for Canada**

- o Canada is pleased that the HRC has found that Canada has not infringed on Chief Ominayak's rights, under the International Covenant on Civil and Political Rights and that the complaint by Grand Chief Marshall has not been accepted for further action.
- o Canada will, of course, continue to deal with the Lubicon issue. Canada has already made a fair offer to the Lubicon, which the Band has not accepted, and we cannot impose what the Band will not accept. If the Lubicon wish to fine-tune a settlement along these lines, we invite them to return to the table. If they wish to pursue their case through the courts, they are free to do so.

**Both Negative against Canada**

- o Canada is disappointed that the HRC has found that Canada has infringed on Chief Ominayak's rights, under the International Covenant on Civil and Political Rights, and that the complaint submitted

by Grand Chief Marshall warrants further HRC consideration.

- o Canada has already made a fair offer to the Lubicon, which the Band has not accepted, and we cannot impose what the Band will not accept. If the Lubicon wish to fine-tune a settlement along these lines, we invite them to return to the table. If they wish to pursue their case through the courts, they are free to do so.
- o Further comment at this time regarding Grand Chief Marshall's complaint is not appropriate, owing to the confidential nature of the HRC process.

## INDEX TO MORE DETAILED INFORMATION

### United Nations' Human Rights Committee

- o Process and Involvement in Lubicon and Mikmaq cases
- o Frequency of complaints against Canada

### Complaint by Chief Ominayak, on behalf of the Lubicon Lake Band

- o Nature of complaint
- o Canada's response to complaint
- o HRC decision in favour of Canada: issue is a matter for domestic resolution
- o HRC decision condemning Canada:  
recommends resuming domestic negotiations,  
including compensation  
  
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### Complaint by Grand Chief Donald Marshall (Senior), on behalf of the Mikmaq Tribal Society Complaint

- o Nature of the complaint
- o HRC decision in favour of Canada: complaint inadmissible
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### Both HRC decisions against Canada

- o General
- o Canadian Treatment of Aboriginal Peoples

**UNITED NATIONS' HUMAN RIGHTS COMMITTEE (HRC)  
LUBICON LAKE AND MIKMAQ TRIBAL SOCIETY COMPLAINTS**

**Q.**

What exactly is the nature of United Nations' involvement in the Lubicon Lake situation and in the Mikmaq Tribal Society situation?

**A.**

Chief Bernard Ominayak, on behalf of the Lubicon Lake Band, in February 1984, and Grand Chief Donald Marshall (Senior), on behalf of the Mikmaq Tribal Society, in March 1987, both chose to submit complaints to the United Nations' Human Rights Committee (HRC), alleging that Canada had infringed on their rights under the International Covenant on Civil and Political Rights. Canada has responded to these and to subsequent related complaints made by these parties, and the HRC has now announced its findings.

Background:

As of March 21, 1990, Canada was one 90 United Nations countries which has ratified the International Covenant on Civil and Political Rights, and one of 49 such countries which has ratified its Optional Protocol. The Optional Protocol allows individuals, who have exhausted domestic remedies, to submit communications alleging violations by these state parties of any of the rights set forth in the Covenant.

Countries are expected to respond to these charges. These communications are reviewed by eighteen members of the United Nations' Human Rights Committee, who sit as independent experts on human rights matters.

While these proceedings are supposed to be confidential, the HRC's rulings on admissibility and its final decisions are made public. While countries are expected to act on decisions which are found against them, the HRC's powers is more one of moral suasion, through pronouncing on issues brought before it. The HRC has no powers to force a state party to implement or enforce its recommendations.

In the past, the HRC has made one ruling against Canada - in the Lovelace case - regarding sexual discrimination in the Indian Act. This decision contributed in part to the eventual revision of the offending sections contained in that act.

Q.

Why is Canada so frequently the subject of complaints under the Optional Protocol process?

A.

One reason that it might seem that Canada is more frequently the subject of complaints under the Optional Protocol is that **Canada is one of only 49 countries which have ratified the Optional Protocol.** Many other countries belong to other international human rights bodies, such as the European Court and the Inter-American Court, to which **Canada is not a party.** For example, most of the other countries which have ratified the Covenant and the Optional Protocol are also part of the European Convention and can choose to which forum they wish to take their complaints, e.g., the European Court or the HRC, and these processes are mutually exclusive.

Further, as a democratic country, Canada attaches considerable importance to human rights issues, and provides its citizens with information about human rights initiatives and forums and also provides funding to human rights groups and to native organizations. Canada's ratification of the various United Nations instruments demonstrates its commitment to human rights and that it is willing to be judged accordingly.

**Complaint by Chief Ominayak,  
on behalf of the Lubicon Lake Band**

Q.

What is the nature of the complaint by Chief Ominayak, on behalf of the Lubicon Lake Band?

A.

Chief Ominayak, on behalf of the Lubicon, first made a submission to the HRC in February 1984, alleging that Canada was infringing on their rights under the International Covenant on Civil and Political Rights by denying them their aboriginal right to self-determination and that they had exhausted the domestic remedies available. Subsequent submissions by the Chief on related matters has made the complaint process protracted and complex.

Q.

What has been Canada's response to the allegations by Chief Ominayak?

A.

Canada has argued that domestic remedies are still available and that several avenues are open, including judicial processes and negotiations. Further, Canada has stated that it recognizes that the Lubicon Lake Band has suffered an historical inequity, and that it is entitled to a reserve and related entitlements. To that end, negotiations have been underway to reach an agreement with the Band. Unfortunately, no satisfactory mutual agreement has been reached. It should be noted that a remedy can only be offered, it cannot be imposed.

Despite the lack of agreement regarding land and compensation issues, the government has been providing a number of programs and services to the band for many years, including funding to the band for its claims research activities.

**Q.**

What is Canada's reaction to the HRC decision in favour of Canada, saying that Canada has not infringed on the rights of Chief Ominayak and that the issue is a matter for domestic resolution by Canada and Chief Ominayak, on behalf of the Lubicon Lake Band?

**A.**

We are pleased that the HRC agrees with us that Canada has not infringed the Chief's rights under the International Covenant on Civil and Political Rights and agrees with us that the Lubicon matter indeed is a subject for domestic resolution. As we have already told the HRC, we agree that the Lubicon are entitled to a settlement - one that is fair and equitable. If they accept our offer, they will receive:

- a 95 square mile reserve
- 79 square miles of oil and gas and timber rights
- \$45 million to build a community, develop economic and employment opportunities
- and they will still have the right to sue Canada, within the ambit of Treaty 8, for more.

As we have said on several occasions, Canada is prepared to meet again with the Lubicon Lake Band to fine-tune the offer. As we have also said, however, we cannot impose what the Band will not accept.

Q.

What is Canada's reaction to the HRC decision finding Canada in breach of the International Covenant on Civil and Political Rights, and:

recommending that Canada immediately resume negotiations with the Lubicon, including the issue of compensation?

finding that Canada is guilty of cultural genocide in its relations with the Lubicon?

A.

Canada is disappointed that the Committee has found that Canada has infringed the Chief's rights under the International Covenant on Civil and Political Rights and that it does not share our view that reasonable processes and remedies for resolving the issue are available.

The effect of this decision is to encourage negotiations such as we have been supporting all along. We believe that the HRC's decision, in fact, implicitly acknowledges Canada's position that the matter must be resolved domestically through negotiation.

We have already told the HRC that the Lubicon are entitled to a reserve and to a reasonable standard of living and access to economic opportunities, and to that end, most regular programs and services are available to the band members. In addition, domestic initiatives have been underway for some time to deal with their concerns. Further, as we have told the HRC, the members of the Lubicon Lake Band have the same civil, legal and political rights as other Canadian citizens.

Canada has made a fair offer that would provide the Band with a 95 square mile reserve, including ownership of 79 square miles of oil and gas and timber rights. As well, we have offered \$45 million to build a community and create employment.

The Band, however, has said that it wants much more. It is demanding \$2 million per family. We have offered the land, and \$45 million to build homes and develop an economy while leaving the Band the right to sue, within the ambit of Treaty 8, for more. That is as far as we can go. But we cannot impose what the Band will not accept.

If the Lubicon wish to fine-tune a settlement along these lines, we invite them to return to the table. If they wish to pursue their case through the courts, they are free to do so.

**Q.**

The decision by the United Nations' HRC makes it clear that it specifically wants Canada to meet the Lubicon demands for compensation. How does Canada respond?

**A.**

Canada believes that its offer to the Lubicon is a fair one. Including a 95 square mile reserve, ownership of 79 square miles of oil and gas and timber rights, and \$45 million to build a community and create employment, acceptance of the offer would allow them to reach their social and economic goals.

The offer is fair to other native groups because it is consistent with the principles of other recent settlements. It is also fair to the taxpayers because it meets Canada's legal and social obligations to the Band. Canada's offer remains open.

**Complaint by Grand Chief Donald Marshall (Senior),  
on behalf of the Mikmaq Tribal Society**

Q.

What is the nature of the complaint by Grand Chief Donald Marshall (Senior), on behalf of the Mikmaq Tribal Society to the United Nations' Human Rights Committee (HRC)?

A.

**USE WITH CAUTION as matters still under HRC review are considered to be confidential**

Grand Chief Donald Marshall (Senior), on behalf of the Mikmaq Tribal Society, submitted a communication in March 1987 which said that its right as a people to self-determination, under Article 1 of the Covenant on Civil and Political Rights, was infringed when the Prime Minister did not invite it to the First Ministers' Conference (FMC) on aboriginal rights, which was being held later in March 1987.

Since then, Grand Chief Marshall has submitted a series of further communications about other concerns, including treaty rights, fishing, moose hunting, and socio-economic issues.

Q.

What is Canada's reaction to the HRC's decision that Grand Chief Marshall's complaint is not admissible? Does this mean that the Mikmaq Tribal Society could be invited to the next FMC on aboriginal matters?

A.

We are pleased that the HRC has found that the Grand Chief's complaint, under the International Covenant on Civil and Political Rights, is not admissible and does not warrant further HRC consideration.

Our position is that it is, quite properly, the prerogative of the Prime Minister to determine suitable representatives to be invited to participate in FMCs.

With respect to future FMCs on aboriginal matters, it is expected that the four national aboriginal organizations will continue to participate and represent the interests of aboriginal Canadians, as we pursue the issue of a constitutional amendment on aboriginal self-government.

**Q.**

What is Canada's reaction to the HRC decision that Grand Chief's Marshall's complaint is **admissible**?

**A.**

Canada is **disappointed** that the HRC has found that **Grand Chief's Marshall's complaint is admissible** and should be the subject of further examination by the HRC.

Canada certainly believes that reasonable processes and remedies are available domestically to address the Grand Chief's concerns.

While Canada will, of course, be responding to the HRC on the merits of the complaint, further comment would not be appropriate at this time owing to the confidential nature of the HRC process.

**Q.**

What is the government's position concerning the conflict over **hunting rights** involving the Government of Nova Scotia and Micmac Indians?

**A.**

The current dispute arises from a September 1988 Micmac moose hunt on Cape Breton Island in which 14 persons were charged with violating provincial hunting regulations. While it is understood that the trial judge has dismissed the case, this is a matter for further government consideration and it would **be inappropriate to comment further at this time.**

**Both Decisions Against Canada**

**Q.**

**What is Canada's reaction to the HRC's finding that Canada has infringed on the rights of Chief Ominayak and finding Grand Chief Marshall's complaint admissible?**

**A.**

**Canada is disappointed that the HRC believes that Canada has infringed on Chief Ominayak's rights and that Grand Chief Marshall's complaint is admissible.**

**In the case of Chief Ominayak's complaint, the effect of this decision is to encourage negotiations such as we have been supporting all along. We have already told the HRC that the Lubicon are entitled to a reserve and to a reasonable standard of living and access to economic opportunities. Further, domestic initiatives have been underway for some time to deal with their concerns.**

**Canada has made a fair offer to the Lubicon and if the Lubicon wish to fine-tune a settlement along these lines, we invite them to return to the table. If they wish to pursue their case through the courts, they are free to do so.**

**In the case of Grand Chief Marshall's complaint, as it has been deemed admissible by the HRC, further comment at this time would be inappropriate given that the HRC process is a confidential one.**

**Q.**

**What is Canada's reaction to these negative determinations and the implicit criticism of its treatment of its aboriginal peoples? Does this not reinforce the findings in the recent report of the Canadian Human Rights Commission which characterized Canada's treatment of aboriginal peoples as a national tragedy?**

**A.**

**Canada's regrets that the United Nations' HRC and the Canadian Human Rights Commission appear to have ignored the significant progress made by aboriginal peoples, supported by government, over the last few decades. It certainly is acknowledged that their socio-economic situation does not match that of the majority of Canadians. Serious measures are indeed required to counter these longstanding problems and improve aboriginal peoples' situation and the government is involved in a variety of**

activities aimed specifically at this objective.

Domestically, Canada's aboriginal people -Indian, Inuit and Métis -have the same civil, legal and political rights as other citizens, as well as special constitutional recognition of their special rights which derive from their descent from the original inhabitants of this country.

Real progress has been achieved in recent years, as the result of the removal of discriminatory provisions under the Indian Act as well as in areas such as education, social services and economic development.

There are ongoing efforts aimed at strengthening the special relationship between Canada and its aboriginal people, such as through self-government community negotiations and land claims negotiations. The government is committed to continuing to work with its aboriginal groups toward further progress.

## UNITED NATIONS HUMAN RIGHTS COMMITTEE (HRC)

The United Nations' International Covenant on Civil and Political Rights came into force in 1976. It defines in more detail, many of the rights of the Universal Declaration of Human Rights. The parties to the Covenant agree that the rights recognized in the Covenant apply without discrimination to all individuals in its territory. The Covenant guarantees, among other things, the right to life, freedom of thought, conscience, and religion, the right to vote, equality before the law, and the protection of minorities. The Covenant is a legally binding treaty whose ratifying States pledge to observe its specific rights.

Canada is one of 90 countries which have ratified the Covenant on Civil and Political Rights, and one of 49 countries which have ratified its Optional Protocol. The Human Rights Committee (HRC) established pursuant to the Covenant: 1) considers reports on measures adopted and progress made in observing the rights enshrined in the Covenant, by States which have ratified the Covenant; 2) considers communications from individuals regarding alleged violations of human rights by States which have ratified the Optional Protocol. The 18-member HRC, which normally meets three times a year, is made up of recognized human rights experts serving in their personal capacity who are from countries which have ratified the Covenant.

As a party to the Optional Protocol, Canada is subject to HRC review of alleged violations under the Covenant which are brought to the HRC's attention. Individuals who claim that any of their rights under the Covenant have been violated and who have exhausted all domestic remedies may submit a written communication for consideration. State parties are expected to respond to allegations and proceedings are to be treated confidentially.

The HRC, in closed session, reviews the complaint and the state party's views. Their decision on whether the Covenant was respected is then forwarded to both parties. The HRC also includes these views in its annual public report to the General Assembly.

The United Nations' has no way of forcing Governments to change their policies or practices. Persuasion is the only tool available to the HRC to bring about improvements in respect for human rights.

## Lubicon Lake

### Background - Lubicon Lake Band Land Claim

The Lubicon Lake Band land claim dates to the 1930s, when Indian families living in the Lubicon Lake area of northern Alberta petitioned for a new reserve on the basis of Treaty Number Eight of 1899. In 1940, the Government of Canada agreed in principle to the request for reserve lands. The Province of Alberta agreed to transfer 128 acres for each Indian to the Government of Canada for a reserve in accordance with the provisions in Treaty Eight. However, the transfer of land did not occur, therefore, the reserve was not established, and in the 1950s the land ceased to be set aside for the purposes of the Band.

In 1980, the Band filed a Statement of Claim in the Federal Court of Canada against the Government of Canada and Alberta and certain corporate entities. It alleged "aboriginal title" to some 8,500 square miles of land in northern Alberta, and sought one billion dollars in compensation. In subsequent years several court proceedings were commenced, none of which have been concluded due to the Band's 1988 decision to boycott all litigation.

.../2

- 2 -

**United Nations Human Rights Committee Complaint**

In 1984 the Band complained to the United Nations Human Rights Committee that Canada had violated the Lubicon's right to self-determination on under Article 1 of the International Covenant on Civil and Political Rights. In 1987 the Human Rights Committee rejected the communication based on Article 1 but allowed the communication to stand in respect of other possible grounds for complaint; specifically under article 27, dealing with minorities, "or other articles".

**Towards a Negotiated Settlement**

The Government of Canada has always contended that the Lubicon Lake Band has a legitimate and outstanding claim. The Government is committed to seeking a fair and just resolution of the claim in accordance with its legal obligations to the Band, which flow from Treaty Eight. It is the Government's position that the best framework for attaining such a resolution is through negotiations with the Band and the Province of Alberta.

Canada has made repeated efforts to get the Band to the negotiating table. During the most recent negotiations between the Lubicon Lake Band and the Government of Canada virtually all of the Band's demands were met, either in full, or to the extent that equal treatment with other Canadian Bands was approximated or exceeded.

.../3

- 3 -

The only major point of contention remaining between the government and the band is a claim by the Band for approximately \$167 million in compensation for economic and other losses allegedly suffered. In an attempt to permit resolution of the matters agreed upon between the parties, the Government of Canada put forward a proposal which would enable the Band to accept Canada's offer in its entirety and still pursue the claim for general compensation.

#### Status of Negotiations

The Government's offer to the Lubicon is still outstanding. It provides a means by which the Band could maintain its culture, control its way of life and achieve economic self-sufficiency. These means can only be offered to the Band, however, they cannot be imposed and to date the Band has refused this option. If the Lubicon accepts the federal offer, they will receive:

- a 95 square mile reserve;
- 79 square miles of oil, gas and timber rights;
- \$350,000 per family to develop community infrastructure;
- \$100,000 per family to develop an economic base;
- an estimated \$20,000 per year per family in regular federal support programs
- the right to sue Canada, within the ambit of Treaty Eight, for compensation.

### Mikmaq Tribal Society

Grand Chief Donald Marshall, on behalf of the Mikmaq Tribal Society, complained to the United Nations Human Rights Committee (HRC) in March, 1987 that its right as a people to self-determination under Article 1 of the Covenant on Civil and Political Rights was violated when the Prime Minister did not invite it to the First Ministers' Conference (FMC) on aboriginal rights, which was being held later in March. Since then, the Mikmaq Tribal Society has submitted a series of further communications about other concerns, including treaty rights, fishing, moose hunting and socio-economic issues.

#### Land and Treaty Claims

Canada is aware of the Mikmaq concerns and has processes in place for obtaining redress for such claims. To date, one specific claim has been settled and another has been validated for negotiation. The Union of Nova Scotia Indians (UNSI) is attempting to reopen discussions on a comprehensive claim which asserts a continuation of aboriginal title in Nova Scotia.

#### Hunting and Fishing Rights

Two recent court cases (March, 1990) have affirmed the aboriginal right to fish and hunt in present day Nova Scotia.

**Communications - Responsibilities**

<b>Topic</b>	<b>Response</b>
General Questions on the United Nations' Human Rights Committee	Minister of External Affairs  Press Office Patricia Low-Bedard (613) 592-6488
Lubicon Lake Negotiations Woodland Cree	Minister of DIAND  Ken Colby, Negotiator (403) 286-3411 Ruth Cardinal (French) (613) 997-9885
Mikmaq Tribal Society	Minister of DIAND  Roger Gagnon (819) 953-3180
Details of Process	Minister of Justice  Martin Low (613) 957-4944
Canada's Treatment of Aboriginal People	Minister of DIAND  Roger Gagnon (819) 953-3180



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*S. [unclear]*  
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*Lubicon Lake Band*

**Clarification -  
Updated Communications Plan  
Possible UN Human Rights Committee Decision  
Lubicon Lake Band Complaint**

1. Further to my letter of March 15, 1990 to which was attached a copy of the above noted communications plan, the parameters within which Canada is prepared to have the band accept its offer and then pursue a claim for further compensasteion in the courts, requires clarification. Reference is made to this proposal on pages 3 and 13 of the Communications Plan.

In this regard when responding to media and public enquiries, it should be emphasized that Canada would be prepared to have the band accept the \$45 million offer, and then sue for further compensation but within the ambit of Treaty #8 only. Canada would not, for instance, be prepared to have its offer accepted while leaving open the possibility of a lawsuit for compensation based on unextinguished aboriginal rights.

.../2

- 2 -

2. While we mention on page 6 that the band will likely attempt to use any ruling to raise negotiations to the ministerial or prime ministerial levels, we did not focus on this matter in the Communications Strategy. Our objective in communications must be to keep the focus of negotiations with the federal negotiating team headed by Mr. Brian Malone, Q.C. This is consistent with the position stated by the Prime Minister in March, 1989 that responsibility for the Lubicon Lake claim rests with the Minister of DIAND.



R.A. Coulter  
A/Director  
Lubicon Lake Band  
Litigation Support

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March 15, 1990

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**Updated Communications Plan  
Possible UN Human Rights Committee Decision  
Lubicon Lake Band Complaint**

Enclosed for your information please find an updated Communications Plan for a possible U.N. Human Rights Committee Decision on the Lubicon Lake complaint. If you have any comments with respect to the updated plan, please contact the undersigned at 994-1241 or Mr. Ken Colby at (403) 286-3411.

R.A. Coulter  
A/Director  
Lubicon Lake Band  
Litigation Support

Attach.

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COMMUNICATIONS PLAN RE:  
PROSPECTIVE U.N. HUMAN RIGHTS COMMITTEE FINDING

A. BACKGROUND

1. The UN Human Rights Committee is expected to rule between March 16 and April 9, 1990 on a complaint by the Lubicon Lake Indian Band that Canada has contravened the Band's human rights by failing to provide a settlement to its land claim.

The UN Human Rights Committee has two options:

- (a) a "soft ruling". The Committee could find Canada in breach of a specific article and urge the parties to continue negotiation.
- (b) a "hard ruling". The Committee could find Canada in breach of a specific article and urge Canada to remedy it. There is an obligation on Canada to report its actions towards remedy to the Committee.

- 2 -

2. In its submission to the Committee, Canada stated that it "recognizes that the Lubicon Lake Indian Band has suffered an historical inequity, and that it is entitled to a reserve and related entitlements..... however, a remedy can only be offered to the band; it cannot be imposed."

For this reason, it seems most likely the UN Human Rights Committee will urge the parties to reach a settlement.

3. Meaningful negotiations first took place from November 1988 to January 1989. The Canadian government met virtually all of the band's demands, either in full or to the extent that equal treatment with other Canadian bands was approximated or exceeded. Ninety-five square miles of land, mineral rights on 79 square miles, community facilities for each family living on the reserve (including housing, water and sewage services, electrification, roads and a school), and an economic self-sufficiency package valued at \$10.2 million were offered in full to the Band. On the basis of 100 on-reserve families (Band estimate)

- 3 -

and a government package worth a total of \$45 million (non-inclusive of land and mineral rights), this offer amounted to \$450 thousand per family.

The only major point of contention remaining between the Government and the Band was a claim by the Band for approximately \$167 million in compensation for economic and other losses allegedly suffered. In an attempt to permit resolution of the matters agreed upon between the parties, the Government of Canada put forward a proposal that would, by its express terms, enable the Band to accept Canada's offer in its entirety and still pursue the claim for general compensation which it has had in the Canadian courts since 1980.

In the following months, the Band made two inaccurate but persistent arguments: the offer, as written, did not clearly leave the right to sue and the \$10.2 million for economic development included \$5 million in projects which require regular program approval by the department.

- 4 -

On September 8, 1989, Canada clarified its offer by way of letter to expressly reserve for the Band its right to sue for compensation, and to provide \$10 million in cash to the Band for economic development purposes. Thus, the two major perceived inadequacies in Canada's offer have been fully addressed. There only remains the band's demand for \$167 million in compensation for alleged losses.

4. In August, 1989, the Minister recognized the Woodland Cree Indian Band, following petitions by some 360 individual native people in the Little Buffalo and Cadotte Lake regions, approximately 100 of whom had been claimed as members by the Lubicon Lake Band. The new band has been characterized by some media and the Lubicon leadership as a tool created by the Federal Government to undermine the current Lubicon membership. The fact is that there is significant dissatisfaction among the Lubicon membership which likely will intensify if the tactics employed by the Lubicon leadership fail to produce progress.

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5. On October 31, 1989 (in a letter dated October 28th), the Lubicon advised the Prime Minister that they intend to exert jurisdiction over oil company activity "on unceded Lubicon land" and that the failure of companies to meet any of their conditions will make involved projects subject to removal as unauthorized developments.
  
6. In a further letter dated December 6, 1989, the Chief asked that all negotiations to date be set aside and demanded \$170 million from the governments of Canada and Alberta to settle the claim.
  
7. In the public's perception, the issue is now money and the response to the band has been largely unsympathetic. The Band now appears to be trying to move public perception toward issues of fairness related to its alleged inability to receive a fair hearing in Canada. This is supported by recent public statements of the Chief and his most recent letter of February 10, 1990 to the Prime Minister. The Band is positioning itself to take maximum advantage of a U.N. ruling in its ongoing efforts to pressure governments into a larger settlement.

**B. FUTURE COURSES OF ACTION**

1. The Band's strategy has been to pursue a settlement well beyond what a court likely would consider, through public relations activity. It seems certain the Band will attempt to portray a U.N. decision as a complete vindication of its position and an endorsement of its claims. It is also likely the Band will attempt to use any U.N. ruling to raise negotiations to the ministerial or prime ministerial levels.
  
2. While an adverse U.N. finding creates an obligation on Canada to report what actions it is taking to remedy the breach, its principal value to the Lubicon Band is its publicity value. Therefore, it is imperative that Canada quickly define the U.N. finding for public perception, i.e., "Canada has said we have an obligation to the Lubicons and we are trying to reach an agreement with them - and the U.N. has accepted that."

- 7 -

3. The negotiating mandate has been defined as reaching a settlement without setting an unacceptable precedent or trampling on policy. The current offer to the Band represents the full extent of the negotiating mandate, approved by the Minister of Finance and the Cabinet. In the absence of authority to increase it - an invitation to resume negotiations must be couched in terms that do not generate an expectation that Canada is willing to consider significant improvements in its offer.

4. The view of the negotiating team is that the Band will not settle until it again tests the waters of public opinion. If the government appears firm in its resolve and if public opinion appears to hold that Canada's offer is fair, the Band will have to return to the table with more reasonable expectations - or risk growing dissent and defection from its membership.

If Canada's resolve appears wavering or its responses incoherent, the Band will draw encouragement and continue its international publicity efforts, while seeking resolution at the highest political level. The negotiating team emphasizes that the Band has acted, and likely will continue to act, in bad faith.

C. CURRENT PUBLIC OPINION

No public opinion research has been conducted into the Lubicon claim, specifically. Therefore, it is necessary to superimpose the facts of the Lubicon situation on the most recent body of research.

PUBLIC OPINION RE LAND CLAIM SETTLEMENTS

Percentage (1506 respondents)

	<u>TOTAL</u>	<u>B.C.</u>	<u>ALBERTA</u>	<u>ONTARIO</u>	<u>QUEBEC</u>
Too Generous	11	10	14	11	8
Generous	10	10	16	9	7
Fair	34	38	40	32	32
Unfair	26	28	18	26	34
Very Unfair	8	10	6	10	7
Don't Know	10	4	6	12	7

Source: Angus Reid/Southam, October, 1989.

Another major piece of research done by Decima for the University of Calgary in 1986, dealing with conflict between native land claims and natural resources development, found that nearly 40% of Canadians considered themselves unable to respond - "I haven't given any thought..." (30%) and "Don't Know" (10%). Of those who could respond, reaction 2 - 1 in favour of the natives.

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This study also found that public sympathy to natives is strongest when their demand is for land, and that support wanes dramatically once the land issue has been resolved. Against this background, it seems likely that, if well understood, Canada's offer to the Lubicon will be perceived as "fair or better" in Ontario and Quebec, and "generous or better" in Alberta.

The coupling of the U.N. decision together with activity such as a blockade on the ground, is therefore likely to be a "one-week wonder", affording Canada the opportunity to reiterate its offer and define the U.N. finding.

The Quebec media - particularly Radio Canada - are attracted to any "international" aspect and seem particularly concerned about Canada's reputation in Europe. It seems likely a U.N. ruling will attract significant French-language coverage in Quebec, as well as attention from the English national media. This interest tends to wane quickly, given the press of other issues and events.

## COMMUNICATIONS STRATEGY

### (a) Objectives

The objectives in all public communications should be to:

- (a) define the U.N. finding as a confirmation of Canada's stated position that we have an obligation to the Lubicons and that we ought to do everything we reasonably can to discharge it.
- (b) emphasize that the U.N. finding is not a blanket endorsement of the Lubicon claim nor is it a demand for a blank cheque from Canada.
- (c) position the government as being both fair and firm.
- (d) reiterate that Canada has never left the table. Our offer provides the land the Lubicon wanted. Further, the \$45 million (\$450 thousand per family) offered to the Band is fair and would remedy the social and economic needs of the Lubicons. It allows the Band to continue to pursue the additional \$167 million (more than \$1.5 million per family) they claim they are entitled to through the courts.

- 11 -

(b) Themes

While the Committee can report either a "soft" or a "hard" finding against Canada, the distinction likely will be lost in the publicity following. In either event, Canada's response could be along the following lines:

"The U.N. finding is not a blanket condemnation of Canada, nor is it a blank cheque endorsement of the Lubicon claims.

We told the Committee the Lubicons were entitled to a reserve and to a reasonable standard of living and access to economic opportunities - the Committee is urging us to provide them.

But you cannot impose what the Band will not accept.

Canada has made an offer that would provide the Band with a 95 square mile reserve, including ownership of 79 square miles of oil and gas and timber rights. And we have offered \$45 million to build a community and create employment. That is the equivalent of \$450 thousand for each family the Band has said would be living on the reserve.

- 12 -

The Band has said it wants much more. It is demanding \$2 million per family. We have offered the land, and \$45 million to build homes and develop an economy while leaving the Band the right to sue for more. That is as far as we can go.

If the Lubicon wish to fine-tune a settlement along these lines, we invite them to return to the table. If they wish to pursue their case through the courts, they are free to do that.

There is no doubt the Band lives under difficult conditions - there are remedies available - but we cannot impose them if the Band chooses not to accept."

An alternative response might be:

"We agree the Lubicon are entitled to a settlement - but it is nowhere near the \$2 million per family that they are demanding. If they accept our offer, they will receive:

- 13 -

- a 95 square mile reserve
- 79 square miles of oil and gas and timber rights
- \$350 thousand per family to develop a community
- \$100 thousand per family to develop an economic base
- and an estimated \$20 thousand a year per family in regular Federal support programs
- AND THEY WILL STILL HAVE THE RIGHT TO SUE CANADA FOR MORE.

If they are truly concerned about the welfare and living standards of their people, they should accept our offer. If they are truly entitled to more, the courts will find that."

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(c) Spokesmanship

Media interest in the Lubicon situation is confined principally to Calgary and Edmonton, with this interest expanding to a national level as "events" occur, although the Globe and Mail maintains a reasonably watchful eye.

To date, communications strategy has been to focus spokespersonship on the negotiating team in the person of Mr. Ken Colby, assistant negotiator. This strategy has been adopted because

- (1) Public communication is a major part of the negotiating process.
- (2) The Band's tactics of exaggeration and misrepresentation require a high level of detail in response.

This strategy has been implemented on the instruction of the Minister of Indian Affairs and the Prime Minister's office.

- 15 -

The Director General of Communications, DIAND, responds on a factual basis to French language queries.

d) Government Spokesmanship Upon Release of Decision

The announcement of UN Committee's findings may well generate a Question in the House of Commons on Canada's international human rights reputation. This question should be answered by the Secretary of State for External Affairs. Any supplementaries on how Canada intends to deal with issue in terms of negotiations with the Lubicons or how Canada treats its aboriginal people will be handled by the Minister of Indian Affairs and Northern Development.

Subsequently, media inquiries are unlikely to focus on the general issue of human rights, but to the extent that they do, these should be handled by External Affairs. Again, when media queries are aimed at specific details of the Lubicon claim and the status of negotiations, English media will be directed to

- 16 -

Mr. Colby and French queries to the Director General of Communications at DIAND. All efforts should be made to focus debate on the claim per se as quickly as possible on Canada's position is highly defensible.

Ken Colby

March 15, 1990

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---UN HUMAN RIGHTS CTTEE: LUBICON LAKE BAND COMMUNICATION

BAND

ATTACHED IS NOTE FROM CENTRE CONVEYING NOV 6 LUBICON COUNSEL SUBMISSION. CENTRE/MOLLER ADVISE THAT LUBICON COUNSEL HAS BEEN INFORMALLY URGED TO REFRAIN FROM SUBMITTING ANY FURTHER MATERIAL. MOLLER COULD NOT/NOT OF COURSE PREDICT WHETHER LUBICON WOULD RESPECT THIS APPEAL. AT SAME TIME, MOLLER EXPRESSED HOPE CDN GOVT WOULD NOT/NOT FEEL COMPELLED TO MAKE ANY FURTHER SUBMISSIONS ~~UNLESS~~ UNLESS ABSOLUTELY NECESSARY. IF YOU SEE NEED TO ADDRESS FACTUAL ASSERTIONS IN LATEST LUBICON SUBMISSION, WE WOULD RECOMMEND THIS BE DONE WITHOUT DELAY AND IN VERY CONCISE TERMS, EG, LESS THAN ONE PAGE.

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JAN 90

DRAFTER/REDACTEUR RG HYNES/SSS	TELEPHONE NBR	APPROVED/APPROUVE TO HARMOND
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OFFICE DES NATIONS UNIES A GENÈVE

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Telephone: 734 60 11 73102 11  
REF. N°: G/SO 215/1 CANA (88)  
(à reporter dans la réponse) 167/1984

Palais des Nations  
CH-1211 GENEVE 10



*John and  
6 references  
noting to  
Lubicon*

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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 and in order to complete the files of the State party, a copy of a letter dated 6 November 1989, transmitting a further submission concerning communication No. 167/1984 (B. Omlinayak and the Lubicon Lake Band v. Canada), which is before the Human Rights Committee for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights.

The Secretariat takes this opportunity to confirm the receipt of the Permanent Mission's note No. 6681/89, dated 8 November 1989, under cover of which it transmitted an undated submission clarifying the State party's earlier submission of 1 September 1989 in respect of communication No. 167/1984.

5 January 1990

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*GSP* *SLIP* *ADJUT*

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November 6, 1989

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Mr. Jakob Th. Moller  
Chief, Communications Unit  
Centre for Human Rights  
United Nations Office  
CH-1211 Geneva 10  
Switzerland

RE: Communication No. 167/1984

Dear Mr. Moller:

Enclosed please find a copy of a letter dated October 28, 1989, from Chief Bernard Ominayak to Prime Minister Mulroney informing the Prime Minister that the Lubicon Lake Band has asserted jurisdiction over the Band's aboriginal territory and will take regulatory action with respect to the oil development within its aboriginal territory.

The Band has been driven to these measures as a result of the following:

1. The winter season brings the advent of another development season in northern Alberta (as the Committee has been informed in past submissions by the

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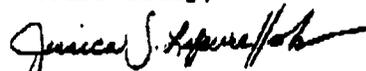
- Band, winter is the prime development season in northern Alberta);
2. The desperate circumstances in which the Band finds itself and of which the Committee has been informed; and
  3. The lack of negotiation or other meaningful discussions between the Band and the Federal Government since January 1989.

The Band has requested that this information be forwarded to the Committee so that the Committee may be informed of current developments in Canada. The Band continues to look forward to a decision by the Committee during its current session.

As always, the Band wishes to express its highest regards to the Secretary-General of the United Nations and its continuing gratitude for the kind consideration of the United Nations Committee on Human Rights and of the staff of the Centre for Human Rights.

Please contact me if you have any questions with respect to this communication.

Yours truly,

  
Jessica S. Lefevre

JSL/sks  
Enclosure

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Lubicon Lake Indian Nation  
Little Buffalo Lake, AB  
403-629-3945  
FAX: 403-629-3939  
Mailing address:  
3536 - 106 Street  
Edmonton, AB T6J 1A4  
403-436-3652  
FAX: 403-437-0719

October 28, 1989

The Hon. B. Mulroney  
Prime Minister  
Government of Canada  
Ottawa, ONT

Dear Mr. Prime Minister:

Your Government has exclusive constitutional responsibility in Canada for negotiating a settlement of unceded Lubicon land rights. It also owns an oil company operating in unceded Lubicon territory called Petro-Canada.

People across Canada and around the world know that your Government has never engaged in serious, good-faith negotiation of unceded Lubicon land rights. Rather it has only used the pretense of serious negotiations to set the stage for a deceitful propaganda campaign designed to publicly discredit the Lubicon people, and for an on-the-ground political campaign designed to tear Lubicon society apart.

In addition to Canadian Government efforts to publicly discredit the Lubicon people and tear Lubicon society apart, Federally-owned Petro-Canada -- operating both on its own and in conjunction with other oil companies -- has been conducting illegitimate oil development activities on unceded Lubicon land. These illegitimate oil development activities have been proceeding without the consent of the Lubicon people, and have caused great and irreparable damage to the traditional Lubicon economy and way of life. Moreover these illegitimate oil development activities both violate and undermine rightful Lubicon jurisdiction over unceded Lubicon territory.

There's of course nothing that the Lubicon people can do to force you or your Government to conduct Canadian affairs of state with decency, honour and integrity. However, if we can't protect our legitimate aboriginal land rights through a negotiated settlement with the Government of Canada, there are things which we can and will do to enforce our rightful jurisdiction over our unceded traditional territory -- starting with illegitimate oil development activity in our unceded traditional territory being conducted by Petro-Canada and other oil companies working in

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conjunction with Petro-Canada.

Effective November 21, 1989, Federally-owned Petro-Canada, and other oil companies working in conjunction with Federally-owned Petro-Canada on unceded Lubicon land, have thirty (30) days to obtain retroactive operating permits and leases from the Lubicon people, and to make arrangements for the payment of royalties on resources extracted -- both past and future. Approval of such retroactive operating permits and leases will be subject to compliance with Lubicon environmental protection and wildlife management laws, as determined by an appropriate Lubicon regulation agency established for that purpose, and may be cancelled for violation of said laws. Failure to meet any of these conditions will make involved projects subject to removal as unauthorized developments on unceded Lubicon territory.

Sincerely,



Bernard Gainsyak, Chief  
Lubicon Lake Indian Nation

- cc: Mr. W.R. Hopper, Petro-Canada Board Chairman and Chief Executive Officer
- The Hon. Getty, Premier, Government of Alberta
- The Hon. J. Turner, Leader, Federal Official Opposition
- The Hon. E. Broadbent, Leader, Federal New Democratic Party
- Ms. Ethel Blondin, M.P., Liberal Aboriginal Affairs Critic
- Mr. Robert Skelly, M.P., NDP Aboriginal Affairs Critic
- Mr. R. Martin, M.L.A., Leader, New Democratic Official Opposition
- Mr. L. Decore, M.L.A., Leader, Alberta Liberals
- Mr. B. Hawkesworth, M.L.A., NO Aboriginal Affairs Critic
- Mr. N. Taylor, M.L.A., Liberal Aboriginal Affairs Critic
- Mr. G. Erasmus, National Chief, Assembly of First Nations
- Mr. John Amagoalik, Inuit Committee on Native Issues
- Mr. Sebadee Nungak, Inuit Committee on Native Issues
- Ms. Donald Rojas, Vice-President, World Council of Indigenous Peoples
- Mr. Jim Sinclair, President, Metis National Council
- President, Native Council of Canada
- Leaders of Provincial Aboriginal Associations
- All Chiefs of Alberta
- All Signatories to Treaty Alliance of North American Aboriginal Nations

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1987-1988-1989-1990-1991-1992-1993-1994-1995-1996-1997-1998-1999-2000-2001-2002-2003-2004-2005-2006-2007-2008-2009-2010-2011-2012-2013-2014-2015-2016-2017-2018-2019-2020-2021-2022-2023-2024-2025-2026-2027-2028-2029-2030-2031-2032-2033-2034-2035-2036-2037-2038-2039-2040-2041-2042-2043-2044-2045-2046-2047-2048-2049-2050-2051-2052-2053-2054-2055-2056-2057-2058-2059-2060-2061-2062-2063-2064-2065-2066-2067-2068-2069-2070-2071-2072-2073-2074-2075-2076-2077-2078-2079-2080-2081-2082-2083-2084-2085-2086-2087-2088-2089-2090-2091-2092-2093-2094-2095-2096-2097-2098-2099-2100-2101-2102-2103-2104-2105-2106-2107-2108-2109-2110-2111-2112-2113-2114-2115-2116-2117-2118-2119-2120-2121-2122-2123-2124-2125-2126-2127-2128-2129-2130-2131-2132-2133-2134-2135-2136-2137-2138-2139-2140-2141-2142-2143-2144-2145-2146-2147-2148-2149-2150-2151-2152-2153-2154-2155-2156-2157-2158-2159-2160-2161-2162-2163-2164-2165-2166-2167-2168-2169-2170-2171-2172-2173-2174-2175-2176-2177-2178-2179-2180-2181-2182-2183-2184-2185-2186-2187-2188-2189-2190-2191-2192-2193-2194-2195-2196-2197-2198-2199-2200-2201-2202-2203-2204-2205-2206-2207-2208-2209-2210-2211-2212-2213-2214-2215-2216-2217-2218-2219-2220-2221-2222-2223-2224-2225-2226-2227-2228-2229-2230-2231-2232-2233-2234-2235-2236-2237-2238-2239-2240-2241-2242-2243-2244-2245-2246-2247-2248-2249-2250-2251-2252-2253-2254-2255-2256-2257-2258-2259-2260-2261-2262-2263-2264-2265-2266-2267-2268-2269-2270-2271-2272-2273-2274-2275-2276-2277-2278-2279-2280-2281-2282-2283-2284-2285-2286-2287-2288-2289-2290-2291-2292-2293-2294-2295-2296-2297-2298-2299-2300-2301-2302-2303-2304-2305-2306-2307-2308-2309-2310-2311-2312-2313-2314-2315-2316-2317-2318-2319-2320-2321-2322-2323-2324-2325-2326-2327-2328-2329-2330-2331-2332-2333-2334-2335-2336-2337-2338-2339-2340-2341-2342-2343-2344-2345-2346-2347-2348-2349-2350-2351-2352-2353-2354-2355-2356-2357-2358-2359-2360-2361-2362-2363-2364-2365-2366-2367-2368-2369-2370-2371-2372-2373-2374-2375-2376-2377-2378-2379-2380-2381-2382-2383-2384-2385-2386-2387-2388-2389-2390-2391-2392-2393-2394-2395-2396-2397-2398-2399-2400-2401-2402-2403-2404-2405-2406-2407-2408-2409-2410-2411-2412-2413-2414-2415-2416-2417-2418-2419-2420-2421-2422-2423-2424-2425-2426-2427-2428-2429-2430-2431-2432-2433-2434-2435-2436-2437-2438-2439-2440-2441-2442-2443-2444-2445-2446-2447-2448-2449-2450-2451-2452-2453-2454-2455-2456-2457-2458-2459-2460-2461-2462-2463-2464-2465-2466-2467-2468-2469-2470-2471-2472-2473-2474-2475-2476-2477-2478-2479-2480-2481-2482-2483-2484-2485-2486-2487-2488-2489-2490-2491-2492-2493-2494-2495-2496-2497-2498-2499-2500-2501-2502-2503-2504-2505-2506-2507-2508-2509-2510-2511-2512-2513-2514-2515-2516-2517-2518-2519-2520-2521-2522-2523-2524-2525-2526-2527-2528-2529-2530-2531-2532-2533-2534-2535-2536-2537-2538-2539-2540-2541-2542-2543-2544-2545-2546-2547-2548-2549-2550-2551-2552-2553-2554-2555-2556-2557-2558-2559-2560-2561-2562-2563-2564-2565-2566-2567-2568-2569-2570-2571-2572-2573-2574-2575-2576-2577-2578-2579-2580-2581-2582-2583-2584-2585-2586-2587-2588-2589-2590-2591-2592-2593-2594-2595-2596-2597-2598-2599-2600-2601-2602-2603-2604-2605-2606-2607-2608-2609-2610-2611-2612-2613-2614-2615-2616-2617-2618-2619-2620-2621-2622-2623-2624-2625-2626-2627-2628-2629-2630-2631-2632-2633-2634-2635-2636-2637-2638-2639-2640-2641-2642-2643-2644-2645-2646-2647-2648-2649-2650-2651-2652-2653-2654-2655-2656-2657-2658-2659-2660-2661-2662-2663-2664-2665-2666-2667-2668-2669-2670-2671-2672-2673-2674-2675-2676-2677-2678-2679-2680-2681-2682-2683-2684-2685-2686-2687-2688-2689-2690-2691-2692-2693-2694-2695-2696-2697-2698-2699-2700-2701-2702-2703-2704-2705-2706-2707-2708-2709-2710-2711-2712-2713-2714-2715-2716-2717-2718-2719-2720-2721-2722-2723-2724-2725-2726-2727-2728-2729-2730-2731-2732-2733-2734-2735-2736-2737-2738-2739-2740-2741-2742-2743-2744-2745-2746-2747-2748-2749-2750-2751-2752-2753-2754-2755-2756-2757-2758-2759-2760-2761-2762-2763-2764-2765-2766-2767-2768-2769-2770-2771-2772-2773-2774-2775-2776-2777-2778-2779-2780-2781-2782-2783-2784-2785-2786-2787-2788-2789-2790-2791-2792-2793-2794-2795-2796-2797-2798-2799-2800-2801-2802-2803-2804-2805-2806-2807-2808-2809-2810-2811-2812-2813-2814-2815-2816-2817-2818-2819-2820-2821-2822-2823-2824-2825-2826-2827-2828-2829-2830-2831-2832-2833-2834-2835-2836-2837-2838-2839-2840-2841-2842-2843-2844-2845-2846-2847-2848-2849-2850-2851-2852-2853-2854-2855-2856-2857-2858-2859-2860-2861-2862-2863-2864-2865-2866-2867-2868-2869-2870-2871-2872-2873-2874-2875-2876-2877-2878-2879-2880-2881-2882-2883-2884-2885-2886-2887-2888-2889-2890-2891-2892-2893-2894-2895-2896-2897-2898-2899-2900-2901-2902-2903-2904-2905-2906-2907-2908-2909-2910-2911-2912-2913-2914-2915-2916-2917-2918-2919-2920-2921-2922-2923-2924-2925-2926-2927-2928-2929-2930-2931-2932-2933-2934-2935-2936-2937-2938-2939-2940-2941-2942-2943-2944-2945-2946-2947-2948-2949-2950-2951-2952-2953-2954-2955-2956-2957-2958-2959-2960-2961-2962-2963-2964-2965-2966-2967-2968-2969-2970-2971-2972-2973-2974-2975-2976-2977-2978-2979-2980-2981-2982-2983-2984-2985-2986-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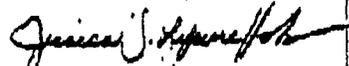
- Band, winter is the prime development season in northern Alberta);
2. The desperate circumstances in which the Band finds itself and of which the Committee has been informed; and
  3. The lack of negotiation or other meaningful discussions between the Band and the Federal Government since January 1989.

The Band has requested that this information be forwarded to the Committee so that the Committee may be informed of current developments in Canada. The Band continues to look forward to a decision by the Committee during its current session.

As always, the Band wishes to express its highest regards to the Secretary-General of the United Nations and its continuing gratitude for the kind consideration of the United Nations Committee on Human Rights and of the staff of the Centre for Human Rights.

Please contact me if you have any questions with respect to this communication.

Yours truly,

  
JESSICA S. LEFEVREJSL/sks  
Enclosure

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October 26, 1989

The Hon. B. Mulroney  
 Prime Minister  
 Government of Canada  
 Ottawa, ONT

Dear Mr. Prime Minister:

Your Government has exclusive constitutional responsibility in Canada for negotiating a settlement of unceded Lubicon land rights. It also owns an oil company operating in unceded Lubicon territory called Petro-Canada.

People across Canada and around the world know that your Government has never engaged in serious, good-faith negotiation of unceded Lubicon land rights. Rather it has only used the pretence of serious negotiations to set the stage for a deceitful propaganda campaign designed to publicly discredit the Lubicon people, and for an on-the-ground political campaign designed to tear Lubicon society apart.

In addition to Canadian Government efforts to publicly discredit the Lubicon people and tear Lubicon society apart, Federally-owned Petro-Canada -- operating both on its own and in conjunction with other oil companies -- has been conducting illegitimate oil development activities on unceded Lubicon land. These illegitimate oil development activities have been proceeding without the consent of the Lubicon people, and have caused great and irreparable damage to the traditional Lubicon economy and way of life. Moreover these illegitimate oil development activities both violate and undermine rightful Lubicon jurisdiction over unceded Lubicon territory.

There's of course nothing that the Lubicon people can do to force you or your Government to conduct Canadian affairs of state with decency, honour and integrity. However, if we can't protect our legitimate aboriginal land rights through a negotiated settlement with the Government of Canada, there are things which we can and will do to enforce our rightful jurisdiction over our unceded traditional territory -- starting with illegitimate oil development activity in our unceded traditional territory being conducted by Petro-Canada and other oil companies working in

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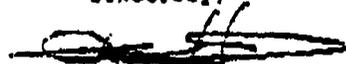
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conjunction with Petro-Canada.

Effective November 31, 1989, Federally-owned Petro-Canada, and other oil companies working in conjunction with Federally-owned Petro-Canada on unceded Lubicon land, have thirty (30) days to obtain retroactive operating permits and leases from the Lubicon people, and to make arrangements for the payment of royalties on resources extracted -- both past and future. Approval of such retroactive operating permits and leases will be subject to compliance with Lubicon environmental protection and wildlife management laws, as determined by an appropriate Lubicon regulation agency established for that purpose, and may be cancelled for violation of said laws. Failure to meet any of these conditions will make involved projects subject to removal as unauthorized developments on unceded Lubicon territory.

Sincerely,



Bernard Omineca, Chief  
Lubicon Lake Indian Nation

cc: Mr. W.K. Ropper, Petro-Canada Board Chairman and Chief Executive Officer  
The Hon. Getty, Premier, Government of Alberta  
The Hon. J. Turner, Leader, Federal Official Opposition  
The Hon. E. Broadbent, Leader, Federal New Democratic Party  
Mr. Ethel Blondin, M.P., Liberal Aboriginal Affairs Critic  
Mr. Robert Skelly, M.P., NDP Aboriginal Affairs Critic  
Mr. R. Marcin, M.L.A., Leader, New Democratic Official Opposition  
Mr. L. Decker, M.L.A., Leader, Alberta Liberals  
Mr. B. Hawkesworth, M.L.A., ND Aboriginal Affairs Critic  
Mr. N. Taylor, M.L.A., Liberal Aboriginal Affairs Critic  
Mr. G. Erasmus, National Chief, Assembly of First Nations  
Mr. John Amagoalik, Inuit Committee on Native Issues  
Mr. Semaden Mungak, Inuit Committee on Native Issues  
Mr. Donald Rojas, Vice-President, World Council of Indigenous Peoples  
Mr. Jim Sinclair, President, Metis National Council  
President, Native Council of Canada  
Leaders of Provincial Aboriginal Associations  
All Chiefs of Alberta  
All Signatories to Treaty Alliance of North American Aboriginal Nations

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